



May 7 2010
2:00PM

1 MITCHELL SILBERBERG & KNUPP LLP
2 WILLIAM L. COLE (STATE BAR NO. 76089)
3 KEVIN E. GAUT (STATE BAR NO. 117352)
4 SETH E. PIERCE (STATE BAR NO. 186576)
5 11377 West Olympic Boulevard
6 Los Angeles, California 90064-1683
7 Telephone: (310) 312-2000
8 Facsimile: (310) 312-3100
9 sep@msk.com
10 Attorneys for Defendants in Case Nos.
11 BC 268 836, BC 268 838, and BC 268 841
12 and Defendants' Liaison Counsel
13 for the Other Settling Defendants

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF LOS ANGELES - CENTRAL CIVIL WEST**

16 IN RE: TV WRITERS CASES

17 **Case Nos. BC 268836 (and related cases)**
18 **[Assigned to Hon. Emilie H. Elias for all**
19 **purposes]**

20 THIS DOCUMENT RELATES TO:

21 **DEFENDANTS' AND LEAD CLASS**
22 **COUNSEL'S JOINT RESPONSE TO**
23 **PRADA OBJECTION**

- 24 **Case No. 268 836** – Alch, et al. v. Time Warner Entertainment Company, L.P., et al.;
- 25 **Case No. 268 837** – Neal, et al. v. Viacom Inc. and United Paramount Network;
- 26 **Case No. 268 838** – Young, et al. v. DreamWorks SKG TV LLC;
- 27 **Case No. 268 839** – Bast, et al. v. Fox Broadcasting Company, et al.;
- 28 **Case No. 268 840** – Levy, et al. v. The Gersh Agency, Inc.;
- Case No. 268 841** – Edwards, et al. v. The Carsey-Werner Co., et al.;
- Case No. 268 842** – Wynn, et al. v. National Broadcasting Company, Inc., et al.;
- Case No. 268 843** – Brooks, et al. v. William Morris Agency, Inc.;
- Case No. 268 844** – Brett, et al. v. Walt Disney Company, et al.;
- Case No. 268 845** – Distefano, et al. v. Columbia TriStar Television, Inc.;
- Case No. 268 847** – Eisenson, et al. v. Lucy Stille & Associates, Inc., d/b/a Paradigm Talent & Literary Agency, et al.;

29 **[Filed concurrently with Supplemental**
30 **Declaration of Paul C. Sprenger in**
31 **Support of Motion for Final Approval**
32 **of Settlements re: Confidentiality**
33 **Concerns of Class Members]**

34 **Date: May 14, 2010**
35 **Time: 1:45 p.m.**
36 **Dept.: 324**

1 **Case No. 268 848** – Lang, et al., v. Shapiro-
2 Lichtman, Inc., d/b/a Shapiro
3 **Case No. 268 849** – Neal, et al. v. The Endeavor
4 Agency, Inc.;
5 **Case No. 268 877** – Kinghorn, et al. v. Universal
6 Studios, Inc., et al.;
7 **Case No. 268 878** – Moriarty, et al. v. Viacom
8 Inc., Paramount Studios, Inc., et al.;
9 **Case No. 268 880** – Yanok, et al. v. Agency for
10 the Performing Arts, Inc.;
11 **Case No. 268 881** – Schwartz, et al. v. United
12 Talent Agency, Inc.;
13 **Case No. 268 882** – Shayne, et al. v. Viacom Inc.
14 and CBS Broadcasting Inc; and
15 **Case No. 268 883** – Kalish, et al. v. Viacom Inc.,
16 Spelling Entertainment Inc., et al.
17
18
19
20
21
22
23
24
25
26
27
28

1 Defendants and Lead Class Counsel submit the following joint¹ response to Claudia
2 Prada's objection to the award confidentiality and liquidated damages provisions of the
3 Settlement and her request that a list of awards be published.

