UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE: OpenAI INC. COPYRIGHT INFRINGEMENT LITIGATION 25 MD 3143 (SHS)(OTW)

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New York, N.Y.
May 22, 2025
10:10 a.m.

Before:

HON. SIDNEY H. STEIN,

District Judge

HON. ONA T. WANG,

Magistrate Judge

APPEARANCES

SUSMAN GODFREY LLP
Attorneys for Authors Guild and Alter Class Plaintiffs
BY: JUSTIN NELSON
-and-
LIEFF CABRASER HEIMANN & BERNSTEIN LLP
BY: RACHEL GEMAN
-and-
COWAN DeBAETS ABRAHAMS & SHEPPARD LLP
BY: SCOTT J. SHOLDER
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BY: DAVIDA BROOK

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Attorneys for Plaintiff Daily News LP and The New York Times Company
BY: STEVEN M. LIEBERMAN
JENNIFER MAISEL

APPEARANCES (continued)

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BY: ANNETTE L. HURST
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FAEGRE DRINKER BIDDLE & REATH LLP
BY: JEFFREY S. JACOBSON
-and-
MORRISON & FOERSTER LLP
BY: JOSEPH C. GRATZ

Also Present: Guy Ruttenberg, Esq.

(Case called)

THE DEPUTY CLERK: Counsel, please state your names for the record.

MR. NELSON: Good morning, your Honors.

THE COURT: Good morning.

MR. NELSON: Justin Nelson from Susman Godfrey, representing the consolidated Alter and Authors Guild classes.

Thank you.

THE COURT: Good morning.

MS. GEMAN: Good morning, your Honors.

Rachel Geman; Lieff, Cabraser, Heimann & Bernstein, also representing the Authors Guild and Alter class plaintiffs.

MS. BROOK: Good morning, your Honors.

Davida Brook of Susman Godfrey, on behalf of *The New York Times*. And while I'll allow my colleagues to introduce themselves, I will note that my client is here with us today as well; we have Diane Brayton, Karen Chesley, and Demetri Blaisdell, all from *The Times*.

THE COURT: Where are they?

MS. BROOK: In the audience.

THE COURT: All right. Good morning.

MR. LIEBERMAN: Good morning, your Honors.

Steven Lieberman from Rothwell Figg, on behalf of *The New York Times* and *The Daily News* plaintiffs.

THE COURT: Good morning.

MS. MAISEL: Good morning, your Honors.

Jennifer Maisel from Rothwell Figg, also on behalf of *The New York Times* and *The Daily News* plaintiffs.

MR. DIAMOND: Good morning, your Honor.

Julian Diamond from the law firm Bursor & Fisher, on behalf of Petryazhan Ruslana, also known as the *Millette* matter.

THE COURT: Thank you.

MR. BOIES: Good morning, your Honor.

David Boies, of Boies Schiller Flexner, on behalf of the Tremblay class plaintiffs.

With me today are my partners Max Pritt and Jesse Panuccio.

THE COURT: Where are they?

All right. Good morning.

MR. SAVERI: Good morning, your Honor.

I'm Joseph Saveri, Joseph Saveri Law Firm. Also we represent the Tremblay Northern District of California consolidated class plaintiffs.

I'm here with my partner Christopher Young.

THE COURT: Good morning.

MR. SAVERI: Good morning.

MR. TOPIC: Good morning.

Matt Topic, Loevy & Loevy, for Center for Investigative Reporting, The Intercept, Raw Story, and

alternate.

THE COURT: Good morning.

MR. COONCE: Good morning, your Honors.

Lance Coonce with Klaris Law, representing the Ziff Davis entities. And with me are several of my colleagues from Klaris: Guy Ruttenberg, from Ruttenberg IP; and George Wukoson, for my client Ziff Davis.

THE COURT: Good morning.

And Ziff Davis just hit the MDL docket this morning or last night.

MR. GRATZ: Good morning, your Honor.

Joe Gratz from Morrison & Foerster, on behalf of OpenAI.

MR. GOLDBERG: Good morning, your Honors --

THE COURT: Just a moment.

I have Mr. Gratz on the appearance sheet as with Keker & Van Nest. That's wrong?

MR. GRATZ: Yes, your Honor. I'm with Morrison & Foerster. Thank you, your Honor.

MR. GOLDBERG: Good morning, your Honors.

Nick Goldberg of Keker, Van Nest & Peters for OpenAI.

MR. SLAUGHTER: Good morning, your Honors.

James Slaughter Keker, Van Nest & Peters, on behalf of OpenAI.

THE COURT: Good morning.

MS. HURST: Good morning, your Honor.

Annette Hurst, from Orrick, Herrington & Sutcliffe, on behalf of Microsoft.

MR. JACOBSON: Good morning, your Honors.

Jeffrey Jacobson from Faegre Drinker, also on behalf of Microsoft.

MR. GASS: And good morning, your Honors.

Andy Gass from Latham & Watkins, on behalf of OpenAI.

THE COURT: Is that everybody?

All right. Thank you.

Here's what I want to do. We have a couple of hours, if we need it. I'd like to get some parameters set for how we're going to conduct the MDL. I thought about some of these issues and have views. And I'd like some discussion on others. And I intend to decide what I can today and, if need be, not decide some things pending my thinking about it.

The proposed agenda in the report — I'll refer to the report that came in two days late as "the report," the parties will know what I'm talking about. And that agenda on page 2 is fine. I'll basically follow it as we go through things.

I think the first one is appointment of plaintiffs' leadership counsel.

To begin with, I think everybody agrees that we should have two simultaneous tracks on the plaintiffs' side, that is, the authors' actions — which I'll call the class actions — on

one track, and the news actions on the second track. And they'll go forward together.

And as of now, at least, on the class actions, we have Tremblay, Silverman and Chabon, which have been all consolidated, so I'll refer to them as the Tremblay action. We've got the Millette action, which I'll refer to as the Petryazhan action. We have Authors Guild and Alter, which I'll refer to as the Authors Guild action. And we've got Basbanes, which has been stayed.

On the news actions, we have *The New York Times*, *The Daily News*, and The Center for Investigative Reporting, which I'll probably refer to as CIR. And those have been -- they're coordinated simply or consolidated for pretrial purposes only.

We have Raw Story, which was before Judge McMahon here. We have The Intercept Media, which was before Judge Rakoff. And again, starting today, we have Ziff Davis.

Those are the actions in this MDL as far as I know.

So that's really the first decision. I'll get a minute order -- not a minute order, I'll get an order out with my decisions of today. That's the first one that will have two tracks for plaintiffs.

On the news plaintiffs leadership counsel, at page 9, the news plaintiffs are requesting four law firms with six attorneys be a leadership committee; and that Ms. Brook also be the liaison for the plaintiffs to both the Court and the

defendants.

So would somebody like to speak on behalf of that briefly? That does seem to me to make sense. It's a little overstuffed. But then I'll want to hear from anyone who opposes that. In other words, a leadership committee of the news plaintiffs, four firms, six attorneys; and to make Ms. Brook the liaison attorney.

As I see the liaison attorney, it would assist the Court greatly if there's somebody who can coordinate the plaintiffs' positions and meet with the defendants before any application is made to the Court. I think that will significantly smooth things over. There's been some rough patch, I think, with the class action people here, but I think that liaison person will help that.

Anyone want to speak -- that's where I am now.

Who would like to speak against that, if anyone?

All right. Well, then I'll do that. I'm appointing a leadership committee on behalf of the news plaintiffs of Susman Godfrey, Rothwell Figg, Loevy & Loevy, and Klaris Law, with the attorneys of Ian Crosby, Davida Brook for Susman Godfrey; Steven Lieberman and Jennifer Maisel for Rothwell Figg; Matthew Topic for Loevy & Loevy; and Lance Cooney for Klaris Law.

All right. And the division, by the way, of myself and Magistrate Judge Wang will be: Magistrate Judge Wang will handle discovery matters.

I don't think I need to do anything with the defendants; they seem to be operating together.

But now let's turn to the class plaintiffs' leadership counsel. I have an issue with that. I think it's an invitation for delay and for disputation to have all of these people be leads and involved in the leadership committee.

So why doesn't somebody for the plaintiffs — for the class plaintiffs — tell me why it's a good idea to have all of those people and all of those firms. The request, to be specific, is four firms as leadership counsel, two from the Authors Guild, two from Tremblay; three interim co-leads; steering committee with a chair.

Why doesn't somebody tell me why that bad idea is a good idea.

MS. GEMAN: Happy to, your Honor -- your Honors.

Rachel Geman.

THE COURT: I'm going to ask, because the mics don't seem to be picking it up, to speak -- everyone who wants to speak, first of all, identify who you are and who your client is, because I'm just getting to know you. And speak from the podium. I think that will be better.

MS. GEMAN: Thank you, your Honor.

