UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 05-5943

Caption [use short title]

In re: Literary Work In Electronic Databases Copyright Litigation.

Motion for: Leave to file supplemental letter brief

Set forth below precise, complete statement of relief sought:

Appellants seek leave to file a four page letter brief address

MOVING PARTY: Irwin Muchnick et al.
☐ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: See attached

MOVING ATTORNEY: Charles D. Chalmers

OPPOSING ATTORNEY: See attached

[name of attorney, with firm, address, phone number and e-mail]

Charles D. Chalmers
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Court-Judge/Agency appealed from: S.D.N.Y., Judge Daniels

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☒ Unopposed ☑ Opposed ☐ Don't Know
1 CONSENTS
1 OPPOSES

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☒ Yes ☐ No If yes, enter date: ALREADY ARGUED

Signature of Moving Attorney: Charles Chalmers **Date:** 1-14-11

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080

Attachment to T-1080

Opposing Party:
Plaintiffs: Michael Castleman Inc., E. L. Doctorow, Tom Dunkel, Andrea Dworkin, Jay Feldman, James Gleick, Ronald Hayman, Robert Lacey, Ruth Laney, Paula McDonald, P/K Associates, Inc., Letty Cottin Pogrebin, Gerald Posner, Miriam Raftery, Ronald M. Schwartz, Mary Sherman, Donald Spoto, Robert E. Treuhaft and Jessica L. Treuhaft Trust, Robert Treuhaft, trustee, Robin Vaughan, Robley Wilson, Marie Winn, National Writers Union, The Authors Guild, Inc. and The American Society of Journalists and Authors.

Defendants: Thomson Corporation, Thomson Business Information, The Dialog Corporation, Gale Group, Inc., West Publishing Company, Inc., Dow Jones & Company, Inc., Dow Jones Reuters Business Interactive, LLC, EBSCO Industries, Inc., Knight Ridder Inc., Mediastream, Inc., Newsbank, Northern Light Technology Corporation, ProQuest Company, Reed Elsevier Inc., Union-Tribune Publishing Company.

Opposing Attorney:

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MEMORANDUM IN SUPPORT OF MOTION

On January 7, 2011 counsel for plaintiffs-appellees wrote the Clerk to inform the Court that earlier information, presented during briefing in June-July 2010, was inaccurate. The letter provided new information, although it indicated that possibly yet more such information will be submitted. This marks the third time during the appeal that appellees have presented, and argued from, facts that are not in the record of this appeal. FRAP 10 (a).

The information is claims data regarding the class action which is the subject of this action. With this second admission that the appellees have presented this Court with inaccurate, false, out-side-the-record information regarding issues on appeal, appellants believe it is extremely important that the Court be presented with a summary of the history and its implications for the issues under consideration. Of particular importance is that Court understand how the settlement claims administration procedures provide the appellees with the ability to control the number.

The proposed supplemental brief summarizes the principal events in that history, addressed the claim procedures and the implications. It briefly reviews related occurrences in the trial court. The proposed letter brief is only four pages. The proposed brief is attached hereto, and it presents the compelling reasons why it is appropriate for the Court to review this history.

Dated: January 14, 2011

s/Charles D. Chalmers
Charles D. Chalmers
Attorney for Appellants

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January 14, 2011

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York City, New York 10007

Re: *In re: Literary Works in Electronic Databases Copyright Litigation* (05-5943-cv)

Dear Ms. Wolfe:

This is a letter brief that appellants seek leave to file by their motion of the same date.

INTRODUCTION. The number of claims by class members has been an important aspect of this case since approval of the settlement was first sought. This is due to Appellants' objection about the C Reduction provision. Appellees have repeatedly violated FRAP 10 (a) by telling this Court the most recent claims number. Despite appellants stating they did not object to presentation of this information so long as they had a chance to verify its accuracy, appellees have never provided that opportunity, and have refused to respond to questions about the data or the claims validation process. This has now culminated in a second admission that previous information given this Court was in error. Now we are told that claims are $11.56 million, just 2% short of the C Reduction trigger of $11.8 million. Letter from Michael Boni to Catherine O'Hagan Wolfe, 1-7-11, attached as Ex. A.