4 **I. INTRODUCTION**

5 Objector Prada has misread the critical liquidated damages provisions – which set
6 damages for a breach at the *lesser* of \$50,000 or 25% of the Claimant's net (after tax) award.
7 This is not a draconian attempt to stifle dissent, but a measured provision that recognizes that the
8 amount of damages from a breach would and should bear a reasonable relationship to the size of
9 the award being disclosed.

10 Objector Prada also proposes that a list of Claimants and their individual settlement
11 awards be published to prevent favoritism or other malfeasance. Unlike the other, substantial
12 safeguards in place, Prada's proposed modification to the Settlement would do nothing to guard
13 against the favoritism she fears.

14 Instead, Objector Prada's proposal would violate the privacy rights of thousands and
15 strike fear among the Plaintiff class. While Objector Prada portrays the nondisclosure provisions
16 as a cynical ploy by a favored minority, the overwhelming majority of Claimants, and all
17 Defendants, demanded confidentiality here – the Claimants, to guard against retaliation and to
18 preserve their financial and other privacy; the Defendants, to guard against unsubstantiated
19 allegations of retaliation and to avoid incentivizing and/or setting a value for future litigation.

20 Objector Prada's demand, if sanctioned by this Court, would upset the parties' carefully
21 constructed compromise, jeopardizing the Settlement for all.

22 Objector Prada's objections and proposed modifications must be rejected.

23 **II. THE LIQUIDATED DAMAGES PROVISION IS VALID**

24 Objector Prada argues that “[t]he Draconian fifty thousand dollar penalty ... is both
25 completely unrelated to any damages which could even arguably flow from disclosure and is an
26

27 _____
28 ¹ Defendants' joinder in this response is without prejudice to Defendants' respective rights to terminate the Settlement. All such rights are expressly reserved.

1 unenforceable penalty provision.” Objection at 2 (emphasis in original). But this argument
2 misstates the facts and law.

3 **A. The Contested Provision Provides that Liquidated Damages Shall Equal the**
4 **Lesser of \$50,000 or 25% of the Claimants’ After Tax Award**

5 Prada’s objection overstates the facts. The parties have not agreed to a one-size-fits-all
6 liquidated damages provision in the amount of \$50,000. The clause, as quoted in Ms. Prada’s
7 objection, clearly states that damages shall equal the *lesser* of \$50,000 or 25% of the Claimants’
8 net (or after tax) award. Thus, the \$50,000 clause acts as a ceiling, not a floor, for the damages
9 provision. The parties’ percentage approach ensures damages proportional to the injury and the
10 breaching Claimants’ ability to pay. The parties’ approach is the antithesis of draconian.

11 **B. The Contested Provision Is Valid under Cal. Civ. Code. § 1671**

12 “[A] provision in a contract liquidating the damages for the breach of the contract is valid
13 unless the party seeking to invalidate the provision establishes that the provision was
14 unreasonable under the circumstances existing at the time the contract was made.” Cal. Civ.
15 Code § 1671(b); *Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal. 4th 970, 977 (1998).

16 “A liquidated damages clause will generally be considered unreasonable, and hence
17 unenforceable under [the Code], if it bears no **reasonable relationship** to the range of actual
18 damages that the parties could have anticipated would flow from a breach.” *Ridgley*, 17 Cal. 4th
19 at 977 (emphasis added). The presence of the reasonable relationship is critical – as “[t]he
20 characteristic feature of a penalty is its lack of **proportional relation** to the damages which may
21 actually flow from failure to perform under a contract.” *Id.* (emphasis added).

22 Objector Prada challenges, at 2, the relationship here, but her argument seems rooted in
23 the same misreading debunked above – that any Claimant who violates the confidentiality
24 agreement is liable for \$50,000. That is not true. The parties “lesser of” construct fixes damages
25 directly in relationship to the size of the award – with an outer cap but no floor. Claimants
26 would not be liable for \$50,000 for disclosing a \$500 (after tax) award. To the contrary, the
27 stipulated damages would be \$125 – hardly unreasonable or disproportionate.