THE COURT: I won't hide the ball. I really think I need one interim lead class counsel. I think that's going to be most efficient. And then the work of class counsel can be,

you know, divided by the lead counsel. But having all these people I don't think makes sense for class. I'm willing to do it, I think, for news; they seem to be better organized. But for class, I'm concerned.

Go ahead.

MS. GEMAN: That you, your Honor.

So Rachel Geman, Lieff Cabraser, for Authors Guild and Alter, and here speaking on behalf of the proposed unanimous leadership slate.

Your Honor, this case is somewhat unusual in that we are not writing from a blank slate. We have had an efficient current leadership structure, as your Honor noted, of three interim co-lead firms. With the integration of the *Tremblay* matter, the *Tremblay* consolidated matters, we simply propose a modification to make that three into four. This reflects the work that already has been done.

With respect to delay and disputations, we actually believe that this structure will ensure the most efficient prosecution of the case. And there has been no -- there have been no disputes.

There is no authority of which we're aware requiring a sole lead. We understand this is up to your Honor.

THE COURT: We're agreed. There's no requirement. It's a case management issue. And this is the beginning of the MDL. It's not the beginning of the cases; *Tremblay* is farther

along. In fact, the California cases were started earlier. But I do want to set up a structure that will be speedy and efficient, whatever Rule 1 is, to lead to a resolution.

MS. GEMAN: Sure.

And here we believe a group will do that. That might sound counterintuitive, but we work together very well, very closely; we work not only on this case, but other similar AI cases. This is a big case that is quite far along, and we believe there would be actually more disruption were we to upend the current structure.

It seems as though your Honor notes a distinct issue, which is sort of a coordination with the Court. And that does not seem -- and ensuring that that would happen seamlessly and with consistently is not inconsistent with an actual leadership structure that has more than one firm.

THE COURT: I'm sorry, say that again. I lost that.

MS. GEMAN: Yeah. It seems like your Honor is putting your finger on two different issues. One issue is the number of firms that are the leadership firms. And a distinct issue might be ensuring as an administrative matter that your Honor can turn to -- or the Court can turn for administrative matters to one firm or one person. We respectfully submit in the class context those things are somewhat distinct.

We believe that in terms of the prosecution of the case, everything that goes on in the day-to-day --

THE COURT: Let me stop you.

I'm not sure they are distinct. They are two different functions, I agree with that. But they are not distinct to the extent that having multiple co-leads makes it more difficult for the co-leads to coordinate in order to present a single view to the liaison counsel to deal with the defendants and then the Court.

MS. GEMAN: Your Honor, I would refer to the work that's already been done on a consistent proposal by the current proposed lead as an example of past is prologue.

THE COURT: No. But without pushing it too far, it seems to me all that means is that the various plaintiffs firms — which are appropriately competing for positions here — have sort of called a standoff and everybody is a chief.

MS. GEMAN: I would respectfully push back against that. It's not a standoff, it's a collaborative work. We have weekly calls. We have a subpoena group where we meet and confer. We jointly participated in ADR. We have jointly handled the depositions that have occurred to date. I'm not talking about a patina of stating something to the Court, I'm talking about the reality of how the case has proceeded.

I would also note that there are more than two options. Your Honor has mentioned this possibility of one lead. We have proposed four leads with a steering committee. It would seem to us that, consistent with most big cases that

we're all involved with, that, at minimum, there should be two or three leads and some assistance from the lawyers with whom we've been ably working this whole time. So I would request --

THE COURT: All right. Thank you.

MS. GEMAN: Thank you.

THE COURT: Would somebody like to speak against that structure?

MR. SAVERI: Your Honor, if I may.

THE COURT: Sure. Go ahead.

MR. SAVERI: Joseph Saveri, on behalf of the Tremblay plaintiffs in California.

THE COURT: Yes.

MR. SAVERI: I'd like to note a couple of things.

First, your Honor, I — my office — filed the first case in the country. We started this litigation. And so --

THE COURT: Bring the mic up to you, sir.

MR. SAVERI: I apologize. Is that better, your Honor?

THE COURT: Yes.

MR. SAVERI: So, your Honor, first, we did file the first case. Since that time, we have been prosecuting the case diligently. There was certainly a time --

THE COURT: Well, *Tremblay* is further along, I'm pretty sure. I don't really have a good handle yet on the California cases, but they are further along than we are. But I don't know how efficient it's been.

MR. SAVERI: And I wanted to get to that, your Honor.

THE COURT: Ma'am, you can sit down.

MR. SAVERI: Since the time that the Tremblay cases were filed and the actions were initiated in the Southern District of New York, despite the fact that the cases were proceeding on separate tracks, which, in my experience doing class actions for decades now, is quite unusual.

Despite that, there has been a remarkable amount of coordination between the class plaintiffs representing the respective groups. Despite the fact there wasn't an MDL, despite the fact that the cases were proceeding on separate tracks, we've actually done a remarkable job coordinating. That includes coordinating on things like scheduling, we have taken joint depositions in this case, we have gone to a consolidated mediation in this case.

And so, again, this isn't like -- this is not a case where this is the first day of an MDL. This is a very unusual case where we are something like — depending on how you count — 18 to 24 months in. There has been substantial work done I guess on the west coast by the Tremblay plaintiffs, but also the lawyers who have been before you since the beginning of the cases in the Southern District of New York.

It's very important to me that that coordination that we've been able to establish be not disrupted but now be continued. And so I want to allay and address any concerns

that the Court has about — I think you used the word "disputation" or disagreement among the class plaintiffs.

To the contrary, there is remarkable alignment and collaboration and agreement on key issues. We are now in one place. We are anxious to continue our work together. And so the leadership structure that's been presented to your Honor I think reflects the hard work we've done and what we plan and intend to do in the future.

THE COURT: All right. Thank you.

I asked for somebody -- if anyone wants to speak against the plaintiffs' position.

MR. SLAUGHTER: Thank you, your Honor.

James Slaughter, Keker, Van Nest & Peters, on behalf of OpenAI.

THE COURT: Just let me find you here, sir.

MR. SLAUGHTER: Take your time.

THE COURT: Yes, sir.

MR. SLAUGHTER: Thank you, your Honor.

Your Honor is correct, there should be one interim lead counsel appointed under Rule 23(g) on behalf of the class. This case was brought to the MDL precisely because there was a lack of coordination and a lack of efficiency amongst plaintiffs.

THE COURT: Why do you say that? What leads you to say that? I know there was papers put into the JPML, but why

do you say that was the reason?

MR. SLAUGHTER: I say a reason, your Honor. One of the reasons was a lack of coordination. We obviously want to make sure that there aren't duplicative inconsistent rulings. But certainly a focus of the JPML briefing was a lack of coordination of depositions because the cases were proceeding on different schedules in different courts; and so there was a lack of coordination and efficiency amongst the plaintiffs and an inability to prosecute the case efficiently.

Unfortunately, that has continued since the JPML order. There have been, since April 3rd, more than two dozen third-party subpoenas served by various plaintiffs on 13 different --

THE COURT: Well, that's going to end.

Go ahead.

MR. SLAUGHTER: Thank you, your Honor.

So we think that there's got to be one lead counsel. We think that that person has to be able to speak on behalf of all counsel. And if you'll see from the C&C statement, your Honor, they have vastly — between California and New York — different views on what the class may or may not be. And that lead counsel needs to propose a single complaint and needs to get everybody on the same page; because right, now we're not. And we agree fundamentally with your Honor that there should be a single counsel to be able to do those things.

THE COURT: All right. Anyone else?

I'll give you an opportunity.

MS. GEMAN: Thank you, your Honor.

MR. JACOBSON: Your Honor, Jeffrey Jacobson from Faegre Drinker, on behalf of Microsoft.

Mostly, your Honor, Ms. Hurst is going to be addressing the Court with respect to the issues in this case. I'm here because I'm sort of the class action guy; been doing this a long time.

I came at this similarly to the way your Honor did. I differ from Mr. Slaughter in the sense that I don't -- I'm not here speaking saying that there needs to be one counsel versus a structure. There are some very good attorneys on the other side of this case, and they can work together.

And, you know, the "who" is none of my business.

The "what," however, is very much our business.

And with respect to Mr. Saveri and how well they've been working together, your Honor saw the proposal about where they are right now. We don't know as we sit here what the proposed class is; we don't know what the proposed causes of action are; and we don't know what Microsoft products are at issue.

THE COURT: Wait. Wait. That's "easy." I mean, we need a single consolidated class action complaint. That will come. That will give you what you're asking for. I don't

think that directly addresses the composition of a class action leadership.

MR. JACOBSON: It may, your Honor, only in the following sense: I don't disagree with that, except for the fact that in their proposal, they didn't explain how they are going to get there.

If, when I sit down and Ms. Geman stands back up, Ms. Geman says, Your Honor, we've got a plan. And in a week or two weeks or whatever the date is that your Honor sets, we're going to have a consolidated complaint and here's what -- and here's how we're going to get there, your Honor may be in one place.