The entire history about the C Reduction provision and the amount of claims is a sordid process of inaccurate statements, likely to mislead this Court and the trial court. This brief collects in one document the main features of that history. It demonstrates a chilling record of negligence by lawyers and the claims administrator in dealing with the court, if not something much worse.

In May, 2006, the appellees filed their briefs and each presented a number for claims said to be provided by the administrator. Brief for Plaintiffs-Appellees, filed 5-26-06, p. 13; Brief for Defendants-Appellees, filed 5-25-06, p. 16, 21, 25. They said the total value of claims

was $10.8 million. Brief for Plaintiffs-Appellees, at p. 13. They made arguments related to the merits from these figures. Shortly thereafter they admitted that the number was inaccurate and described that the reason for the error, the right of claimants to correct deficiencies, would undoubtedly lead to a higher total. Letter of Michael J. Boni to Roseann MacKechnie, July 7, 2006.[1] They stated that the defense group had a right of review and challenge to claims, so that the higher total might then be reduced. *Id.*

In 2010 the appellees told the Court in letter briefs that a new total was now $8.9 million. Letter Brief of Plaintiffs-Appellees, 6-23-10, p. 4; Letter Brief of Defendants-Appellees, 6-23-10, p. 2. They gave no explanation of the process by which the number had gone from $10.8 million and sure to rise, to the new number of $8.9 million. They did make clear the reason was not the defense group review.

On January 7, 2011 the appellees informed the Court that the 2010 number was inaccurate. Letter from Michael Boni, dated 1-7-11, docket 1-11-11. The number is now $11.56 million. There still is no explanation of how the $10.8 million number fell to $8.9 million.

THE PROVISIONS FOR CLAIMS ADMINISTRATION. Claims administration procedures are Exhibit B to the Settlement Agreement. A 383-387. This states that the procedures therein apply only to claims for Works in U.S. publications. Those authored abroad are subject to different requirements, such as may be agreed by the parties. A 383. Thus, we don't know the procedures applied to foreign works claims. The settlement includes many thousands of foreign publications.

The procedures describe requirements for a claim. While not explicit, a right of a claimant to correct a deficiency is implied.

> The inability by Claimants to document their claims after a reasonable search for the documentation or to identify on which databases their Subject Works appeared shall not necessarily render such Claimants ineligible to receive his or her full Settlement Payment under the Plan of Allocation: claim allowance depends on sections 3-5 below. A 384

The procedure specifies a process called "initial claim computation and evaluation by the claims administrator." A 384. This describes information, like a registration statement, that must be presented. The claims administrator is to email the parties a weekly report which shows the claims presented "to the extent they appear valid, the computation of initial claim awards, and disallowed or disputed claims." A 385. There is a review of claims by publishers and the data base. A 385-386. These are two separate reviews, each of which can lead to an objection. Contested claims are put aside for dispute resolution.

Given the importance of the number of claims, the dispute resolution procedures are of serious concern. A 387. The parties repeatedly try to show that the claims do not, or will not, exceed $11.8 million – the C Reduction trigger. They have a motivation to disallow claims.

[1] This letter was submitted by plaintiffs as they filed their corrected brief, and it is not separately identified on the Court's docket. A copy is attached as Ex. B.

Claim dispute resolution is conducted by the plaintiffs and defendants. The arbitration is handled by a designee of plaintiffs, a designee of defendants, and the mediator.

TRIAL COURT RECORD REGARDING CLAIMS AND THE C REDUCTION.

The parties repeatedly misstated to the court below how claims related to the C Reduction. In the first such misstatement plaintiffs stated:

> Muchnick complains that class members with unregistered works may get no cash if the settlement funds are exhausted by Category A and B claims, and that such a circumstance is "not remote." … Plaintiffs were closely advised by the Associational Plaintiffs and presented with convincing evidence on this issue, and have concluded that the risk is in fact exceedingly remote. A 490.