1 While the amount of liquidated damages would increase with higher awards, that is
2 appropriate and consistent, if not mandated by, the proportionality principle. Confidentiality
3 provisions protect the reputation of the defendant and minimize the settlement's impact on future
4 litigation – e.g., by establishing a settlement value. It is axiomatic that the reputational injury for
5 defendants, and the potential costs in connection with future litigation, would rise with the
6 disclosure of higher awards.

7 Objector's single citation to *Ridgley* is unavailing. In that case, a borrower was
8 challenging a prepayment provision in a real estate loan agreement. The provision required the
9 borrower to pay a fee to the bank in the amount of \$113,000 (or 6 months interest), upon sale of
10 the property, if he was late on any interest payments or otherwise breached the loan agreement.
11 The borrower was late on one payment and the bank charged the fee at closing. The California
12 Supreme Court declared the provision an invalid penalty "because it bore no relationship to the
13 potential damages defendant would incur from a late interest payment." *Id.* at 974, 979 n 4
14 (noting absence of plausible argument and inconsistency with late fee term of 10% of the missed
15 payment). The facts here – a sliding scale, percentage-based formula tied to the Claimant's
16 award with a cap – could not be any more different than the facts presented in *Ridgley*.

17 **III. AWARD CONFIDENTIALITY IS APPROPRIATE**

18 Objector Prada's bigger concern appears to revolve around the potential for favoritism in
19 the award calculation process. *See* Objection at 2 ("The inferential reason is clearly that the
20 distribution of benefits will be unfair and inequitable with certain favored persons receiving the
21 lion's share of the monies."). But the Settlement contains multiple safeguards to prevent such
22 favoritism.²

23 **A. Extensive Safeguards Exist**

24 All of the following must occur before any money can be distributed to the class – each
25 of which acts as independent check on the fairness of the formula.

26
27
28 ² It is also worth noting that award confidentiality is not uncommon. *See, e.g., Martens v. Smith-Barney, Inc.*, 2003
U.S. Dist. LEXIS 11587, *42-*44 (S.D.N.Y. 2003) (class action settlement; rejecting request to make "the
settlement amounts of each resolved claim be made known to all other Claimants and their counsel).

1 First, Lead Class Counsel and Class Counsel must devise a formula for distributing the
2 settlement funds. Creation of a formula that improperly favored one set of class member clients
3 over others would violate Lead Class Counsel and Class Counsel's fiduciary and professional
4 obligations to the class and as officers of the Court. *See* Administrative Order No. 4 at 11:27-
5 12:5. Here, Lead Class Counsel and Class Counsel plan to craft a formula based on the factors
6 described in the Settlement Notice, as well as based upon the detailed information solicited in the
7 Claim Form. The formula, and thus the awards, will be grounded in the Claimants' economic
8 and other losses and their documented efforts to secure writing employment and/or further the
9 lawsuits. Every claim will be evaluated individually with the expected result that each award
10 will differ (except for minimum awards). Named plaintiffs will not receive "bonuses" or other
11 incentive payments for lending their names to these cases. But, consistent with applicable law
12 and the ICM/Broder formula, Claimants, **whether named plaintiffs or not**, who provided
13 testimony, documents or were otherwise instrumental in pursuing the cases will receive points
14 for those additional efforts.

15 Second, Lead Class Counsel must present the formula and a proposed list of awards
16 (without names) to Defendants' Liaison Counsel for review. Defendants have the right to object
17 to the formula if they believe it is unfair, including, for example, if it were to improperly favor
18 certain class members. *See* Administrative Order No. 4 at 12:16-13:10.

19 Third, Lead Class Counsel will then provide notice of the proposed formula to the class,
20 ***who will then have an opportunity to comment or object to the Court.*** Each Claimant will
21 receive notice of the formula by mail or email. The formula will also be posted on the settlement
22 websites. *See* Administrative Order No. 4 at 13:11-18. While Claimants will not yet know the
23 amount of their respective awards, that will increase the objectivity of the process, not detract
24 from it. The class will be asked to assess the claim formula in a vacuum – without knowing how
25 their claim stacks up in absolute terms or in comparison to the other claims submitted. In other
26 words, the class will be asked to assess the proposed formula without the blinding light of greed
27 and self-interest, because it will be impossible for any Claimant to know whether any proposed
28 changes he or she might suggest will increase or decrease his or her individual award.