But part of the issue is that right now, as your Honor may or may not be aware, because you're just kind of getting to know the California cases, there are different competing motions for leave to amend that Microsoft and OpenAI both oppose. One would add an antitrust claim in this case. One would add Microsoft products that haven't been the subject of any discovery. There's a lot going on behind the scenes here.

And so when I see my friends on the other side stand up and say, We've been working very well together, it's been two months since consolidation. And the proposal that came in did not give you a timeline about what's coming in, what it's going to say, and how they are going to get there.

And so I'm standing up just very briefly, and I'll

stop in 15 more seconds and let the plaintiffs have back at it. But I just want to be clear, the "who" is none of my business; it's up to them. It's not that I disagree with Mr. Slaughter that we would like -- we need to have one person we're dealing with. Because right now, the current structure is that for anything they want to do, they need the approval of everybody at that table, half of that table, the entire gallery and the jury box. I'm sorry, half the gallery and the jury box. And that's a lot of people.

So, so long as they empower someone or a couple of someones, I'm good. I think OpenAI will be good. But we've got to, as your Honor said, get ourselves to a place where there is a complaint or a proposed complaint, because if they want to add products and causes of action, we're going to want to have something to say about it if your Honor will let us.

Thank you.

THE COURT: All right. Ms. Geman.

MS. GEMAN: Super briefly, your Honor.

We agree with your comment that it's a little bit apples and oranges between the leadership and what the consolidated complaint that we propose to file by June 10th is.

But getting to the heart of the matter, if your Honor is not inclined to accept our proposal, we would respectfully request that we have until 5 o'clock today to submit something with whatever the number is that your Honor wants.

THE COURT: Well, I want one interim lead counsel for the class action plaintiffs. You can do that by 5 today?

MS. GEMAN: Yes, your Honor.

THE COURT: All right. By 5 today, submit who the proposed interim lead counsel is for the class action plaintiffs. All right?

And then, assuming there's no dispute, assuming you can present me with one person, I'll want a consolidated amended class action complaint. When do you think your team — you or, rather, the lead counsel — can have that in order, in shape?

MS. GEMAN: We had proposed June 10th, your Honor. Is that date agreeable?

THE COURT: That's acceptable.

Assuming there's a single proposed class action interim lead plaintiff today, a consolidated class action complaint should be filed by June 10, all right. No new products and no new causes of action that have not been asserted -- well, no new products or causes of action; only those that have been already asserted in these cases. None of the new ones on the proposed amended complaints; just the causes of action that are already existing and the products that are already existing.

All right.

MS. GEMAN: Your Honor --

THE COURT: Go ahead.

MS. GEMAN: At the risk of further frustrating your Honor, may one of the other counsel be heard on the subject of the proposed amendments, if your Honor would like to address that now?

THE COURT: Yes, of course.

I'm sorry, were you done?

MS. GEMAN: I wanted to turn -- yes, your Honor. I wanted to turn the floor to Mr. Nelson -- or Mr. Saveri about the subject of the amended complaints, if your Honor will allow.

THE COURT: Yes, of course.

MR. DIAMOND: Before that, can we have a point of clarification, your Honor?

I think all the parties agree that the *Millette* matter is not included in this structure.

THE COURT: The what?

MR. DIAMOND: The *Millette* matter, also known as the *Petryazhan* matter.

THE COURT: That's the YouTube, yeah. Go ahead.

MR. DIAMOND: I just wanted to make sure this is not including the *Petryazhan* matter; is that correct?

THE COURT: Well, the *Petryazhan* matter, what's the nature of the stay that the parties have agreed in? I take it it's stayed pending class action certification, is that it?

MR. DIAMOND: Yes, your Honor, and/or motion for summary judgment.

THE COURT: Yeah, I understand.

MR. DIAMOND: Discovery only opened in our case a mere few days before consolidation.

THE COURT: Get me a stipulation of the parties. Can you do it by tomorrow?

MR. DIAMOND: Yes, your Honor.

THE COURT: That's staying the *Millette* or *Petryazhan* — I never know how to pronounce it — action pending either class certification or motions for summary judgment.

MR. DIAMOND: Yes, your Honor.

THE COURT: That takes care of that.

Sir.

MR. SAVERI: Joseph Saveri again.

So on the issue of --

THE COURT: Let me find you on the list. Sorry.

MR. SAVERI: On an unrelated note, I'm listed as an attorney at Saveri & Saveri, which is ironic to me, considering that was my father's firm. And I haven't worked for them since I was a young boy. So I guess I'll have to correct that.

THE COURT: I have you under Saveri Law Firm. What is the correct --

MR. SAVERI: Joseph Saveri Law Firm.

When I checked in, it said Saveri & Saveri, Inc.,

which, as it happens, was my father's law firm many years ago.

THE COURT: All right. So you want us to have you under Joseph R. Saveri Law Firm?

MR. SAVERI: Yes.

THE COURT: Done.

MR. SAVERI: Thank you, your Honor.

Okay. So on the consolidated complaint, I want to make sure I understand your guidance. We had intended to, by the date that's inserted in the schedule --

THE COURT: Proposed schedule.

MR. SAVERI: The schedule that's found at page 39 of the joint status conference statement.

THE COURT: Yes, that's the plaintiffs' proposed schedule.

MR. SAVERI: Yeah. To file the consolidated class action complaint by June 10th. And we had intended — but I think it's different than what -- the direction your Honor just gave — that we would take that opportunity to synthesize the complaints, including causes of action or complaints or facts which have not been -- which were outside the complaints that are at issue in the respective cases.

I understood, but I want to make sure I heard you correctly, that the amended -- the consolidated complaint would only include the claims and causes of action --

THE COURT: And products.

MR. SAVERI: -- and products that are subject to the operative complaints in the respective cases.

THE COURT: Yes.

MR. SAVERI: And so we would intend, consistent with the motions that are already on file, to amend those complaints pursuant to Rule 15. But I guess I wanted to get your Honor's sense about how you would like to sequence that.

And there's another issue which I guess we will resolve or deal with --

THE COURT: But wait. Let's make sure we're talking about the same thing.

MR. SAVERI: Yes, your Honor.

THE COURT: What I'm proposing, in order to move this forward, is by June 10, a single consolidate -- not a proposed complaint, a single consolidated class action complaint on behalf of all the plaintiffs.

MR. SAVERI: Yes.

THE COURT: That's what I see.

And what I'm doing — I'll hear discussion — is limiting it to the claims that already exist in the action. So I don't foresee motions to further amend the complaints. And because there's a new complaint that will be a single complaint going forward — and I'm limiting it to the claims that have already existed — there's no room for proposed amendments.

MR. SAVERI: So I want to make sure I understand, your

Honor, that we have, based on the discovery that we've taken and further analysis of the case, proposed supplementation of the complaints that are at issue in the respective cases.

Based on the evidence that we've developed and our further analysis of the case, we are interested in pursuing those claims, including additional products, additional causes of action.

And so it is our position that we would be entitled to amend, and we would seek -- and we have sought leave in the respective courts pursuant to Rule 15.

And so my question to your Honor is: How would you like us to organize that and proceed?

THE COURT: All right. Let me hear from -- I actually don't intend to permit further amendments, but let me hear from the defendants.

It seems to me all that would do would be to invite another round of Rule 12(b)(6) motions, and would expand discovery, if you're talking antitrust or additional DMCA claims. I don't know what the proposals are. It would extend discovery; it would require briefing and determination of the 12(b)(6) motions. It would slow everything down, when the parties have already had full opportunity, it seems to me, to assert their claims.

If I'm going to allow amended claims, new claims, new products, it would be a never-ending process.

But let me hear from the defendants.

The argument is that the plaintiffs have a right to amend under Rule 15.

MS. HURST: Thank you, your Honor.

An Annette Hurst from Orrick, Harrington & Sutcliffe, for Microsoft.

THE COURT: Again, I'm sorry, let me find you.

Yes. Go ahead.

MS. HURST: We agree with the Court that those alterations to the scope of the claims should not be permitted. The one thing that all parties agree is that the case should be on the same simultaneous track schedule as the Court noted, and that we should have a single summary judgment deadline to address all these fair use defenses at once, so the Court just has to deal with all that once.

What the plaintiffs are proposing, the class plaintiffs are proposing, is it would completely frustrate that objective.

THE COURT: No, but what -- I'm sorry, go ahead. I should let the parties talk.

MS. HURST: Well, your Honor, not only would they propose to add antitrust claims, which would dramatically alter the scope of the case and necessitate 12(b)(6) motions, as the Court has noted, but the proposed additional products, especially for Microsoft, your Honor, could double or triple

the existing size of fact discovery in this case, when, otherwise, we are poised for the completion of document discovery and embarking on depositions.

Do they have a right to amend? They don't have a right to amend under Rule 15, your Honor. We're not within --

THE COURT: Leave to amend should be freely granted.

