IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT LITIGATION	)	MDL No. 1379

MEMORANDUM OF LAW IN SUPPORT OF A/B COUNSEL'S APPLICATION FOR (1) AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF COSTS; (2) SERVICE AWARDS TO A/B PLAINTIFFS; AND (3) APPROVAL OF PAYMENT OF ADMINISTRATIVE COSTS

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Dated: April 9, 2014

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I. INTRODUCTION

In advance of final approval of the revised settlement, and pursuant to paragraph 9(a) of the Revised Settlement Agreement, A/B Counsel submit this application for an award of attorneys' fees, reimbursement of their costs, and service awards for the A/B Plaintiffs.[1] A/B Counsel request a fee of approximately $2.7 million ($2,688,222.93), representing only a third of their lodestar through March 28, 2014, and 15 percent of the benefits conferred on the class by the settlement. The proposed fee is thus reasonable under both the lodestar and percentage-of-recovery approaches approved by the Second Circuit for awarding class action attorneys' fees. A/B Counsel also seek reimbursement of approximately $618,000 ($617,986.83) in costs incurred in this matter. In addition, A/B Counsel request approval of service awards to the nineteen A/B Plaintiffs and the estates of two deceased former representative plaintiffs, in the amount of $2,000 each, for their effort and initiative in serving as class representatives in this long-running case. A/B Counsel also request approval for a total of $762,790.24 in (i) payments to third parties for claims administration, mediation, bank, and accounting services in connection with the original and revised settlements and (ii) reserves for the claims dispute resolution process.

When the Court approved the original settlement in this case, it awarded $4.4 million in attorneys' fees and costs to A/B Counsel and/or their predecessor firms, who were then serving as counsel for all class members and their Subject Works. None of the amount was paid, however, because the Court's approval of the original settlement was vacated on appeal. On remand, A/B Counsel represented the Category A and Category B works in negotiating the

[1] A/B Counsel are the law firms Boni & Zack LLC, Girard Gibbs LLP, Hosie Rice LLP, and Fergus, A Law Office. These firms and/or their predecessors and other associated counsel represented the entire class in connection with the original settlement.

revised settlement with defendants and the C Plaintiffs/former objectors. Although A/B Counsel's lodestar has increased substantially since approval of the original settlement, they now seek a significantly ***lower*** fee and cost award of approximately $3.3 million. C Counsel is seeking a fee and cost award of $600,000. Thus, the total amount sought by the class attorneys in fees and cost reimbursement (approximately $3.9 million) is significantly less than the $4.4 million awarded in connection with the original settlement, with the difference going to pay additional expenses of the revised settlement. Furthermore, attorneys' fees and costs will be paid separately from, and without reducing, the cash distributions due class members under the settlement's payment schedule.

The twists and turns of this fourteen-year-old case have demanded much of A/B Counsel in the way of time, skill, and perseverance. Two years of investigation and litigation, followed by three and a half years of highly contentious, complex negotiations leading to the original settlement; months of notice and approval-related activities for that settlement; five and a half years of review by the Second Circuit (twice) and the Supreme Court; and two years of negotiations resulting in the revised settlement – through it all A/B Counsel have sought to deliver an exceptional result for the class members. Now, under the revised settlement, freelance authors stand to receive millions of dollars in cash compensation for use of their works. The fees and costs requested by A/B Counsel are reasonable under the circumstances and should be approved.

II. SOURCE FOR PAYMENT OF FEES AND COSTS

Under the revised settlement, attorneys' fees and expenses and administrative costs will be paid separately from the compensation to valid claimants, which was also the case under the original settlement. In 2005, pursuant to the original settlement, A/B Counsel and/or their

predecessor firms sought and were awarded $4.4 million in attorneys' fees and costs. The award became inoperative, however, when approval of that settlement was vacated on appeal. In the negotiations leading to the revised settlement, A/B Counsel agreed to reduce their fee and cost request to approximately $3.3 million, to enable payment of (i) $600,000 for attorneys' fees and costs and service awards to C Counsel and his clients and (ii) administrative costs and other amounts payable to third parties, particularly amounts owed to the claims administrator in connection with the original settlement.

As stated above, payments of fees and costs will not affect the amount of compensation to valid claimants under the settlement's payment schedule. Payments to claimants will be made in full from additional amounts provided by defendants and participating publishers.

II. SUMMARY OF THE BENEFITS CONFERRED ON THE CLASS BY THE SETTLEMENT

Under the revised settlement, class members who submitted valid, timely claims under the original settlement will have those claims paid in full according to a payment schedule that takes into consideration (1) whether the work was registered in time to be eligible for statutory or actual damages under the Copyright Act, (2) the original price paid to the author for publishing the work, (3) the date of original publication of the work, and (4) whether the author is willing to permit use of the work in the future. This schedule is the same as that for the original settlement, except that the amounts payable on Category C claims are 14 percent higher than before (a change that was negotiated by C Counsel). Pursuant to the schedule, it appears that approximately $12 million in settlement payments could be made (pending further claim processing and resolution of claim disputes, if any).

More detail about the payment schedule, compensation to the class, and other aspects of the settlement can be found in the revised settlement agreement, memorandum in support of

preliminary settlement approval, and Court-approved class notice. More detail will also be provided in the memorandum in support of final approval due June 3, 2014.