1 Fourth, the Court will hold a hearing to determine whether the formula is fair. The Court
2 will be provided the proposed formula, a list of awards (including names and identifying the
3 named plaintiffs and liaison committee members), and any comments or objections received.
4 Class members may also appear in person, if appropriate, to address the Court directly. If the
5 Court rejects the formula, the entire process must be repeated. *See* Administrative Order No. 4 at
6 13:9-14:6.

7 Finally, class members may appeal the Court's approval of the formula. *See*
8 Administrative Order No. 4 at 14:17-18.

9 Only when the formula is finally approved through this painstaking process will the funds
10 be disbursed.

11 **B. Objector Prada's Alternative Approach Will Not Shed Any Additional Light**

12 Objector Prada argues that class members should be "able to compare notes" – that Ms.
13 Prada should know exactly how much, for example, named plaintiffs Jason Brett and Tracy
14 Wynn received, so that she can determine whether her award measures appropriately. But
15 Objector Prada's proposal would not permit such comparison.

16 The settlement fund will not be distributed pro rata. Awards will be based on a single
17 formula, applied to all Claimants, that examines the **specific facts of each claim**. *See*
18 Administrative Order No. 4 at 15:18-20. The parties have amassed, through the claim form
19 submission process, a substantial amount of information regarding each claim to make the award
20 allocation process as precise as possible:

- 21
- 22 • The claim form requires Claimants to divulge highly personal and fact
23 specific information regarding their careers, including their age, detailed
24 salary information, periods of employment and unemployment, periods of
25 disability and other nonpublic information regarding their availability,
26 interest, and qualifications for television writing employment. .
 - 27 • The claim form also invites Claimants to provide extremely personal medical
28 and other information to the extent it bears on their claim – e.g., financial
bankruptcy; medical conditions related to the discrimination they contend they
experienced.

1 The only way effectively to compare individual awards is to grant access to all of the
2 underlying information regarding the Claimants being compared. Without this detailed
3 information, there would be no way to know whether the writers, and thus their awards, are truly
4 comparable.

5 It is, hopefully, undisputed that the disclosure of such detailed information would be
6 improper – and also impractical.

7 First, detailed information regarding the Claimants was collected with the assurance of
8 strict confidentiality. *See* Claim Form at 1. Most class members seeking advice from Class
9 Counsel, and there were thousands who called or emailed, expressed concern about filing a claim
10 **unless their privacy was assured**, including assurances that their identities would not be
11 disclosed. Relying on the Settlement Agreements, including the strict confidentiality provisions
12 contained therein, Class Counsel assured these Claimants that their identities and information
13 would remain private. *See* P. Sprenger Decl. These Claimants, and others, relied on the
14 Settlements’ promise when they submitted their claims. The parties and Court cannot break that
15 promise now.

16 Second, even if no assurances were made, Claimants have a reasonable expectation of
17 privacy in financial, employment, and health information. Cal. Constitution, Art. I, Sec. 1;
18 *Valley Bank of Nev. v. Superior Court*, 15 Cal. 3d 652, 656 (1975) (“‘privacy’ ... extends to ...
19 financial records”); *Harding Lawson Associates v. Superior Court*, 10 Cal. App. 4th 7, 10 (1992)
20 (“‘personnel files’”); *Pettus v. Cole*, 49 Cal. App. 4th 402, 441 (1996) (health information
21 embodies “quintessential zone of human privacy”). This information cannot be disclosed
22 without provision of a privacy notice and an opportunity to object – which has not been
23 provided. Nor can the amount of any single award be disclosed for the same reason.