MS. HURST: Your Honor, certainly that's true. But in the MDL, the Court has the discretion to put administrability and the need for efficiency in the orderly conduct of the proceedings ahead of that.

And, your Honor, certainly this is not a situation where they're forfeiting claims with respect to additional products and the like. Once the Court has ruled on the variety of legal defenses and such, if there are additional claims that can be brought against subsequent products, then those cases can still be brought, your Honor.

So nobody is forfeiting anything. But the Court certainly has the discretion, as the administrator of the MDL, to decide that in the orderly conduct of the proceedings, we should lock this down where it is and get on with it on the unified schedule that all parties agree we should have.

If they have amended claims, it will derail that.

Right now the parties are not that far different in terms of when they say that single summary judgment deadline should be. The plaintiffs say March of '26, the defendants say

November of '26. But if Mr. Saveri's proposal to start amending the pleadings is accepted, that would have to change.

THE COURT: Excuse me.

You're talking about three to six months, if not more, in delay.

MS. HURST: Absolutely.

It's more than that, your Honor. Because if the scope of the pleadings is augmented, then the fact discovery is back to, I know, square two in terms of documents and depositions.

THE COURT: All right.

But let me go back to Mr. Saveri's point, which was, if we don't have an absolute right to amend, certainly the Court should be liberal, pursuant to the federal rules, in granting leave to amend.

MS. HURST: Your Honor, it's not necessary --

THE COURT: I think that's his best point.

MS. HURST: Yeah. Your Honor, certainly the Court has the discretion to say if they have additional claims, they can be brought in separate proceedings.

THE COURT: I'm sorry, what does that mean?

MS. HURST: Well, your Honor, they can file separate claims for antitrust, if that's what Mr. Saveri wants to do. And that case can be stayed pending the orderly resolution of the MDL proceedings. I mean, obviously we don't encourage that. But to allow it to become at issue in the MDL would

derail the single unified schedule that all parties agree that we should have.

Your Honor, Microsoft even offered a tolling agreement to the plaintiffs in New York when they proposed to dramatically augment by adding products and, you know, doubling or tripling the size of the case, just because we recognize that, you know, there's not a forfeiture. However, your Honor, it is also true that the Court has the discretion to deny under Rule 15 in order to conduct the MDL in an orderly fashion.

THE COURT: All right. Thank you.

Response.

MR. SAVERI: Thank you, your Honor.

Again, Joseph Saveri.

We believe under the rule we are entitled to make the motion under Rule 15 to amend the complaint. That amendment would be based on facts that have come up in the discovery that we've taken, and that would be true in the ordinary course in litigation in federal court. We don't think that the peculiar or the particular posture of this proceeding would change those substantive or procedural rights under the Federal Rules of Civil Procedure.

THE COURT: But there's no right to amend, sir.

MR. SAVERI: No, but with the right to move to amend. We are entitled to make the motion, based on the requirements of Rule 15, to seek to leave to amend the complaint based on

the case law and the rule itself.

Now, we're prepared to do that. In fact, we did that. The respective cases did that in the respective district courts prior to the MDL proceeding. So we've had that motion on file — those respective motions on file — for some time, and they have not been addressed by the respective courts.

So all we're really asking for is to have a ruling on the motion for leave to amend that have been pending for some time. By your Court's order, I understand it, the consolidated complaint isn't going to add any new claims; it's just going to bring together what's already at issue in the respective courts. It's going to be a little bit of work because they don't fit exactly together, but that's our job and that's why we need a little time to do that.

But once we have done that, we would be -- we would like to -- and I don't want to -- I'm not arguing we have an automatic right to do that, but we should be entitled to make the motion to apply to the Court under Rule 15 to amend those pleadings. And that's all we're seeking to preserve.

The other point, your Honor — and maybe this is a different point — is, at some point we have to deal with the fact that there are protective orders that have been issued in the respective cases that, at least for right now, prevent me from having any access to the discovery record that was created in the Southern District and vice versa.

And if we were going to do any kind of work together, we need to address that. That might apply to the complaint, but that's a different issue. But I just want to flag that. Because right now, that is an impediment for us to try and get together.

THE COURT: All right.

MR. SAVERI: So, your Honor, I don't have anything else to add on that point.

MR. BOIES: Your Honor, could I just make one practical suggestion?

The Court obviously has the discretion to manage the docket, and either grant or deny the motion to amend.

But this is an MDL. The idea that we are going to now take claims that could be adjudicated, that are clearly overlapping, and file them in another court, I just don't think that is consistent with what the MDL was intended to do. The antitrust claim clearly involves the same conduct as the underlying claims.

THE COURT: But in terms of managing the MDL, an antitrust claim will send this skittering off into the unknown.

MR. BOIES: Your Honor, it may be that the right thing to do is to file it separately.

THE COURT: I'm sorry.

MR. BOIES: It may be that the right thing to do is to file it separately. But I suspect that what's going to happen,

because the discovery is so overlapping, that they are going to move to bring it here as a tagalong. So now what you're going to have -- now, if they say they are not going to bring it here as a tagalong is a different situation. But given my experience with the way defendants operate, I think -- including when I'm representing them, I think that they are going to move to bring it here as a tagalong.

Then what you're going to have, is you're going to have that case here anyway. And now the argument is going to be whether you stay that case, which I think would be quite unfair.

THE COURT: Would be?

MR. BOIES: Quite unfair until this case, which may go on for two years, gets decided.

Now, if they tell you that they are not going to bring it here as a tagalong, I'll sit down. And we can bring the case in another court and another court can adjudicate it.

But I suspect what they are going to want to do is — because it does have overlap in terms of discovery — they are going to want to bring it here. And then they are going to be asking you to stay it. And this is going to be taking place now two or three months from now.

So I just think, as a practical matter, the Court needs to consider how that antitrust claim — which is a serious claim — is going to get adjudicated. If it's going to be in

the MDL, then I think we ought to put it into the consolidated complaint.

THE COURT: All right. Let me hear -- please.

And then I'll hear from a defendant.

MS. GEMAN: Thank you, your Honors. Rachel Geman.

A brief substance -- a brief process point on the Alter AG case, and then a brief substance point that I think will allay your Honors' concerns.

As Magistrate Judge Wang knows, we did have a hearing about issues in connection with amendments. Magistrate Judge Wang ordered us to file an amended complaint by April 15th.

We, the Authors Guild plaintiffs, submitted a proposed amended complaint to defendants on March 19th. Many weeks went by. Nevertheless, despite the, sort of, lack of coordination/cooperation on that, we did file the proposed complaint by April 11th. This was timely.

But even if those facts were not true, I just want to be very transparent about what our proposed amendments are to show the Court that they will not slow down discovery, and that, in fact, they will be efficient.

With your Honor's permission, I'll just say three things.

Your Honor did not mention parties, but just again, in the interest of transparency, a minority of the plaintiffs have wholly owned loan-out companies, like many, many writers. And

so just in the interest of fulsome plaintiff addition, we added those loan-outs. To be clear, we have already produced the discovery from those loan-outs; they are essentially the same as the plaintiffs. There might be a couple more documents, but that's basically done. So that's issue one. And we don't read your Honor's ruling, if it is unmodified, to preclude that administrative step.

The second addition that we want to note is that we made explicit models that were already in the case that the Honorable Judge Wang had indicated that discovery was limited to certain models. In our amended complaint, we just simply name what they are as to having them be sort of grouped by functional reference.

The third point I'd like to make is that we have proposed adding a vicarious liability claim against Microsoft. We already have a contributory infringement claim against Microsoft, and we can proffer that we do not believe the vicarious claim would add any marginal new discovery.

So for these reasons, we want to be transparent about what we see as still permitted under your Court's order, unless the Court modifies the order for more broad amendments. And this hopefully shows the Court that this is not going to slow this case down. We are pushing to be trial-ready in August of 2026.

THE COURT: You didn't talk about the antitrust issue.

MS. GEMAN: Well, your Honor, just to be very explicit, I'm talking about the proposed amended complaint in the *Authors Guild/Alter* matter. That was about which we sought a motion to amend to file on April 11th in this court.

THE COURT: All right. Let me hear from a defendant.

And address Mr. Boies's point about tagalongs.

MS. HURST: Thank you, your Honor.

I do think this underscores why there is the necessity of a single interim lead counsel for the class cases.

I think we've heard --

THE COURT: All right. That's done.

MS. HURST: -- very different visions here.

Your Honor, even the news plaintiffs note that they would not like in footnote 21 any amended complaints to result in the extension of discovery or delay of the case schedule.

THE COURT: Let me look at that footnote.

All right. Go ahead.

MS. HURST: The news plaintiffs and the defendants are on the same page here, your Honor, that these proposed amendments to add antitrust claims, to add products which would extend -- dramatically extend the scope of the case would derail the schedule and should not be permitted.