IV. LITIGATION HISTORY AND EFFORTS OF A/B COUNSEL[2]

A. Efforts Of A/B Counsel From Inception To Mediation For The Original Settlement

In addition to extensive research and investigation of the potential claims against defendants, which began in October 1999, strategizing with the trade associations with respect to who to name as defendants and what causes of action to bring, and preparing the initial complaints, A/B Counsel performed the following necessary work in connection with this litigation before the mediation: participated in numerous in-person and telephonic meetings with the Associational Plaintiffs (the Authors Guild, the American Society of Journalists and Authors and the National Writers Union) and the named plaintiffs; held weekly strategy teleconferences among themselves; interviewed potential experts; researched, briefed and argued issues in connection with the MDL proceeding; held meetings in connection with the organization of plaintiffs' counsel in the consolidated proceeding; prepared the Consolidated Amended Class

[2] The work of A/B Counsel and their associated counsel through June 10, 2005 is summarized in the Declaration Of Michael J. Boni On Behalf Of Kohn, Swift & Graf P.C. In Support Of Class Counsel's Application For Attorneys' Fees And Disbursements, filed June 15, 2005, and the other declarations of counsel attached thereto as Exhibits A-F (collectively, "June 2005 Omnibus Declaration"). The work of counsel from June 11, 2005 through March 28, 2014 is summarized in the following declarations filed with this memorandum: (i) Declaration Of Michael J. Boni On Behalf Of Boni & Zack LLC In Support Of Class Counsel's Application For Attorneys' Fees And Disbursements ("Boni & Zack Declaration"); (ii) Declaration Of Robert J. LaRocca On Behalf Of Kohn, Swift & Graf P.C. In Support Of Class Counsel's Application For Attorneys' Fees And Disbursements ("Kohn Swift Declaration"); (iii) Declaration Of A. J. De Bartolomeo On Behalf Of Girard Gibbs LLP In Support Of A/B Counsel's Application For Attorneys' Fees And Disbursements ("Girard Gibbs Declaration"); (iv) Declaration Of Diane S. Rice On Behalf Of Hosie Rice LLP (And Predecessor Firms) In Support Of Class Counsel's Application For Attorneys' Fees And Disbursements ("Hosie Rice Declaration"); and Declaration Of Gary S. Fergus In Support Of Class Counsel's Application For Attorneys' Fees And Disbursements ("Fergus Declaration").

Action Complaint and performed research in connection therewith; researched and investigated claims against defendant Contentville, negotiated settlements with Contentville, and drafted settlement papers regarding Contentville; researched, investigated and responded to a multitude of authors' reports concerning coercive license agreements imposed on them by content providers as well as reports of continuing electronic infringement after the Supreme Court's *Tasini* decision; studied the Supreme Court briefing and participated in meetings with respect to amici positions in connection with the Supreme Court *Tasini* case; prepared for and participated in status conferences before this Court; researched and investigated potential claims against the New York Times; prepared and filed a class action complaint against the New York Times; researched and drafted TRO papers and negotiated a partial settlement with the New York Times in connection with its Restoration Request website, including in-person meetings in New York; initiated and participated in early settlement meeting with defense counsel; negotiated a stipulated scheduling order and case management order with defense counsel; researched related Canadian freelance authors class litigation; worked with copyright experts on issues such as, for example, damages methodologies and standing with respect to authors of unregistered works; researched and briefed a multitude of issues, including class certification, damages, standing requirements (trade associational standing as well as class representative and absent class member standing), Berne Convention and other international copyright treaty issues, pendent state claims under contract and tort theories, methods of industry-wide payment for the future use of infringed works (such as, for example, issuance of non-exclusive licenses and setting up and implementing a royalty payment clearinghouse system), the right to transfer licenses, the right of licensees to sub-license, implied in fact licenses, injunctive relief, parameters of Class

participation (e.g., letters to the editor, law review articles, scientific journal articles, etc.), spoliation of evidence, and willful infringement.

B. Efforts Of A/B Counsel Concerning The Mediation And Original Settlement

A/B Counsel participated in the mediation as follows: attended scores of in-person meetings and teleconferences with co-counsel, clients, the mediators, and/or defense counsel; prepared mediation briefs and numerous other research memoranda and position statements; took discovery of defendants and analyzed discovery with damages expert; conducted independent discovery and investigation with respect to the publishing industry and the literary database industry (e.g., market concentration and market share); monitored related litigation such as *Morris*, *Boston Globe*, and *National Geographic*; prepared and presented arguments and made presentations to defense counsel and the mediators; researched and briefed issues concerning plaintiffs' right to compensation for the future use of infringed works; briefed MDL transfer motion regarding one of the *National Geographic* cases; researched and responded to ProQuest's image-based archiving of newspapers, including negotiating a standstill agreement as an alternative to plaintiffs' seeking injunctive relief; prepared and exchanged settlement proposals, including mediators' proposals; drafted and exchanged settlement term sheets; drafted settlement agreement, notice of class action settlement, proposed order of preliminary settlement approval, summary notice, final judgment and order of dismissal and claim form, claims administration memorandum, confidential agreement regarding opt-outs, timeline; researched and strategized in connection with claims administration procedures; researched issue of ability to bind absent class members to a classwide grant of non-exclusive licenses; researched Berne Convention issues as they pertain to damages and notice; researched and negotiated possible carve out of

Canadian class; researched and investigated scope of retroactivity agreements and effect thereof on the settlement; researched class notice issues.