24 Finally, even if background data could be provided, it is doubtful that Objector Prada or
25 any of the class members could effectively use it to assess the relative fairness of awards –
26 beyond what is obvious from the formula itself. The award database contains detailed financial
27 and other information regarding 4,200 Claimants. To perform the type of assessment envisioned,
28 Objector Prada would have to process this data to ascertain whether there are specific

1 characteristics that a “favored” subset of the class possess which are being overcompensated in
2 the formula. The enormity of that task is apparent.

3 * * *

4 Given the numerous safeguards that exist, and the Claimants and Defendants’ strong
5 interest in confidentiality, Prada’s objection should be overruled.

6 **IV. ANY MODIFICATION OF THE SETTLEMENT PROVISIONS MUST BE**
7 **RATIFIED BY THE PARTIES**

8 Settlements require compromise.

9 The parties’ representatives spent over two years negotiating the terms of this extremely
10 complicated Settlement. Every single word, not just every provision, was the subject of intense
11 scrutiny, heated debate and compromise. The award confidentiality and liquidated damages
12 provisions were no exception.

13 It is not surprising that individual settlement class members take issue with various
14 compromises that have been negotiated on their behalf. Everyone, of course, wants more. That
15 is human nature – but it is not how settlements are reached.

16 Any modification of this highly-negotiated Settlement – but particularly a modification of
17 the bargained-for confidentiality provisions that both sides deemed critical – could very well
18 prove fatal.

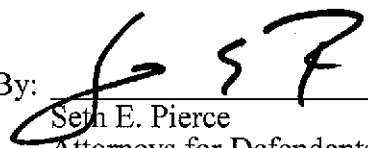
19 While Defendants believe Objector Prada’s comments/objections can and should be
20 overruled for the reasons set forth above, if the Court will not grant final approval without
21 making modifications to the Settlement in response to her objections (or any other objections),
22 the parties request that (a) the Court identify the changes that would be required to grant final
23 approval, and (b) the final approval hearing be continued to May 26, 2010, to afford Defendants
24 an opportunity to consider whether they are willing to proceed with the Settlement in light of the
25 required changes.

1 **V. CONCLUSION**

2 For all the foregoing reasons, the parties jointly request that the Court overrule Ms.
3 Prada's objections.

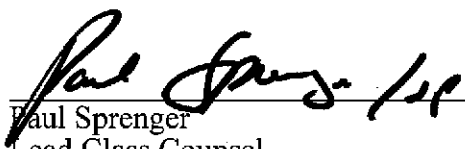
4
5 DATED: May 7, 2010

MITCHELL SILBERBERG & KNUPP LLP
William L. Cole
Kevin E. Gaut
Seth E. Pierce

6
7
8
9 By: 
Seth E. Pierce
Attorneys for Defendants in Case Nos.
10 BC 268 836, BC 268 838, and BC 268 841
11 and Defendants' Liaison Counsel for the
Other Settling Defendants

12 DATED: May 7, 2010

PAUL SPRENGER, ESQ.
Paul Sprenger

13
14
15 By: 
16 Paul Sprenger
Lead Class Counsel

PROOF OF SERVICE

I declare that I am employed in Los Angeles, California, over the age of 18 years, and not a party to the within cause. My business address is 11377 West Olympic Boulevard, Los Angeles, California, 90064.

On May 7, 2010, I served the foregoing document described as:

**DEFENDANTS' AND LEAD CLASS COUNSEL'S
JOINT RESPONSE TO PRADA OBJECTION
and
SUPPLEMENTAL DECLARATION OF PAUL C. SPRENGER
IN SUPPORT OF MOTION FOR FINAL APPROVAL OF
SETTLEMENTS RE: CONFIDENTIALITY
CONCERNS OF CLASS MEMBERS**

- by transmitting a true and correct electronic copy thereof via the Internet to the LexisNexis File & Serve Web site for this action.
- By placing true and correct copies thereof enclosed in sealed envelopes addressed as set forth on the attached service list by causing such envelopes to be delivered by the office of the addressee by overnight delivery via FedEx or by a similar overnight delivery service.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 7, 2010 at Los Angeles, California.

Robert Toombs
[Type Name]



Signature