UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT LITIGATION

MDL 1379 (GBD)

MEMORANDUM IN SUPPORT OF MOTION OF CATEGORY C CLAIMS COUNSEL FOR AWARD OF ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

I. INTRODUCTION

This is the motion of counsel for the Category C claims[1] ("C counsel"), who previously represented the 10 objectors. It seeks an award of attorneys' fees, costs and incentive awards for the objectors, including the two objectors who now serve as Category C subclass representatives. The Revised Settlement Agreement ("RSA") provides $600,000 for these three items. RSA, 9.c. The source for that award is the $4.4 million the defendants' previously deposited into escrow earmarked for the attorneys' fees and costs of the original class counsel, who are now the A-B counsel.

The motion has an unusual feature. The allocation of $600,000 to these three items is intended to provide that if the Court does not award any of the requested incentive awards, totaling $26,000, that money will be awarded to C counsel for fees and costs. Thus, the motion first seeks $26,000 of incentive fees for the 10 objectors. To the extent that the court does not award any of the requested incentive fees the motion requests that amount be added to the award of attorneys' fees and costs. If those incentive fees are awarded, the requested award for costs and attorneys' fees is $574,000. Costs currently are about $10,500, including an estimate to attend the final approval hearing. The ultimate costs can't be known as further

[1] The use of the term "C claims" throughout this motion refers to claims for works in Category C. A claimant's total "claim" may also include works in A and/or B, in which case that claimant is represented by both A-B counsel and C counsel.

costs may be incurred in the post-approval claim administration phase during which C counsel will represent C claims in disputes about defense group or claims administration challenges. Thus, the fees part of the present request ($563,500) is actually for fees and such costs as are necessary in the future.

II. BACKGROUND AND SUMMARY

A. Background. The original settlement received preliminary approval in March 2005. Shortly thereafter C counsel appeared for Irvin Muchnick to present objections to the procedures for notice and settlement approval. The number of objectors eventually increased to ten. After extensive proceedings the objections were overruled. The objectors pursued an appeal. The Court of Appeals requested briefing on a question which was not raised by the appeal. That Court thought there was a question whether federal jurisdiction existed to approve a class action settlement which covered unregistered U.S. copyrights. The parties and the objectors argued for such jurisdiction. In late 2007 that Court held federal courts lacked that jurisdiction. *In re: Literary Works in Electronic Databases Copyright Litigation*, 509 F.3d 116 (2d Cir. 2007). The parties and objectors each filed petitions for rehearing, which were denied.

The defendants petitioned the Supreme Court for a writ of certiorari, which was granted. In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010) the Supreme Court held that jurisdiction existed. The title of the opinion suggests that the objectors opposed that decision but in fact they supported it and filed three separate briefs in the Supreme Court supporting that outcome. The case returned to the Second Circuit. In the next year and a half there was supplemental briefing and an unsuccessful settlement mediation. In August 2011 the court reversed the settlement approval on the ground that C claims had not received adequate representation. *In re: Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242, 251-54 (2d Cir. 2011). Petitions by the plaintiffs and defendants for rehearing were denied in November. The opinion suggested the desirability of separate representation for the Category C claims in any renewed litigation or negotiation. (*Id.*)

The parties, with assistance from the mediator Kenneth Feinberg, considered and agreed to renewed negotiations with counsel for the objectors serving as counsel for the C claims. These efforts commenced at a meeting in New York in March 2012. The negotiations in New York and thereafter were protracted, in large part because there are so many entities (databases, publishers, insurance companies) on the defense side. Eventually there was success with the Revised Settlement Agreement.