After the parties agreed on the original settlement, A/B Counsel were responsible for representing plaintiffs' and the class's interests in the approval and implementation process, including obtaining preliminary approval, disseminating individual, publication, and email notice, claims administration, claims dispute resolution, and briefing and arguing in opposition to a class member's motion to vacate the Court's order granting preliminary approval of the original settlement. A/B Counsel also had to participate in the MDL proceedings in *Roeder v. Tribune Co.*, a related case brought by a freelance author against one of the participating publishers in the original settlement. After notice of the original settlement was disseminated, A/B Counsel started responding to a multitude of class member inquiries on a daily basis, and continued to do so through the end of the claims period on September 30, 2005. In addition, A/B Counsel prepared and filed a motion for final settlement approval; responded to numerous arguments by objectors; negotiated and obtained approval of the Amazon/Highbeam amendment; and attended and argued at the extensive fairness hearing in September 2005.

C. Efforts Of A/B Counsel Concerning The Appeal And Supreme Court Review

A/B Counsel briefed the objectors' appeal on behalf of plaintiffs/appellees. After the Second Circuit sua sponte asked the parties to brief whether a federal court had the jurisdiction to approve a settlement of unregistered-copyright claims, A/B Counsel briefed and argued that issue as well as all other issues the objectors had raised on appeal. A/B Counsel then prepared and filed a motion for rehearing en banc in response to the Second Circuit panel's split decision to vacate this Court's order granting final settlement approval, on the sole ground that the Court lacked jurisdiction over the unregistered works (Walker, J., dissenting). When that motion was

denied, A/B Counsel prepared and filed a petition for writ of certiorari regarding the Second Circuit's ruling. Certiorari was granted, and A/B Counsel briefed the matter before the Supreme Court, which reversed the decision of the Second Circuit panel on the issue of jurisdiction over unregistered works and directed the appeals court to reach the merits of the objectors' appeal. In a split decision (Straub, J., dissenting), the Second Circuit vacated this Court's order granting final settlement approval, and A/B Counsel prepared and filed a petition for rehearing, which was unsuccessful.

D. Efforts Of A/B Counsel Concerning The Post-Remand Proceedings And Revised Settlement

On remand of the case to this Court, A/B Counsel analyzed the options of resumed litigation versus renewed settlement efforts. After initial discussions among plaintiffs, defendants, and the objectors developed into full settlement negotiations, A/B Counsel advocated for the Category A and Category B works, while the objectors' attorney (C Counsel) advocated for the Category C works. A host of issues arose during the negotiations, which were contentious and protracted, lasting two years. Such issues included the definition of the Category A/B and Category C subclasses; form of increased compensation for Category C works; analysis of claims already classified as ineligible by the claims administrator; clarification of claim processing procedures and nature of the process for resolving claim disputes; provision for payment of administrative costs, including costs due and payable from the time of the original settlement; the forms and methods of giving notice of the revised settlement; and wording of the revised settlement agreement and related documents, including notices, proposed orders, and claim administration guidelines. A/B Counsel had to negotiate through all these issues with C Counsel and defense counsel (aligning themselves with C Counsel on some points, and with defense counsel on others); worked with the claims administrator to obtain necessary

data and design the notice campaign; and took the laboring oar on much of the settlement documentation and the motion for preliminary settlement approval.

V. A/B COUNSEL'S REQUESTED FEE IS REASONABLE AND SHOULD BE APPROVED

A. Legal Standards

In *Goldberger v. Integrated Resources, Inc.*, 209 F.3d. 43 (2d. Cir. 2000), the Second Circuit stated that "where an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury," "the attorneys whose efforts created the fund are entitled to a reasonable fee – set by the court – to be taken from the fund." *Id.* at 47. "[W]e hold that both the lodestar and the percentage of the fund methods are available to district judges in calculating attorney's fees in common fund cases." *Id.* at 50. Whether a court chooses to use the lodestar method or the percentage-of-recovery method, assessing the fee under the other method is recommended as a "cross check." *See id.* at 47 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen. Indeed, we encourage the practice of requiring documentation of hours as a 'cross check' on the reasonableness of the requested percentage.").

> Of course, no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "**(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.**"

Id. at 50 (emphasis added).

Furthermore, where "money paid to the attorney is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean* v. *City of*

New York, 233 F.R.D. 377, 392 (S.D.N.Y. 2006). That is the case here. Valid claimants will receive full settlement compensation as set forth in the payment schedule regardless of the fee awarded to A/B Counsel. Furthermore, the parties did not negotiate the issue of fees until after the class benefits were agreed. *See Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003) ("[U]nlike common fund cases, where attorneys' fees can erase a considerable portion of the funds allocated for settlement, the fees were negotiated separately and after the settlement amount had been decided, thus considerably removing the danger that attorneys' fees would unfairly swallow the proceeds that should go to class members.").