The C Reduction does not occur if "the settlement funds are exhausted by Category A and B claims" and Muchnick never described it that way. The C Reduction is triggered if all claims, A, B and C, exceed the settlement fund. The quoted statement fabricated a position by Muchnick – he has never described the C reduction that way. The statement by Muchnick reads:

> Therefore if the total of Post 1977 Claims exceeds $11.8 million the provision comes into effect, and the compensation to Category C Claims, already by far the lowest under the settlement, starts to be reduced in order to bring the total under $18 million. Memorandum In Support of Motion to Vacate, p. 10. [2]

Plaintiffs repeated the misstatement in their final briefing.

> Plaintiffs knew that it was a virtual certainty that Category A and B claims would not consume the $18 million settlement fund, and no one who participated in the mediation was surprised when the claims reports to date confirmed that fact. A 1446-1447

Defendants made the misstatement several times. "Mr. Chalmers' first complaint is that claims for C works might not be paid at all (if A and B category claims bring the settlement amount above $ 18 million)." A 1553. No place in the record did the objectors make such an objection. Their objection states it correctly:

> "The proposed settlement contains a provision pursuant to which, in the event the settlement fund is insufficient to pay **all claims**, the awards for Category C Subject Works can be reduced to zero, while awards for Category A and B remain undiminished." A 731-732 (emphasis added)

Defendants again said "[I]t was extremely implausible that claims in categories A and B (for registered works) would exhaust the available $ 18 million Settlement Fund." A 1553. The statement was also made under oath by defendants' lead counsel. A 1571.

The parties presented interim claims data below as part of an argument that the C Reduction would not even be approached. The administrator said with just a short time left for filing claims, there were 1220 claims covering 64,544 works. A 1541. He did not give a dollar value, but plaintiffs' counsel declared the value was approximately $3,200,000. A 1482. She went on to say that in order to reach the settlement trigger the claims would have to, in the

[2] This pleading is not in the Appendix. It is docket no. 55 in the trial court.

remaining 18 days, jump from a previous average of $31, 373 a day to $477,000 a day. Notably, given the total of $11.56 million submitted January 7, 2011, that is what happened. Either that, or the value presented to the district court was inaccurate. Given the two administrator errors leading to inaccurate numbers being presented to this Court, there is a strong suggestion that the number provided to the district court included the same errors.

CONCLUSION. This record is a frontal attack on the integrity of the appellate judicial process. Three different times the appellees have violated FRAP 10 (a) by referring to facts outside the record. At oral argument they offered updated information from the inaccurate number presented in 2006, and Judge Walker told them that if the Court wanted such information it would let them know. Still they did it again.

The record is one of amazing negligence. One would think that if you were going to violate the rules, you would be very, very certain that the information was accurate. It is clear that expediency overcame professional obligation to the Court. The appellees were bent on making a *no harm - no foul* argument about the C Reduction. Defendants used remarkably blunt language to tell this Court that in view of the information they provided it would be an absurd act to reverse the settlement.

> It would be absurd to reverse class certification on this ground, since the claim period expired last September and the submitted claims as reported by the claims administrator make plain that there will be no C reduction whatever, even if every claim asserted were valid. Brief for Defendants-Appellees, filed 5-25-06, p. 25.

The C Reduction so clearly presents a conflict between members of the unitary class that the parties were willing to risk violation of the Rules, and submission of possibly inaccurate information, to persuade this Court to turn a blind eye.

We are left with single, unavoidable, conclusion. This Court can place no faith in the claims information that has been presented during the appeal. It has twice proven inaccurate. Reasonable questions about the process remain unanswered. Finally, the parties, deeply invested in keeping the value of claims low, are in a position to directly affect the final number by their actions during the dispute resolution process.

s/Charles Chalmers
Charles D. Chalmers
Attorney for Appellants

Exhibit A

Exhibit A

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January 7, 2011

VIA ELECTRONIC AND POSTAL MAIL

Catherine O'Hagan Wolfe, Clerk
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Court House
40 Foley Square
New York, New York 10007

Re: *In re Literary Works in Electronic Databases Copyright Litigation*, 05-5943-cv

Dear Ms. Wolfe,

I write on behalf of plaintiffs-appellees. In December 2010, a class member inquired about the value of her claim. In the course of responding to that inquiry, the claims administrator, Garden City Group ("GCG"), discovered that it had erred in calculating certain claims. Specifically, GCG overlooked an amended settlement provision that reclassified certain Category B claims to Category A. As a result, class counsel and GCG's Vice President of Auditing and Compliance agreed that GCG would not only correct the error and recalculate the claims to factor in the amended provision, but also perform a complete audit of its claim calculations.