B. Summary

The Claims Administrator (Garden City Group) has reportedly processed the great majority of claims through an initial review. That included giving claimants an opportunity to correct defects appearing on the face of the claim. The approximately 2600 total class member claims with at least one eligible work breakdown as:

Category	Number of works	Value
A	5,966	$6,750,490.00
B	2,081	$ 326,083.49
C	305,930	$4,386,873.84
		$11,463,447.33

While some claims include more than one category of work, the vast majority have only C works. There are 343,478 ineligible works. The final result will differ, and the difference might be substantial, either up or down, as a result of the post-approval claims processing. This processing will include a claimant opportunity to dispute ineligible determinations, and defense group opportunities to challenge eligible claims or eligible works. The categories and value of the works presently deemed ineligible is not known, except that in number they are mostly C Category works.

C counsel has spent over 1400 hours and will continue to work for C claims during the final approval and the claims review process for another six months or more. While a rate of $600 per hour, or more, would be reasonable the requested award is $394 per hour for the time to the present because of the $600,000 limit. The primary benefits of his work are increased compensation to C works, and the removal of a cap (the “C Reduction”) on the

total value of all claims, which previously provided that if the cap was exceeded only C works compensation would be reduced to maintain the cap. The ultimate value of the increased C compensation will not be known until the completion of claims processing. However, as explained in detail below, it will be an increase by a percentage higher than 14%, and likely a 20% or higher increase.

III. BENEFITS ACHIEVED BY THE REPRESENTATION

There are three direct benefits conferred by counsel's dual roles, for the successful objectors and then for the C claims in negotiation of the Revised Settlement. They are:

1. Increased compensation for C claims. The increase is more than 14% because the publishers have committed to that percentage increase. More than 14% is assured because $343,500 of new money provided by the databases is reserved to be paid pro-rata to valid C claims. As discussed below, depending upon the final claims review, it is likely to be a 20% plus increase. Based on the recently reported value of valid C works, the 14% increase equals $614,156. If the $343,500 was applied to the presently valid C claims it would add 7.8% for a total increase of 21.8%. That percentage increase is worth $956,148.

2. Elimination of the C Reduction. The RSA eliminates the "C Reduction" or the provision of the original settlement which provided that if total claims exceeded $11.8 million (after deduction of $6.2 million in costs and attorneys' fees from the total settlement of $18 million) the C claims alone would be reduced to keep the total below $18 million.

3. Procedural benefits. The right of claimants to contest all "ineligible" determinations by the claim administrator is confirmed in the RS. (RSA, Exhibit B, Claims Administration Memorandum, Section 5.a.) During the negotiations the defendants asserted that the ineligible determinations by the claims administrator to this point should be considered final and beyond dispute. (Decl. CDC, ¶ 12.) After determining that the administrator had made mistakes in the claims of several objectors, C counsel refused to accept this position and the final agreement provides all claimants with the right to dispute the ineligible determination. (*Id.*) This benefit is not susceptible to a dollar valuation, but is an enhancement of claimants' rights for all categories.

4. Analysis of Additional Financial Benefits Negotiated by C Claims Counsel.

The defendants and contributing publishers will pay an increase of 14% compensation to C work claims. (RSA, Section 3.c.) At the current value of C works, this has a value of $614,156. Further, the Database Defendants will pay $343,500 to provide additional compensation to C claims. (RSA, Sections 2.b. & 3.c.) At the current value of C claims at $4,386,831 that is an additional increase of 7.8% to C compensation, for a total percentage increase of 21.8%.

Additionally, $517,000 is provided for the payment of notice and settlement administration, with any unspent part also devoted to increase C claim compensation. The money allocated for notice and administrative costs under the original settlement was exhausted. Thus it was necessary to provide for the payment of all such costs going forward in order to complete the revised settlement. $315,000 of the new $517,000 is earmarked as the source for payment of these costs, but it is not certain that it will be consumed by the costs. If the new costs exceed the $315,000 the additional costs will be paid 50% by A-B counsel and 50% from the remaining $202,000 of the $517,000 contribution. (RSA, Exhibit C, ¶ 3.)This structure provides incentive to the A-B counsel who have the interface responsibility with the Administrator to keep costs as low as possible. This is a benefit to C claims because it increases the possibility of additional money being provided to valid C claims, but it can't be qualified. To the extent the $517,000 is not consumed by costs, the remainder will be added to compensation for C claims.