B. The *Goldberger* Factors All Support A/B Counsel's Fee Request

1. The time and labor expended by counsel

The six factors in *Goldberger* all weigh in favor of A/B Counsel's proposed fee. The first criterion is time and labor expended. A/B Counsel have been diligently pursuing this litigation for the past fourteen years. Thousands of hours have been spent developing plaintiffs' case against defendants. The time expended and lodestar accumulated by A/B Counsel are discussed in more detail below, in the discussion of the lodestar-multiplier method of awarding attorneys' fees, but in summary, counsel have expended almost 17,000 hours in the case as of March 28, 2014, representing a total lodestar of over $8 million. Thus, far from reflecting a multiplier enhancement, the requested fee of $2.7 million represents approximately one-third of A/B Counsel's lodestar. The time and lodestar figures will only increase as counsel prepare for final-approval proceedings, continue responding to class member inquiries, and conduct other necessary activity.

2. The magnitude and complexities of the litigation

The magnitude and complexities of this case particularly militate in favor of awarding A/B Counsel's requested fee. *See Shapiro v. JPMorgan Chase & Co.*, Case No. 11 Civ. 8331 (CM) (MHD), 2014 WL 1224666, at *21 (S.D.N.Y. Mar. 24, 2014) (finding this factor supported $18 million fee request where class counsel had to "research[ ] and evaluate[ ] novel and complex claims and areas of law"). Many complex issues surfaced in the course of the mediation leading to the original settlement. Defendants aggressively argued, for example, that (1) the class had to be limited to authors who registered their works in the U.S. Copyright Office; (2) a class action would never be certified in this case because of many issues claimed by Defendants to be individual in nature (e.g., the amount of damages to which each class member is entitled); (3) the databases did not distinguish between freelance works and works for hire, and such information was in the possession of the many thousand content providers, if it existed at all; and (4) identification of the infringed works was unmanageable. Defendants also vigorously attacked plaintiffs' damage analysis and argued that the value of printed freelance work was very low; the electronic market for resale of freelance works was small; and defendants' profits were minimal. From the inception of the case and throughout the three-plus years of mediation sessions, A/B Counsel had to wage battle after battle with defense counsel on virtually every legal and factual issue in the case.

Then, when the objectors appealed from the approval of the original settlement, A/B Counsel devoted substantially more time, effort, and skill to defending this Court's decision – from addressing the unregistered-copyright issue raised sua sponte by the Second Circuit, to obtaining certiorari and successfully contesting the Second Circuit's ruling on the matter before the Supreme Court, to arguing the fairness of the original settlement on remand to the Court of

Appeals. After approval of the original settlement was vacated and the case remanded to this Court by the Second Circuit, A/B Counsel spent almost two more years in an intensive three-sided negotiation with C Counsel and defense counsel ironing out issue after issue before the parties could agree on the terms of a revised settlement and the language of the documents embodying those terms.

Moreover, unlike securities, antitrust, and other class actions for which templates have been forged over decades and thousands of cases, this is just one of only a handful of copyright class actions ever brought, and A/B Counsel have had to litigate and negotiate the many novel, complex issues in this matter from scratch.

3. The risk of the litigation

A/B Counsel undertook the prosecution of this highly complex matter on a wholly contingent basis. No client or class member was asked to pay fees or advance costs. Unlike defense counsel, who were compensated on a current basis throughout this litigation, A/B Counsel have received no compensation or reimbursement of costs whatsoever for the fourteen years this case has been pending. At no time was success in any sense guaranteed. The litigation risks, and thus the financial risks to counsel, were enormous. *See Shapiro*, 2014 WL 1224666, at *22 ("For years, Co-Lead Counsel have invested thousands of hours of time without any guarantee of compensation or even a recovery of out-of-pocket expenses."). Among other things, A/B Counsel faced serious difficulties in maintaining the litigation on behalf of unregistered authors, obtaining class certification, and proving class-wide liability and damages at trial. The riskiness of this class action was highlighted by the fact that no tag-along cases were filed, as is typical in large class actions with a good chance of recovery.

The Supreme Court's decision in *Tasini* by no means minimized A/B Counsel's litigation risk, as such risk is measured at the time the case is filed. *See Goldberger*, 209 F.3d at 55 ("It is well-established that litigation risk must be measured as of when the case is filed."); *DiFilippo v. Morizio*, 759 F.2d. 231, 234 (2d. Cir. 1985) ("[T]he analysis [of counsel's risk] should not have been based upon the hindsight afforded by the actual results in the case. Rather, it should have been an ex ante determination of whether the chance of a substantial judgment was sufficiently great when the case was brought . . . ."). The Supreme Court did not decide *Tasini* until after this litigation was initiated. Furthermore, *Tasini* did not resolve any of the standing, class certification, damages, or class liability issues that made this case highly risky both before and after the Supreme Court's decision. A/B Counsel nevertheless embarked on the matter aware they would likely have to bear those risks and spend a substantial amount of time, effort, and money before having even a possibility of recovering a fee or cost reimbursement.