THE COURT: What about Mr. Boies's point that all that will do will lead to plaintiffs filing complaints, additional complaints, and then ask that they be joined as tagalongs?

MS. HURST: Well, your Honor, the only reason they would need to file the complaints is if they are concerned about statute of limitations issues. And it seems to me the parties ought to be able to work that out and have tolling agreements so that plaintiffs do not feel that that is necessary.

But if they decline to engage in such negotiation and feel it's necessary, then they -- and that they do need to file, then probably the way they've characterized it, there would be overlapping allegations and we would seek to stay those proceedings.

I think we should be able to work that out so that it's unnecessary. And we can get to the substance of the issues here, which are so important for this technology which is being implemented all across the country --

THE COURT: No, that's a fair point. Go ahead.

MS. HURST: I mean, you know --

THE COURT: It seems to me it's time. It's time.

MS. HURST: Yes.

THE COURT: Although it's a brand-new MDL, in my view. The cases have been -- especially the California cases, have been going on. It seems to me there's a public interest in these things being resolved. I am very concerned about amendments and amendments and amendments.

Go ahead.

MS. HURST: Your Honor, I think the defendants agree with the Court and submit on that basis.

THE COURT: Okay. Look, I don't think I'm saying anything that the parties disagree with. It seems to me that ultimately these matters will resolve themselves on the fair use defense. That's what everybody has been -- that's the subtext here.

And it seems to me, in the interest of all the parties and the Court, that that issue be -- that there be discovery on it; that it be -- discovery be closed when appropriate; that there be cross-motions -- that there be motions for summary judgment — I'm not telling you how to brief it. And my educated guess is that that all will be leading to a fair use opinion.

These amendments, including the antitrust amendment, are not getting us there. So I am going to maintain my position that the consolidated amended class action complaint include simply the products and causes of action that have already been asserted.

The parties should discuss the tolling issue. It seems to me that's a more efficient way to resolve it. Then there's no issue of a statute of limitations. But, if need be, I'll handle any tagalong actions that come.

That's the ruling of the Court.

The three weeks from today still stands, assuming the

plaintiffs are able to present a single lead by the end of the day. If they can't, they should submit competing proposals to me by next Wednesday. But I take the statement that the plaintiffs think they can resolve that amongst themselves at face value.

All right. Let's move on.

MS. GEMAN: Your Honor, just very briefly, at the risk of sounding obtuse — Rachel Geman — was our recitation of our view that the amendments that we've laid out for the *Authors Guild* case permissibly within the scope of your ruling? Namely, that those amendments and tweaks are permitted. Was our understanding correct?

THE COURT: Tell me what they are.

MS. GEMAN: Yes, your Honor.

The inclusion of a vicarious infringement claim against Microsoft. Currently, there is a direct and a contributory claim, so this would not entail new discovery.

The second is making --

THE COURT: No, but won't it involve the 12(b)(6) motion?

MS. GEMAN: I mean, that would be a question for defendants. There was no 12(b)(6) motion on the direct or contributory claims; and so I would respectfully be surprised if, certainly as a pleading matter, they would say that we don't satisfy the vicarious standard.

THE COURT: You're saying you think as a pleading matter they would move is what you just said.

MS. GEMAN: No, no. Your Honor, I'm saying that they didn't -- there was no 12(b)(6) motion on direct infringement, contributory infringement. We have not heard, and I can be corrected --

THE COURT: But I had those in *New York Times*, *Daily News* and CIR.

MS. GEMAN: I will be corrected by Microsoft if I'm wrong, but I do not believe that the concern raised by Microsoft about the vicarious claim was one of the statement of the elements, but, rather, as part of a welter of discussions about impact on the case.

So that would be a question for Microsoft as to whether they would intend to move on a 12(b)(6). Our goal is to keep the current schedule. So if I had a choice between jettisoning that claim -- but I have to say, your Honor, that I don't respectfully see a basis to move to dismiss that claim, but that is a question for Microsoft.

Moving to the other two issues, one is simply housekeeping, making explicit models that are already in the case.

And the third issue --

THE COURT: If there are any models already in the case, that's okay.

MS. GEMAN: Thank you, your Honor.

THE COURT: But they have to be in the case already.

MS. GEMAN: Thank you, your Honor.

THE COURT: Okay.

MS. GEMAN: The third issue was simply the fact that a minority of the plaintiffs have loan-out companies, and so those companies would be added as party plaintiffs.

To repeat, we have already produced --

THE COURT: I don't see any issue with that.

Do the defendants see an issue with adding loan-out companies? I take it these have to do with individual authors, is that it, setting up loan-out companies.

MS. GEMAN: Yes, your Honor.

THE COURT: So that there's some separation of the individual and his or her company.

MS. GEMAN: Yes, your Honor.

THE COURT: Okay.

MS. HURST: Your Honor, we do think the loan-out companies changes the fourth-factor analysis and would necessitate potentially significant additional discovery related to not only those companies, but the markets in which they participate for assessing fourth-factor issues. It could inject a variety of secondary economic considerations related to the exploitation of the works in those cases that are not currently present.

And we also would have said, your Honor, that if it's a standing problem for particular named plaintiffs, they knew about their ownership and exclusive arrangements with respect to their rights when they first filed the case. So that is also — especially in this MDL context — a matter of undue delay on their part. And it could have a significant effect on the scope of discovery.

So, your Honor, I would say, in sum, we don't have a problem with adding the vicarious liability claim. I think that's just a different legal theory for facts that are already alleged. And I would agree with Ms. Geman that that's not going to substantially alter the scope of anything; it's already in the cases writ large.

I don't know what models Ms. Geman is referring to. So what I would propose, your Honor, is that the plaintiffs provide their proposed class consolidated complaint to the defendants first, to ensure that we agree that, you know, the matters that they present are not beyond the existing scope of the case or reasonable alterations that we've already indicated that we agree to. And then if the parties are unable to agree on that, then they present the motion with whatever are the contested issues.

THE COURT: Ms. Geman, speak to the issue of loan-outs substantially changing the discovery and the fair use analysis, because that's what I want to focus on.

MS. GEMAN: Thank you, your Honor.

So I feel very confident in saying that there is zero impact. This is simply a matter of an author having a loan-out company. It doesn't change issues about how the books were acquired in this case; it doesn't change issues --

THE COURT: Does it change profitability issues?

MS. GEMAN: It does not, your Honor. Because this is simply an administrative thing for a writer to have sort of a company to get their royalties. Your Honor is certainly correct that commercialness is a fair use issue, but that goes to the nature of defendants' use; it has nothing to do with whether a plaintiff has a loan-out company.

I can submit to you, your Honor, that one of the other cases that Mr. Nelson and I are prosecuting is against a company called Anthropic. In that case, there are plaintiffs and their loan-out companies. There was no issue with the depositions because the plaintiff is the loan-out company. And the depositions were completed.

Just a data point, the defendants first asked questions to the plaintiff in her capacity as a writer. And then they sort of put on a different hat and asked questions to them as a loan-out, but it was all the same people, all the same questions.

There is zero delay here. We submit that this amendment is timely and this is just administratively

convenient.

I feel very strongly in saying this has -- should have zero impact on factor four. And --

THE COURT: Go ahead.

MS. GEMAN: And then did your Honor have another question about impact on Rule 23? I just want to make sure I've answered your Honor's questions.

THE COURT: No, I don't think there is an impact on Rule 23.

MS. GEMAN: I would also note, your Honor, that your Honor has expressed the importance — and Ms. Hurst has expressed the importance — of streamlining. The loan-outs are already in the Tremblay class. And so this is really more of an interest in conforming the cases. This is, to us, a very important issue that will not create more discovery because, again, this discovery has been produced and will make life easier later on.

THE COURT: Discovery has been what?

MS. GEMAN: Meaning to the extent that some of the plaintiffs have a loan-out company and there are documents -- oh, I'm sorry. I said the word "produced."

THE COURT: Thank you.

MS. GEMAN: I'm not going to submit that literally every document has been produced; but in the main, there has been no withholding of documents simply for the ancillary fact

that someone has a loan-out.

Thank you, your Honor.

THE COURT: I understand.

Mr. Saveri.

MR. SAVERI: Your Honor, thank you.

Joseph Saveri again.

I just want to point out that this issue with the loan-out corporations, the loan-out corporations are already in our case.

THE COURT: They are in *Tremblay* already.

MR. SAVERI: Yeah.

THE COURT: That's relevant. Go ahead.

MR. SAVERI: And then also, because of that, the discovery in the *Tremblay* case has already -- this has already been a focus of the discovery in *Tremblay*, both in terms of document discovery and also, I defended one of the class plaintiffs' deposition. And this was a subject of the interrogation at the deposition.

THE COURT: No, but the fact that you're telling me it's in *Tremblay* goes toward my allowing the loan-outs in the consolidated amended complaint. I understand that.

MR. SAVERI: Yes.