Having factored in the amended provision, GCG reports that, as of today's date, the claim value has increased to yield a total value of approximately $11.56 million. While significantly more than the $8.9 million total value appellees reported in their June 23, 2010 letter briefs, this increase will not cause the $18 million settlement cap to be exceeded or any Category C claims to be ratcheted down.

With respect to the full audit of its claim calculations, GCG has advised us that its audit will be completed by January 21, 2011. Class counsel will notify the Court if (contrary to GCG's expectations) the audit yields a material change in the claim value.

We regret this error, and are available upon request to provide further information.

Respectfully yours,
/s/
Michael J. Boni

cc: Service List

Exhibit B

Exhibit B

KOHN, SWIFT & GRAF, P.C.

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July 7, 2006

Via Federal Express

Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square, Room 1802
New York, NY 10007

Re: Corrected Brief For Plaintiffs-Appellees in *In re Literary Works in Electronic Databases Copyright Litigation*, 05-5943-cv

Dear Ms. MacKechnie:

Plaintiffs-Appellees hereby file the enclosed Corrected Brief For Plaintiffs-Appellees, which replaces and supersedes the brief that was filed on May 25, 2006. The enclosed brief deletes from the May 25 brief (1) the sentence on pp. 12-13, (2) sixteen words in the last full sentence on p. 22, (3) three words in the sentence on pp. 22-23, (4) the parenthetical clause in the middle of p. 37, and (5) footnotes 7, 12 and 15. The reason for our striking such language is as follows.

Prior to the May 25 filing, the parties asked the Claims Administrator to calculate the aggregate potential value of the claims, in order to determine whether two of the appellants' arguments may be moot. Appellants argue that (1) it is unfair for the settlement to reduce the amount of certain class members' awards before others (with weaker claims) in the event the aggregate claims value exceeds the $18 million settlement cap; and (2) the named plaintiffs, who registered some of their works with the U.S. Copyright Office, are inadequate representatives of class members who did not register any of their works. The information the Claims Administrator provided to us indicated that the $18 million cap would not be reached, and that the named plaintiffs actually submitted far more claims for unregistered works than registered works. That is why we included that information in the brief filed on May 25, 2006.

However, contrary to our clear instructions, and unbeknownst to us, the Claims Administrator provided us with a value that excluded claims that were the subject of deficient but potentially curable claims. We learned of this only after June 16, 2006, when the Claims Administrator mailed out deficiency letters to claimants. As a result, we are striking the language that pertains to the information we received from the Claims Administrator after the record was closed.

At this point, we have insufficient data to determine whether the $18 million cap will be reached, and will not know this until after the claims have been examined by the defense group pursuant to the terms of the settlement, sometime in the Fall of 2006. It may be that the prima facie claims with the deficiencies put back in will raise the number over $18 million; even if that were the case, the number might thereafter fall below $18 million after the August 31, 2006 deadline for claimants to respond to the deficiency letters, and after the defense group examines the claims.

We are available to answer any questions the Court may have, and we apologize for any inconvenience caused by our having to file a corrected brief.

Sincerely yours,

Michael J. Boni

MJB/yr
Enclosures

cc: Charles Chalmers, Counsel for Appellants (w/encl.)
Counsel for Plaintiffs-Appellees (w/encl.)
Counsel for Defendants-Appellees (w/encl.)

CERTIFICATE OF SERVICE

I, Charles D. Chalmers, do declare:

I am over the age of eighteen and not a party to this action. On January 14, 2011, I served Appellants' Motion for Leave to file Supplemental Letter Brief, dated 1-14-11, by U.S. Mail, by email, addressed as below.

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I declare under penalty of perjury under the law of the United States that the foregoing is true and correct. Executed at San Rafael, CA on January 14, 2011.

Charles D. Chalmers