There were costs of the original settlement which remained unpaid. Under the RSA the A-B counsel are solely responsible for $223,000 of the old costs. (RSA, Exhibit C, Exhibit 1, Line 10.) This is an additional financial benefit for C claims in that that the $517,000 earmarked for costs, with a spillover to C claims compensation, will not be responsible for these old costs. Actual C claims compensation will not be known until all claims are processed, but it will likely be between a 20 to 25% increase, possibly higher.

Both the original and revised settlement contain a provision identified by the shorthand "one work – one claim." (RSA Section 3.f.)This means that only one publication

of a single work can receive compensation. Review of a claims report shows that some claims deemed eligible to this point have the same name but are in different publications and close in time, suggesting repeated publication of the same work**.** (Decl. CDC, ¶ 13) The defense group intends to challenge these as is their right, and it appears likely that some unknown number of such claims will be found to violate the "one work – one claim" restriction. If this, or any other defense challenge results in reducing the value of eligible C Claims, the proration of the additional $343,500 over the C Claims will result in more than a 7.8% increase to C compensation, as will any increase left over from $517,000 costs fund.

Using reasonable estimates, counsel has provided approximately $1.475 million in certain new value to the settlement. This is composed of a 14% increase which is valued at $$614,156 based on current claim analysis, plus the $343,500 and the $517,000. He has also provided the benefit that his compensation comes from the money previously earmarked to pay the original class counsel (now called A-B counsel) and does not come out of the increased compensation to C claims. Thus his costs and fees are about 27% of the fund his efforts have provided, without taking into account the removal of the C Reduction, or that A-B counsel must bear responsibility for over $200,000 of old administration costs, and 50% of going forward costs that exceed $315,000.[2]

IV. THE REQUESTED FEE AWARD IS CONSISTENT WITH THE LAW.

The traditional criteria for determining a reasonable common fund fee are: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)

//

//

[2] There is part of the agreement about "going-forward" costs which should be taken into account by the Court with respect to the fee motions of A, B and C counsel. They have agreed in rough proportion to the fees they each seek to be responsible if costs for administration are greater than $517,000. (RSA, Exhibit C, ¶ 4.)

A. Time and Labor

Counsel has spent more than 1400 hours to date, with more time required to complete the representation. While counsel believes $600 an hour is a reasonable rate, the request of approximately $563,000 (after deduction of incentive awards and costs) amounts to $394 per hour for the time to date, and the amount per hour will decrease with additional time. (Decl. CDC, ¶ 13.) In 2005 a judge of the Southern District found counsel's reasonable hourly rate where he presented successful objections to be $500 per hour. *In re Elan Securities Litigation*, 385 F.Supp.2d 363, 377 (S.D.N.Y. 2005). Approximately 100 hours of counsel's time is travel to New York and thus only compensable at half the reasonable rate, but in this instance that has a minimal impact on the analysis. If counsel spends another hundred hours helping the 310,000 C claims during claims processing, his hourly rate is $368.

The contemplated future work is likely to be substantial. It will be counsel's responsibility to represent any claim in responding to eligibility determinations by the Claims Administrator, or challenges by the defense group. The defense group negotiated strenuously for enforcement of the "one work – one claim" provision in the negotiation of the RSA and it is to be expected that they will work to enforce it. (Decl. CDC, ¶12.)

B. The Magnitude and Complexity Are Substantial

The magnitude of C counsel's effort is clear, given the unusual procedural history here. It is further confirmed by the list of substantive pleadings, involving factual investigation and legal research. (Decl. CDC, ¶ 2-6.) Similarly the matter is obviously at least relatively complex. This element is most often considered in depth for requests that a fee be enhanced, which is not applicable here.

C. The Risk of the Litigation

Risk generally is considered in depth with respect to requests for a fee enhancement or multiplier. *Goldberger*, at 54 (" 'perhaps the foremost' factor to be considered in determining whether to award an enhancement."). No enhancement is involved here.