THE COURT: The fact that you're telling me it was a major subject of discussion in the deposition squints in the direction of what the defendant just said, that is, it would

add additional discovery here, if it was such a major subject of the *Tremblay* depositions.

MR. SAVERI: Your Honor is correct.

To the extent that there is analogous discovery to the *Tremblay* case that has not been conducted here, I'm not familiar with the discovery in the *AG* case. I just know, your Honor, that with respect to the clients I represent, this issue is already on the table; the discovery has been on the table; and, in fact, depositions have focused on it. So from our perspective, this doesn't add any delay because we've been undertaking the prosecution of those claims already.

THE COURT: All right.

Here's what I'm going to do: Judge Wang tells me that in an Alter discussion there were explicit models laid out as to what the specifics ones were. I'm going to allow those in the amendment.

I am going to allow the loan-outs, given the fact that it's in *Tremblay*. Plaintiffs here are nodding aggressively. And there seems to be no real dispute about the vicarious infringement claims. So that should clear up what the consolidated amended complaint can have.

In terms of antitrust, you'll either work out a tolling agreement or drop it or bring it as a separate action.

All right. Let's move on.

And I think I've indicated this already, but this is

not going to work unless there's some cooperation here, some streamlining. And the theory is with a single interim class action counsel, plus the agreed-upon group of lawyers for the news plaintiffs, the plaintiffs will speak with one voice, that is, the single interim plaintiffs' class action counsel. And they will interact with Ms. Brook as liaison counsel, who will be speaking also with the news plaintiffs and then the defendants.

So that by the time it gets to the Court, there's either been agreement, or an application can be made by the Court with your telling me, We tried to work this out — that would be Ms. Brook speaking for that on behalf of the plaintiffs. That's the streamlining that I envision here. And I've already handled that in terms of the complaint moving it forward.

Okay. The duties of counsel will be largely what's in the manual on complex litigation. I'll set it forth in an order.

Compensation of leadership counsel. I'm certainly not going to deal with that now.

Consolidation of the class actions — I've handled that.

Additional claims — I've handled that.

I don't need a consolidation of the news plaintiffs' complaint. Everybody agrees consolidation of the news

plaintiffs is unnecessary.

My notes say *The Times* has an unopposed motion to amend the complaint to add a 1202(b)(1) claim, DMCA claim; is that right, *Times*?

MS. BROOK: Yes, your Honor, with one clarification. It's not a new claim, it's just to replead the one that the Court dismissed, so that it is in line with the ones that the Court has allowed to go forward as to *The Daily News* and other news plaintiffs.

THE COURT: All right. So why don't you get me a stipulation that says what it is, and that it's unopposed, and I'll sign it.

MS. BROOK: Thank you, your Honor.

THE COURT: I guess it doesn't have to be a stipulation if you have the agreement from the other side. I leave that to you.

Bifurcation damages. I'm not going to do that now. I mean, I don't see any need for bifurcation, unless there's a need to slow this down, so I'm not going to do it. If anybody wants to argue otherwise, I'll hear it.

Okay. No bifurcation of damages.

This is important — everything is important — but the issue of class certification versus summary judgment, which comes first. I feel fairly strongly about this. I've thought about all these things, that, again, on my theory, that we're

most likely moving toward a determination of fair use, of the affirmative defense of fair use. The way to get there sooner rather than later is by having class certification after summary judgment motions.

Anyone want to argue otherwise?

In other words, summary judgment briefing for discovery, summary judgment briefing, decision, class certification issues.

Sir.

MR. NELSON: Thank you, your Honor.

Justin Nelson from Susman Godfrey.

THE COURT: Just let me find you. Yes, I have you.

MR. NELSON: Thank you.

We do believe that the class certification issue should come before or certainly, if nothing else, simultaneously with. And we understand your Honor's position, just to be clear. Courts have done it both ways.

THE COURT: Yes.

MR. NELSON: And if your Honor decides that, it is perfectly within your discretion to do so.

We do think from a staging perspective it would be more appropriate to do class certification first. I just argued class certification in the *Anthropic AI* case — which overlaps with these claims — last week in front of Judge Alsup in the Northern District of California. There is a summary

judgment hearing today in *Anthropic* that my partner Rohit Nath is handling. And there are ways to stage it. By the way, the only reason they have summary judgment now — because we're in the middle of fact discovery there — is because the defendants wanted an early summary judgment motion on fair use.

THE COURT: Wait, wait, wait. I'm sorry. Let me slow down a little so I understand that.

Discovery is ongoing. Nonetheless, Judge Alsup is having a summary judgment -- has brought on a summary judgment motion even though discovery is ongoing?

MR. NELSON: Yes, your Honor. At defendants' request there, because of the common issue involving fair use --

THE COURT: But fair use is for nonexclusive factors. It seems to me, essentially, cover the waterfront in terms of discovery.

MR. NELSON: Your Honor, we believe that we win on the merits right now in that *Anthropic* case, but we do have --

THE COURT: On summary judgment.

MR. NELSON: On summary judgment. Well, to oppose their summary judgment. We have not cross-moved, your Honor.

THE COURT: Okay.

MR. NELSON: But we believe that we will prevail on that motion with prejudice; but to the extent that the Court disagrees, obviously there is more discovery to come.

The point actually is that there are a huge amount of

common issues. The common issues on the class side, with all the books, go factor by factor by factor. There are certainly some issues that require discovery. There have been expert reports preliminarily submitted, there were expert reports for class certification that came in with the class certification motion and response.

Our concern with pushing back class certification is the concern that your Honor identified just a few minutes ago, which is that we believe quite strongly that the cases should be resolved quickly; and that pushing back class certification, in fact, will delay ultimate resolution. And we can do it in the course of fact discovery and stage it with it, so that we are teed up along with the news cases so that we can do it simultaneously.

If your Honor grants class certification, of course, they have a right to a 23(f), it would not delay the other cases. But at least we have that issue already in the hopper, so to speak, if the Court, the Second Circuit, decides to grant a stay during the 23(f) process.

If, of course, we believe that --

THE COURT: Wait. I'm sorry.

Just do that 23(f) point again.

MR. NELSON: So, your Honor, if your Honor grants a class, presumably they are going to move for interlocutory appeal. The Second Circuit will decide whether to stay that

part of it during the course of the 23(f) appeal or not. But regardless, the individual actions are going to go forward. The summary judgment is going to go forward; certainly even the summary judgment with respect to the book authors can proceed in their individual capacities. So it will not delay the resolution of the fair use issues.

If your Honor — we think inappropriately so — were to deny class certification, that actually would be important to know earlier so that, therefore, there could be individual suits that would be brought, presumably tagalonged to this same MDL. And instead of having, you know, one class action, we would have tens or hundreds of thousands of individual actions with the same point, which is why we believe a class is superior, but we'll get to that whenever we get to that.

But the point is it will not delay the schedule, right, in terms of the main issue of fair use.

Your Honor, if we wanted to, we could hold a summary judgment hearing next month on fair use on their argument. I mean, I'm not saying that they want to do that or should do that. I'm saying that the issues are fairly joined right now. There are certainly some factual issues --

THE COURT: Yeah, but they are fairly joined, I agree with that, but they are not fairly discovered yet.

MR. NELSON: Well, let's take, for example, one example, okay, which is we have two theories of infringement.

The first is the piracy that occurred. And under *Andy Warhol*, each use is a separate infringement. That piracy, that initial download, we have the facts for that. We know what's going on in the market. We know that widespread use of piracy would destroy it under factor four. So with literally a couple of months more of discovery, maybe with a few expert reports, we can get certainly to a resolution of the piracy use of that.

Now, there's a separate issue with respect to training, right, which is that they -- if whatever happens, even if they lawfully acquired it, despite the fact that, for example, in the movie context, there's an FBI screen saying that you can't use it except for personal uses, and they take -- however they acquired it, they take it for training without a license. Yes, there will be some issues there.

Again, we can do that discovery, I think, quite quickly. And so we believe that those issues are common across all of the class, and that your Honor can stage it so that by the time we get to summary judgment, we can have a class certification certainly hearing, if not an order prior to that.

We do expect that in this instance, for example, your Honor would not -- whenever your Honor rules, even on our schedule, would not be the first court to consider class certification, given that Judge Alsup has that issue under advisement right now on a class that mirrors what we have proposed certainly in the *Alter* and *Authors Guild* amended

complaint here.

So we do believe that it would be appropriate to stage that first. But, if nothing else, if not first, at least at the same time as summary judgment so that we can proceed first. Remember, the *Authors Guild* and *Alter* class actions were the first filed cases in this Court. And we want to proceed. There is ongoing harm to the market. And having that --

THE COURT: I don't understand. Obviously we're going to proceed, that's not at issue. The question is --

MR. NELSON: Proceed as a class.

THE COURT: This question is the order in which I take the disputes.

MR. NELSON: Absolutely, your Honor. That is 100 percent right.

THE COURT: Discovery is going forward. That's irrelevant to this issue.