4. The quality of representation

A/B Counsel have decades of experience successfully prosecuting and trying class actions and other complex cases, and are highly reputable and skilled attorneys. The quality of legal representation is best measured by the result obtained, *Goldberger*, 209 F.3d at 55; *In re Citigroup Inc. Bond Litig.*, 08 Civ. 9522 (SHS), 2013 WL 6697822, at *8 (S.D.N.Y. Dec. 19, 2013), and the settlement achieved by A/B Counsel here is outstanding given the legal and factual complexities of the case. The settlement will provide meaningful relief to all valid claimants, most of whom otherwise would not have received any compensation at all.

The quality of opposing counsel is also an important factor for the Court to consider in evaluating the quality of services provided by A/B Counsel. *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002). Opposing counsel include such prominent firms

such as Proskauer Rose LLP; Gibson, Dunn & Crutcher; Greenberg Traurig, LLP; Satterlee Stephens Burke & Burke LLP; and Simpson Thacher & Bartlett LLP. As the court stated in *In re IMAX Securities Litigation*, Case No. 06 Civ. 6128 (NRB), 2012 WL 3133476 (S.D.N.Y. Aug. 1, 2012), "as to the quality of representation, there is no question that [class counsel] . . . are experienced and sophisticated counsel well-recognized as leaders in the securities class action bar and further that defendants were represented by highly competent members of the bar." *Id.* at *9.

As an example of the formidable nature of the opposition, at the first two mediation sessions held in New York in 2001, approximately forty outside and in-house counsel attended for defendants, while only seven lawyers attended on behalf of plaintiffs. At several mediation sessions, five lawyers attended for one defendant alone. Defense counsel's advocacy on behalf of their clients has been zealous and skillful at all times. That A/B Counsel were able to obtain a substantial class settlement under these circumstances is evidence of their own skill and perseverance.

5. The requested fee in relation to the settlement

As explained in more detail below, in the discussion of the percentage-of-recovery method for awarding attorneys' fees, A/B Counsel's requested fee of approximately $2.7 million represents 15 percent of the settlement benefits, which is at the lower end of the range typically awarded for recoveries of this magnitude. *See, e.g., Shapiro*, 2014 WL 1224666, at *19 ("[A] review of district court decisions in this Circuit applying the *Goldberger* factors place a reasonable percentage-of-the-fund range between 10% and 30%.").

6. Public policy considerations

The Second Circuit has repeatedly recognized that private attorneys should be encouraged to undertake the risks required to represent those who would otherwise be unprotected. *See Goldberger*, 209 F.3d. at 51 ("There is also commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest."); *In re Worldcom Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005) ("In order to attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives."). "Private attorneys should be encouraged to take the risks required to represent those who would not otherwise be protected from socially undesirable activities" such as copyright infringement. *Maley*, 186 F. Supp. 2d. at 374.

This case has amply served the public interest. But for this class action, the rights of freelance authors subjected to defendants' conduct would not have been effectively vindicated. Perhaps in recognition of the problems inherent in such an undertaking – including the small size of most class members' claims, the significant complexity and novelty of the issues involved, the substantial risk that a litigation class including authors of unregistered works (i.e., the overwhelming majority of the class) could not be certified – no attorneys filed a class action to seek redress other than A/B Counsel. "Where relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill the private attorney general role must be adequately compensated for their efforts." *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013). Without this case, most of the freelance authors in the class would not have received any compensation for the alleged infringement of their copyrights.

C. The Fee Is Reasonable Under Both The Lodestar And Percentage-Of-Recovery Methods

1. The lodestar method

A/B Counsel's fee request is reasonable under both the lodestar and percentage-of-recovery approaches. Under the lodestar method, "the district court scrutinizes the fee petition to ascertain the number of hours reasonably billed to the class and then multiplies that figure by an appropriate hourly rate." *Goldberger*, 209 F.3d at 47. "Once that initial computation has been made, the district court may, in its discretion, increase the lodestar by applying a multiplier based on 'other less objective factors,' such as the risk of the litigation and the performance of the attorneys." *Id.* "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court." *Id.* at 50.

A/B Counsel and their associated counsel have spent over 16,856 hours on this matter as of March 28, 2014, representing a total lodestar of over $8 million. This aggregate amount was calculated from contemporaneous, daily time records regularly prepared and maintained by counsel in the ordinary course of business. The time expended was necessary and non-duplicative, and no time spent on the original fee application or this one was included in the figure. The lodestar was calculated by (i) multiplying counsel's time spent since their June 2005 fee petition by their current hourly rates and (ii) adding the resulting fee amount to the lodestar reported in that earlier fee petition, which was calculated using counsel's then-current, lower rates.