//

//

D. The Quality of Representation

The quality of representation should generally be reflected by the hourly rate and the basic lodestar. This is again commonly considered in connection with a request for fee enhancement.

E. The Requested Fee In Relation To The Recovery

As described, a reasonable estimate of the direct financial benefit to C claims, including the amount provided for C counsel's compensation, is $2.075 million. The total request of $600,000 is 28% of the total "fund" created by counsel's effort and this is without assigning a value to the elimination of the C Reduction. Only $563,000 is actually compensation to C counsel under this request.

F. Public Policy

1. To Provide Incentive For Qualified Counsel To Represent Objectors.

"[I]t is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and that, as the district court recognized, they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts." *White v. Auerbach*, 500 F.2d 822, 828 (2nd Cir. 1974). As noted above, Courts have expressed the desire to have competent adversarial representation in connection with settlement approval and attorneys' fee awards.

The *Auerbach* policy has particular application in the context of the frequently heard "professional objector" battle cry. In that context, the policy should be read as particularly encouraging objector's counsel that do not engage in that condemned approach to objections. The parties made the accusation repeatedly here and in the Court of Appeals. The term comes from *Shaw v. Toshiba Corp.*, 91 F.Supp.2d 942, 973-974 (E.D. Tex. 2000), but it is rarely noted that decision also defined "beneficial objectors" and granted an award to the objectors. District courts are increasingly identifying counsel that they find to be engaged in "professional objector" representations. *In re Initial Pub. Offering Sec. Litig.*, 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010). C counsel has never been associated with such a designation

by a court, or even an admonishment or criticism. His work has been deemed "helpful" by a judge in this district. *In re Elan Securities Litigation*, *supra*. His declaration identifies other cases in which he has been credited with helping the court and improving a settlement. (Decl. CDC, ¶ 14.) Granting this request will acknowledge that counsel is a "beneficial objector."

2. To Address Non-Financial Aspects of a Settlement.

The elimination of the C Reduction feature of the original settlement can't be reduced to a financial benefit, at least until the processing of all claims is complete and it is revealed whether the total of valid claims exceeds that $11.8 million cap. At an estimated increase for C claims of 20% applied to the present value of those works, the present value of C works is $5,263,000 for a total value of all works of $12,339,000, or $539,000 over the former cap. It was a feature with clear potential negative impact since it threatened C claims alone with a reduction of compensation. That feature was central to the outcome here. It was the central concern in the first presentation that objector Muchnick made in April 2005. Docket 55. It, and not the compensation for Category C, is the central fact that convinced the Second Circuit that the C claims had not received adequate representation. *In re: Literary Works in Electronic Databases Copyright Litigation*, *supra*, at 253-254.

V. INCENTIVE FEE AWARDS

This motion requests the following incentive or service awards. Irvin Muchnick ($5,000); Anita Bartholomew ($3,000); Judith Stacey ($3,000); Christopher Goodrich ($3,000): Judith Trotsky ($2,000); Abraham Zaleznik ($2,000); Charles Schwartz ($2,000); Jack Sands ($2,000); Todd Pitock ($2,000); Kathy Glicken (Vyn) ($2,000). Stacey and Goodrich are the C Claims subclass representative in addition to having been objectors.

The contributions of these class members is described in the accompanying declaration. They showed courage and responsibility in serving as objectors. (Decl. CDC, ¶ 9, 10, 11.)

VI. CONCLUSION

Counsel requests the award of incentive fees to the objectors as stated. It requests an award of costs in the approximate amount stated and will update the cost number at the

hearing on this motion. Finally, a fee award in the amount of approximately $563,000 is requested.

Dated: April 9, 2014

S/Charles Chalmers
Charles D. Chalmers

Charles D. Chalmers
Allegiance Litigation
769 Center Blvd., Ste. 134
Fairfax, CA 94930
415 869-8134
Fax 801 382-2469
cchalmers@allegiancelit.com