MR. NELSON: Correct.

But final resolution for the class obviously cannot happen until the class resolution is resolved.

THE COURT: Right.

MR. NELSON: And so being --

THE COURT: But that's probably, as you point out, an interim appeal. You haven't yet talked about the possibility of the Second Circuit staying things below while the appeal goes forward.

MR. NELSON: The Second Circuit certainly could stay it with respect to the class side of it. But, again, for the individuals, they have the claims in their individual capacities anyway. The fair use analysis will be the same. And certainly for the news plaintiffs, which has nothing to do with this, they will be going forward regardless.

So our only point, your Honor — and I hear you — and again, it would not be inappropriate --

THE COURT: Why don't you conclude. Go ahead.

MR. NELSON: We want to be able to go to trial with a class as fast as possible. We believe that the best way to do that is to stage class certification first or simultaneously with summary judgment, so we can do that.

Thank you, your Honor.

THE COURT: Okay. Thank you.

Well, that puts a different slant on it.

Let me hear from any defendant who wants to tell me that they agree with my initial thinking.

MR. SLAUGHTER: Thank you, your Honor.

James Slaughter, Keker, Van Nest & Peters, on behalf of OpenAI. And I know Ms. Hurst, on behalf of Microsoft, will want to be heard on this issue as well.

Your Honor had it exactly right in your first inclination, that the orderly process and the efficient process here is, as the Second Circuit endorsed in the *Authors Guild v.*

Google matter, 721 F.3d 132, which is to have summary judgment precede class certification precisely because in a copyright action such as this and such as existed in the *Google Books* case, the fair use defense "in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues." So the efficient way, as the Second Circuit endorsed, is to proceed with class -- with a summary judgment first.

The idea that it would be equally efficient to do it simultaneous is defeated just by what the *Google Books* case said, which is, the whole purpose of doing the fair use analysis initially as part of the dispositive motions is to get that information and to get those rulings because it will necessarily inform the class cert. analysis.

So your Honor's inclination was exactly right, and we think that that's the way that we should proceed.

MS. HURST: Your Honor, I would just briefly add as well --

THE COURT: For the record, say your name, please.

MS. HURST: Yes, your Honor.

Ms. Hurst, for Microsoft.

I think the reason plaintiffs are incorrect about the effect of a 23(f) appeal is that the dividing line would not be between class and individual claims. But the fact that there's this overlap between the fair use factors and the class

certification considerations means that a 23(f) appeal would bring the fair use consideration to a halt. And that would affect not only the class plaintiffs, the individual-named plaintiffs in their capacity, but also the news plaintiffs who are basically opt-out class plaintiffs here.

And so to have the 23 considerations either simultaneously or before the fair use defense would completely stymie what we're trying to accomplish here and, as Mr. Slaughter noted, deprive the Court of the efficiency of fair use going first.

THE COURT: In the Second Circuit, it seems to me that there's a strong preference for certification following summary judgment. So I'm going to do what I consider the standard procedure in the Second Circuit. I'd be interested in following what happens in that Alsup case; but here, we're going to do summary judgment first.

MR. NELSON: Thank you, your Honor.

THE COURT: I'm inclined to have the parties schedule reply expert reports, given the obligation of the party that bears the burden of proof to go first. As of now, I'll allow reply expert reports.

Next is the technology tutorial.

I accept the point that was made in the report that we've already had it. But I can tell you, each time I hear it, I learn a little more and I feel a little more comfortable with

the technology. So A, I don't mind hearing it for the second time; and B, undoubtedly there's more that the parties will want to tell me — tell us — in terms of technology. So I'm strongly inclined to have the second technology tutorial and I'm not foreclosing additional ones. But right now -- I think I have a pretty good grasp of it, but we're going to have a second technology tutorial.

Have the parties talked about dates for that? I'm pretty flexible.

MS. BROOK: Davida Brook of Susman Godfrey.

No, your Honor. But I'm happy to have that conversation with both my friends on the class side and on the defense side and report some dates to the Court.

THE COURT: Yes, please.

MS. BROOK: Does the Court want to give some parameters on how soon it would like that tutorial?

THE COURT: I don't think there's an emergent need, but certainly I would think June or early July, something like that.

MS. BROOK: That you, your Honor.

THE COURT: Okay.

MR. SLAUGHTER: Thank you, your Honor.

James Slaughter, on behalf of OpenAI.

We'll work with the plaintiffs to schedule that and propose a date to your Honor.

THE COURT: Okay.

Protective order. That's going to be handled. I believe the parties have a conference next week.

JUDGE WANG: Tuesday morning.

THE COURT: So that will be handled then, along with ironing out a deposition protocol and discovery schedules. Again, Judge Wang will be handling discovery, including third-party discovery.

I think that basically handles everything except the case schedule, okay. Now, surprise, surprise, the plaintiffs' proposed schedule was too aggressive and the defendants' proposed schedule was too unaggressive.

I think, given the rulings today, that will help the parties amend their schedule. Certainly the ordering of summary judgment and a certification, certainly the timing on the consolidated class action complaint, certainly no additional claims should help the parties do that, come up with another schedule. If you can come up with a joint schedule, fine. If you can't, submit something to me.

When do the parties want to do it? We're talking about -- are we talking about June 10 for the consolidated complaint?

MS. BROOK: Yes, your Honor.

Davida Brook of Susman Godfrey.

We would appreciate there being a date certain for the

parties to submit either a stipulated schedule or disputed schedules for the Court's consideration. And June 10th or, frankly, earlier would be perfectly amenable to, I believe, both the news plaintiffs and the class plaintiffs.

MR. SLAUGHTER: Your Honor, James Slaughter, on behalf of OpenAI.

Part of the issue there is we will not -- if we do it on June 10, we will not have had the benefit of seeing that proposed consolidated class action complaint.

THE COURT: I think the consolidated complaint should come first, I agree with that.

MR. SLAUGHTER: So can I suggest, your Honor, perhaps two weeks after June 10 to submit proposed schedules so that we can take into account what we learned from the proposed class action complaint?

MS. BROOK: Your Honor, might I suggest that's maybe a little too unaggressive, maybe mine was a little too aggressive. Shall we split the baby and do one week after June 10th.

THE COURT: That's exactly what was bubbling to the surface. One week after June 10, which I assume is June 17.

MS. BROOK: Thank you, your Honor.

MR. SLAUGHTER: Thank you, your Honor.

MS. BROOK: And, your Honor, if I may, just to clarify — perhaps this is for Magistrate Judge Wang as well — I would

posit that that schedule should include all the discovery deadlines as well, and we'll submit a complete schedule for your Honors' consideration.

THE COURT: Yes.

MS. BROOK: Thank you.

THE COURT: Is there a briefing schedule on the Raw Story motion for reconsideration? I just don't know the state of that.

MR. TOPIC: Good morning. Matt Topic, Loevy & Loevy, for Raw Story and Alter Net, who are the two plaintiffs together in that case.

We filed the motion to reconsider, and then the briefing was stayed by your first order. So we do not have a briefing schedule. I'm also happy to just argue it out right now if the Court would like. It's very straightforward.

THE COURT: Let me hear it.

MR. TOPIC: So what we're seeking --

THE COURT: I'm sorry.

MR. GRATZ: Your Honor, Joe Gratz, representing OpenAI.

We would like the benefit of an opposition brief before oral argument.

THE COURT: I fully understand that. But this is a preview. This is an appetizer here. No, no, the brief --

MR. GRATZ: I look forward to serving the second

course of appetizers.

THE COURT: All right.

Starting to fall apart here. Go ahead.

MR. TOPIC: I apologize if I'm responsible for that.

So Judge McMahon denied us leave to file an amended complaint that would have brought the Raw Story DCMA claim in line with the allegations that your Honor has allowed for CIR and for *Daily News*, and you've now allowed --

THE COURT: I know. But it seems to me the issue is, if I can say, a cute one; that is, if I deny the motion for reconsideration, it goes to the Second Circuit, and we get a nice clear, hopefully, determination on that DMCA claim.

If, on the other hand, I say it's as I had already determined it, then it gets folded into this. It's the, I don't know, perhaps unseemly position that two different judges have come out two different ways. No, that's not unseemly, that's the way the law developments.

But here, it would be simply because the case was sent to another judge, there's the possibility of the opposite result. I'm not sure that's a good way to run the railroad.

MR. TOPIC: We cited some cases, including Second Circuit cases, that talk about this situation where there has been an MDL created. The transferee judge, your Honor, has the ability and the obligation to correct any decisions by the prior judge that you believe to be erroneous. And the point of

the MDL — and we heard it again today from the defendants — was to have consistent rulings. And we have two irreconcilable inconsistent rulings that, according to their own arguments for why there should have been an MDL, those should be brought into conformance with each other.

THE COURT: Preview.

MR. GRATZ: Course two of appetizers, your Honor.

Joe Gratz at Morrison & Foerster, for OpenAI.