The following table shows the aggregate time, lodestar, and expenses as of June 10, 2005; the additional time, lodestar, and expenses of each A/B Counsel or associated counsel from June 11, 2005 through March 28, 2014; and the totals.[3]

	Hours	Lodestar	Expenses
All counsel as of June 10, 2005	10,848.32	4,696,291.05	520,847.29
Boni & Zack LLC (add'l)	1,670.25	1,158,618.75	12,265.03
Kohn, Swift & Graf, P.C. (add'l)	721.70	289,713.50	16,349.77
Girard Gibbs LLP (add'l)	1,649.40	813,369.50	32,389.10
Hosie Rice LLP (add'l)	1,476.15	819,215.75	25,049.18
Fergus, A Law Office (add'l)	490.80	387,197.00	11,086.46
Totals	**16,856.62**	**8,164,405.55**	**617,986.83**

The use of current as opposed to historical rates is proper, because it compensates for inflation, delay in payment, and lost use of funds. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 n.10 (S.D.N.Y. 2008) ("The use of current rates to calculate the lodestar figure has been endorsed repeatedly by courts as a means of accounting for the delay in payment inherent in class actions and for inflation.").[4] In addition, counsel's rates reflect the competitive market rates for national cases involving complex litigation as well as the reputation, experience, and success of the lawyers and firms involved.

[3] The figures for the aggregate time, lodestar, and expenses as of June 10, 2005 are set forth in the June 2005 Omnibus Declaration. The figures for the period from June 11, 2005 through March 28, 2014 are set forth and detailed in the accompanying Boni & Zack Declaration, Kohn Swift Declaration, Girard Gibbs Declaration, Hosie Rice Declaration, and Fergus Declaration.

[4] A/B Counsel's reported lodestar actually understates the present value of the time they spent. Counsel would have been justified in valuing all their time in this case using current rates. Instead, counsel valued only time spent since June 2005 at those rates.

Cf. Telik, 576 F. Supp. 2d at 589 ("The current hourly rates of the partners litigating this action on behalf of the Class, who performed the vast majority of the partner-level work on this matter, range from $700 to $750. Those rates fall within the norm of the rates charged by those attorneys' common adversaries in the defense bar.") (citation omitted).

Thus, A/B Counsel's lodestar is reasonable. Furthermore, a fee greater than their lodestar would also be reasonable, as courts routinely award such fees where attorneys have invested a substantial amount of time and effort on a wholly contingent basis, borne considerable risk, and obtained a highly favorable result for the class. *See Shapiro*, 2014 WL 1224666, at *24 (attorneys who pursue complex case on contingent basis are entitled to lodestar enhancement). In such cases, "[c]ourts regularly award lodestar multipliers from 2 to 6 times lodestar." *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 623 (S.D.N.Y. 2012). Some courts have awarded multipliers as high as 8 or even more. *Beckman*, 293 F.R.D. at 481. "Lodestar multipliers of nearly 5 have been deemed 'common' by courts in this District." *In re EVCI Career Colleges Holding Corp. Sec. Litig.,* Case No. 05 Civ. 10240 (CM), 2007 WL 2230177, at *17 n.7 (S.D.N.Y. July 27, 2007).

Nevertheless, A/B Counsel do not seek a lodestar enhancement, nor do they request even their bare lodestar as a fee. Rather, they request a fee of approximately $2.7 million that represents only a third of their lodestar. As the court explained in *Fogarazzo v. Lehman Bros., Inc.*, Case No. 03 Civ. 5194 (SAS), 2011 WL 671745 (S.D.N.Y. Feb. 23, 2011):

> Not only is Class Counsel not receiving a multiplier of their lodestar to compensate them for the contingent risk factor, their fee request amounts to a deep discount from their lodestar. Thus, the lodestar 'cross-check' unquestionably supports a percentage fee award of one-third.

Id. at *4; *see also In re Bear Stearns Cos., Inc. Sec., Deriv. & ERISA Litig.*, 909 F. Supp. 2d 259, 271 (S.D.N.Y. 2012) ("[T]he lodestar cross-check results in a ***negative*** multiplier of less

than 0.92 – a strong indication of the reasonableness of the proposed fee.") (original emphasis). In fact, the true fractional multiplier will be even lower, as there is significantly more work to be done that is not reflected in counsel's current time figures (e.g., continuing to respond to class member inquiries, briefing and arguing the motion for final settlement approval, handling claims administration issues).

Thus, the reasonableness of the proposed fee is amply shown by the lodestar approach.

2. The percentage-of-recovery method

The percentage-of-recovery approach confirms that A/B Counsel's fee request is reasonable. The percentage method is self-explanatory: "The court sets some percentage of the recovery as a fee. In determining what percentage to award, courts have looked to the same 'less objective' factors that are used to determine the multiplier for the lodestar." *Goldberger*, 209 F.3d at 47 (citation omitted). "The trend in this Circuit is toward the percentage method, which 'directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.'" *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citation omitted).

As an initial matter, it bears repeating that this is not a true common-fund case, where a defendant settles by paying an "all-in" lump sum to fund class benefits, notice and administrative costs, and attorneys' fees and expenses, and any fee award necessarily reduces the money available for the class. Instead, fees will be paid separately from and without reducing the compensation to valid claimants under the settlement. Thus, "the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean,* 233 F.R.D. at 392.