First of all, your Honor is right. Denying the motion for reconsideration will allow this issue to go to the Second Circuit and will allow us to get some additional guidance on the issue presented which may shed light for other claims.

The second point --

THE COURT: Yes. But now that it's under my aegis, how can I in good faith let something proceed where I've stated my disagreement with it?

MR. GRATZ: The answer, your Honor, is that Judge McMahon's order is a final order. It granted with prejudice a motion to dismiss. And that is a final order that is subject only to perfection into a judgment and then appeal, or a Rule 60 motion to amend a final order.

And the standard to amend a final order is much higher than, Well, there's a new judge assigned. It's that something was overlooked or there's been an intervening change in law, none of which, as we look forward to outlining in our

opposition, is met here.

The other issue, your Honor, is that the standards applied in the cases are actually -- the cases are actually not in conflict, because in the *Raw Story* case, there was no showing of any of Raw Story's material appearing in the output, despite an opportunity to amend to add that allegation. It's just not there in the same way that it is in, for example, the *CIR* case, where your Honor reached his view on the 1202 issue.

And so for all of those reasons, we think that the right course is to enter final -- deny the Rule 60 motion, because the standard isn't met, enter final judgment, and have it go to the Second Circuit, where they can tell us something.

THE COURT: So you have a MDL where the transferee judge is allowing there to be differing views on the record.

MR. GRATZ: So I don't think there are differing views, your Honor, because I think the standard that your Honor applied in the *CIR* case, if applied to the facts pleaded in the *Raw Story* case would actually lead to dismissal because the basis in the *CIR* case for standing was that they could make it output at least some of their stuff.

And in the *Raw Story* case, even after an opportunity to amend, there is not such an allegation. And that's what makes those two things not incompatible. But this is just a different set of facts that does not meet the standard your Honor set in ruling on the motions to dismiss.

THE COURT: When can you get your opposition briefing?

MR. GRATZ: Two days, your Honor.

THE COURT: Absolutely.

MR. GRATZ: I guess two days would put us on Saturday. So can I have till Monday, your Honor.

THE COURT: Monday is a holiday. You can have till Tuesday.

MR. GRATZ: Tuesday. Thank you, your Honor.

THE COURT: And that's May 27.

And what do you want for a reply?

MR. TOPIC: Could I have one week, your Honor?

THE COURT: June 2 for reply in *Raw Story*.

Where do we stand on Ziff Davis? As I said, it just hit the docket today.

MS. BROOK: Your Honor, I'll refer to my colleague Mr. Coonce to the extent things get too specific. But on behalf of the news plaintiffs, including Ziff Davis, I think there's just a couple quick requests.

We've already been working incredibly well with counsel for Ziff Davis who have come in and made every effort to get up to speed as quickly as possible. To that end, I believe they have three main requests for this Court, one of which is they need a date set for the answer to their pending complaint. That would have been due, your Honor, absent this MDL proceeding, earlier this week on May 20th.

I'll propose — though I don't believe we have run this by defense counsel yet, but I'll propose June 10th, the same date that class plaintiffs have been ordered to submit their consolidated amended complaint.

That's issue one, your Honor.

THE COURT: Just a moment.

The request was what now?

MS. BROOK: The request, your Honor, was for June 10th, whereas it was previously due May 20th.

THE COURT: All right. I have no problem with that.

June 10th for the answer due in Ziff Davis.

Go ahead. What else?

MS. BROOK: Two other related points, your Honor.

One, I believe that counsel for Ziff Davis would appreciate guidance from this Court that discovery as to Ziff Davis is considered open; and that they can start participating in that process freely as of this afternoon.

THE COURT: Seems to me they should.

JUDGE WANG: Yes. And we'll see you on Tuesday as well.

MS. BROOK: Thank you, your Honor.

They look forward to it.

THE COURT: Do they?

MS. BROOK: On a related note, I believe they have made a request already of counsel for OpenAI that they make the

previously propounded discovery -- previously issued discovery to the other news plaintiffs available to Ziff Davis immediately. They've agreed to abide by the existing protective order in the news cases pending any entry of a more consolidated protective order. And so, again, on a related note, they would just request that OpenAI make that discovery available as soon as practicable.

JUDGE WANG: Can OpenAI do that?

MR. SLAUGHTER: Your Honor, James Slaughter; Keker, Van Nest & Peters, on behalf of OpenAI.

I'll need to check with my colleagues on that, judges, and can get back to be prepared to respond to that, if it's okay with you, your Honors, when we have the conference on Tuesday, the 27th, with respect to that.

I did want to respond just on the documents. I did just want to respond to a couple of things.

One, with respect to response to the complaint, June 10 is acceptable obviously for the response to the complaint. It's a response. And not necessarily --

THE COURT: What you're saying is you intend to move to dismiss, is that what you're saying?

MR. SLAUGHTER: Well, it depends, your Honor. The answer is potentially. And it depends upon what's in that case as a tagalong and not. Consistent with what your Honor ruled earlier today, we understand that these consolidated MDL

proceedings are going to be the claims that were -- existed as of the dates of the respected news and class plaintiffs complaints.

The Ziff Davis complaint is broader; it has additional products, it has additional claims. As a tagalong action, your Honor, you obviously have authority to manage that docket. And consistent with what you suggested earlier, there's either going to have to be, sort of, two ways forward: Either Ziff Davis is stayed or it proceeds on the common issues that are currently pled in these coordinated proceedings, the claims and the products currently in the case. And we can proceed on those common issues, but we don't want — for the same reasons that your Honor articulated earlier — to have this tagalong case then upset the applecart with respect to the other issues.

MS. BROOK: Your Honor, Davida Brook of Susman Godfrey.

I think Mr. Boies had it right. You can't have your cake and eat it too. It would be very uncommon for a court to stay all cases at this point in an MDL proceeding. OpenAI moved to transfer the *Ziff Davis* case to this Court, to this MDL. And it has now been transferred. Their case is largely duplicative with the existing cases. They have agreed against maybe --

THE COURT: Well, I thought the suggestion was made that it's not.

MS. BROOK: I don't know if my friend on the other side was saying that it's not largely duplicative. There are some differences. But it is largely duplicative; it is largely overlapping. Most of the discovery has already taken place. And the discovery schedule that was put forth by either of the plaintiffs, the proposed schedule or by the defendants, would allow for Ziff Davis, as currently pled, to be incorporated into this MDL. And we think that they, having moved Ziff Davis into this action, into this courtroom, that should be allowed to proceed.

MR. SLAUGHTER: May I be heard, your Honor?

THE COURT: Yes.

MR. SLAUGHTER: Of course, we had an obligation under the JPML rules to make our motion; so the suggestion that it was our choice is inaccurate.

And, of course, tagalong cases are often treated differently than the core actions. We're not suggesting, contrary to what my -- what Ms. Brook suggested, we're not suggesting staying the core actions. We're prepared and want to proceed swiftly.

All we're suggesting is, as a tagalong action, which can be treated differently and should be, it should not unduly expand the scope. It has, as I said, additional claims; it proposes additional products which will have all of the impacts --

THE COURT: Yeah, but Ms. Brook's point was you wanted the MDL.

MR. SLAUGHTER: We had an obligation, your Honor, under the JPML's rules to notify the JPML and transfer into the court, absolutely. But that doesn't mean, your Honor, that this case, which admittedly could have been brought a year ago, their allegations in their complaint say, Hey, we've been talking to you about this for a year, that it should come in and then expand discovery and expand claims. We're prepared to proceed — and we think we should — on the common issues and on the common claims.

THE COURT: All right. This is what you do: We have a complaint. You file your response. You can move to dismiss on any grounds you want, but we've got a complaint.

MR. SLAUGHTER: Thank you, your Honor.

THE COURT: That's by June 10.

I think that handles it.

We need a schedule.

First we need a lead counsel for the class actions.

We need an agreed-upon schedule between the parties or competing schedules to me.

We've got the Ziff Davis motion.

The parties will proceed with discovery.

There's a conference next Tuesday with Judge Wang on discovery that will involve, at a minimum, not only a schedule,

but deposition protocols and protective orders. Let's get all of those out of the way, and then we can move forward.

All right. I think we've done quite a bit.

Unless there's anything else -- oh, I know. I don't think -- Magistrate Judge Wang thinks we don't need monthly discovery meetings. The judge is certainly capable of calling meetings when she thinks it's appropriate, and the parties are certainly capable of telling her that they want a conference.

All right.

JUDGE WANG: I'll add to that, and we'll get into it more on Tuesday morning, but the structure we've had with the S.D.N.Y. cases, with limited deadlines for filing and then the charts, have been extremely helpful to the Court, and I plan to continue that.

So for the new lawyers and the new parties who have recently been brought into the court, you'll see what we mean when you look at the dockets. Thanks.

THE COURT: All right. This MDL has been launched.

Let's have clear sailing ahead.

Thank you, all.

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