At any rate, A/B Counsel's fee request easily passes scrutiny under the percentage method, which can be applied by assessing the fee in relation to all amounts provided or paid for the benefit of the class under the settlement. *See Shapiro*, 2014 WL 1224666, at *19 (applying percentage approach to separately paid fee by constructively "pooling" it with class fund). Because only valid claims timely filed under the original settlement will be paid in this revised settlement, the "universe" of claims is now closed, and a reasonable estimate of the expected payout can be made. Pursuant to the payment schedule, it appears that approximately $12 million in settlement payments will be made, pending further claim processing and resolution of claim disputes, if any. (The $12 million breaks down into approximately $6.75 million for Category A claims, $326,000 for Category B, and $5 million for Category C.) An additional $343,500 will be distributed among valid Category C claimants. The current balance of defendants' deposit from the original settlement, now earmarked for attorneys' fees and expenses, administrative costs, and similar outlays, is approximately $5 million. The participating publishers have been providing, and are providing, publication of the summary notice in their magazines and websites in an amount valued at over $2 million (even though the Revised Settlement Agreement required a publication value of only $1 million). Thus, the total value of the settlement can be estimated as $12 million plus $0.3 million plus $5 million plus $2 million, or $19.3 million.

It was C Counsel who negotiated greater compensation for Category C works, including a 14-percent increase in the original payment schedule for such works (such increase being currently valued at approximately $610,000) and an additional lump sum of $343,500 for Category C works. Furthermore, he negotiated the retention of $517,000 in accrued interest, earnings, and appreciation on the original settlement deposit for plaintiffs' benefit, when

defendants were arguably entitled to have the amount returned to them. (That $517,000 will first be allocated to certain non-attorney costs, and then any remainder will be distributed among Category C claimants.) Thus, "backing out" the increased amounts negotiated by C Counsel will reflect the results achieved by A/B Counsel. Reducing the $19.3 million settlement value by those amounts ($610,000, $343,500, and $517,000) yields approximately $17.8 million in settlement value attributable to A/B Counsel. Their requested fee of $2.7 million is only 15 percent of that amount.

Fifteen percent is at the lower end of the range typically awarded for non-"megafund" settlements. In *Board of Trustees v. JPMorgan Chase Bank, N.A.*, Case No. 09 Civ. 686 (SAS), 2012 WL 2064907 (S.D.N.Y. June 7, 2012), the court awarded a 25-percent fee of $37.5 million, stating that "[t]his fee is well within the standard range for fee awards given under *Goldberger*." *Id.* at *2; *see also Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming award of 30 percent of $42.5 million fund); *Shapiro*, 2014 WL 1224666, at *19 ("[A] review of district court decisions in this Circuit applying the *Goldberger* factors place a reasonable percentage-of-the-fund range between 10% and 30%."); *Telik*, 576 F. Supp. 2d at 578 & n.8 (in awarding 25-percent fee, stating that it was "well within the range of fees approved by courts in this Circuit and elsewhere, under the percentage and the lodestar/multiplier approaches," and collecting multiple decisions awarding fees of 30 percent or higher).

Thus, the requested fee is a reasonable percentage of the settlement value.

VI. IT IS APPROPRIATE FOR A/B COUNSEL TO ALLOCATE THE FEE AWARD AMONG THEMSELVES AND OTHER CO-COUNSEL

As plaintiffs' lead counsel for most of this litigation, A/B Counsel supervised their co-counsel and managed the efficient prosecution of the case. This Court should authorize A/B

Counsel to allocate the fee award among themselves and their co-counsel, as provided by paragraph 9(c) of the Revised Settlement Agreement.

As the court observed in *In re Initial Public Offering Securities Litigation*, Case No. 21 MC 92 (SAS), 2011 WL 2732563 (S.D.N.Y. July 8, 2011):

> District courts routinely give lead counsel the initial responsibility of devising a fee allocation proposal "as they deem appropriate, based on their assessments of class counsel's relative contributions." District courts similarly acknowledge that, by working together and communicating daily, often from the case's inception, class counsel is best positioned to determine the "weight and merit of each other's contributions."

Id. at *7 (footnote omitted); *see also Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 90 (2d Cir. 2010) (affirming district court's approval of lead counsel's allocation of fees to non-lead counsel) ("Since lead counsel is typically well-positioned to weigh the relative merit of other counsel's contributions, it is neither unusual nor inappropriate for courts to consider lead counsel's proposed allocation of attorneys fees . . . .").

Here, although paragraph 9(c) of the Revised Settlement Agreement provides that A/B Counsel will allocate fees among their associated non-lead counsel in good faith by weighing relative contributions, they do not propose to go even that far. Instead, the allocation will be done simply in proportion to time spent on the case. The four firms serving as A/B Counsel have agreed to divide the fee award into three equal shares. One share will go to Boni & Zack LLC; another to Girard Gibbs LLP; and the third to Hosie Rice LLP and Fergus, A Law Office, collectively. Boni & Zack has agreed to allocate its share between itself and the firm with whom it filed its original complaint in this litigation based on their respective lodestars. Girard Gibbs has agreed to do likewise with respect to the associated lawyer on its own original complaint. Hosie Rice and Fergus will divide their share according to their own agreement.

VII. A/B COUNSEL'S EXPENSE REIMBURSEMENT REQUEST SHOULD ALSO BE APPROVED AS REASONABLE

As set forth above in the discussion of the lodestar method, A/B Counsel have incurred $617,986.83 in out-of-pocket expenses through March 28, 2014, for which they have not been reimbursed. A/B Counsel now request reimbursement of these expenses in addition to an award of attorneys' fees. As with the fee award, any reimbursement of expenses will be paid separately and without reducing the compensation to valid claimants.

"Courts typically allow counsel to recover their reasonable out-of-pocket expenses." *Beckman*, 293 F.R.D. at 482. The above figure includes costs previously approved for reimbursement by the Court at the time of the original settlement, but that were never paid because of the appeal. The expenses include, among other things, copying costs, costs of the document depository, computerized legal research services, analysis by consultants, and travel costs. The expenses advanced by counsel were reasonable and necessary to the prosecution of the case, and should therefore be reimbursed. *See, e.g., Bear Stearns*, 909 F. Supp. 2d at 272 (approving "sizable" cost reimbursement request where "Class Counsel have submitted declarations itemizing the incurred expenses, and all of the identified categories are of the type for which reimbursement is generally granted").

VIII. THE REQUESTED SERVICE AWARDS FOR THE A/B PLAINTIFFS ARE MODEST UNDER THE CIRCUMSTANCES AND SHOULD BE APPROVED

A/B Counsel also seek approval for the payment of service awards to the nineteen A/B Plaintiffs and the estates of deceased former representative plaintiffs Derrick Bell and Andrea Dworkin in the amount of $2,000 each, for a total of $42,000. If approved, the awards will be paid separately from and without reducing claimant compensation.

"Service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs." *Beckman*, 293 F.R.D. at 483. Here, the A/B Plaintiffs (and Derrick Bell until he passed away in 2011, and Andrea Dworkin until she passed away in 2005) worked with A/B Counsel and the Associational Plaintiffs by providing detailed information about their works and the registration of those works with the U.S. Copyright Office, and by consulting throughout the case, particularly during the mediation leading to the original settlement. They also risked jeopardizing their relationships with the publishers of their works by pursuing this copyright infringement action on behalf of the class.

Under these circumstances, and especially in comparison to awards typically approved in other cases, the $2,000 service awards are modest and should be approved. *See, e.g., McReynolds v. Richards-Cantave*, 588 F.3d 790, 796 (2d Cir. 2009) (affirming settlement under which $15,000 and $10,000 incentive awards were paid to named plaintiffs); *Beckman*, 293 F.R.D. at 483 (approving $7,500 and $5,000 service awards); *Morris*, 859 F. Supp. 2d at 624 (approving $7,500 service award); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 263-64 (S.D.N.Y. 2003) (approving $15,000 incentive award).

IX. THE COURT SHOULD ALSO APPROVE PAYMENT OF ADMINISTRATIVE COSTS AND OTHER REASONABLY NECESSARY EXPENDITURES

In addition, A/B Counsel request the Court's approval of the payments and reserves listed on Exhibit 1 to Exhibit C (plaintiffs' counsel's cost sharing agreement) to the Revised Settlement Agreement, in the total amount of $762,790.24. None of these items is a payment to A/B Counsel or C Counsel; they consist mostly of amounts to be paid to third-party service providers.

If approved, they will be funded from the balance of defendants' original settlement deposit and will not reduce claimant compensation, which will be paid separately.

Items (1)-(5), totaling $285,000, are payments to the claims administrator for various tasks already done, being done, or that must be done to provide notice to the class, process claims, or otherwise administer or facilitate the settlement. Item (6), for $5,000, is payment for bank escrow fees and tax preparation and other services and fees associated with the account holding the balance of defendants' original deposit. Items (7)-(8), totaling $100,000, are reserves to pay for the services of a claims dispute resolution arbitrator and the claims themselves, if necessary. Item (9) is $150,000 for the fees of settlement mediator Kenneth Feinberg (and which represents a substantial reduction from the amount originally owed, to which Mr. Feinberg agreed). Item (10) is $222,790.24 still owed to the claims administrator for work done in connection with the original settlement, payment for which the administrator has been waiting almost ten years. All these items are reasonably necessary costs of suit or settlement and should be approved for payment from the balance of defendants' original settlement deposit. *Cf. In re Texaco, Inc. Shareholder Litig.*, 20 F. Supp. 2d 577, 583 (S.D.N.Y. 1998) ("Pursuant to this settlement, a common fund of $115 million was created to pay the monetary claims of all individual class members in the *Roberts* Action, in addition to the costs of suit, including attorney's fees and the costs of administering the plan of allocation . . . .").

X. CONCLUSION

For the foregoing reasons, the Court should award A/B Counsel $2,688,222.93 in attorneys' fees and $617,986.83 for reimbursement of expenses incurred in this matter. The Court should also approve service awards in the amount of $2,000 each to the nineteen A/B Plaintiffs and the estates of deceased former representative plaintiffs Derrick Bell and Andrea

Dworkin, for a total of $42,000.[5] Furthermore, the Court should approve $762,790.24 in (i) payments to third parties for claims administration, mediation, bank, and accounting services in connection with the original and revised settlements and (ii) reserves for the claims dispute resolution process.

Respectfully submitted,

Dated: April 9, 2014

/s/ Michael J. Boni

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[5] In accordance with paragraph 9(c) of the Revised Settlement Agreement, A/B Counsel request that any award of attorneys' fees and expenses and any approved service awards be paid on the Effective Date, as defined in paragraph 1(q) of the agreement.