UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KELVIN JAMES, MARY SIMMONS, and JODI FOSTER, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

PENGUIN GROUP (USA) INC. and AUTHOR SOLUTIONS,

Defendants.

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Index No. 13-CV-2801 (DLC)
ECF Case

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

This is a case about a publishing company that makes money from authors, not for them. Author Solutions LLC ("AS" or the "Company") represents to authors that it is a leading "indie" self-publisher,[1] suggesting that it is a small, independently run press, when this is far from the case. Plaintiffs Mary Simmons ("Simmons") and Jodi Foster ("Foster") and members of the class (the "Class" or "Plaintiffs") reasonably believed that AS was a publisher that would help its authors ("Authors") sell their books and get them "primed for retail success."[2] Instead, AS operates more like a telemarketing company, not a publisher, that employs a large, commissioned sales force to sell books and services to its target audience: the Authors themselves, not the general public. Its top executives have no experience in the publishing industry (Giskan Dec. Ex. 10, Weiss Dep. 11; *id.* Ex. 7, Ogorek Dep. 13; i*d.* Ex. 9, Seitz Dep. 4-5),[3] nor do they need it to run AS.

AS refers to its sales force as Publishing Consultants ("PCs"), Editorial Consultants ("ECs"),[4] Marketing Consultants ("MCs"), and Book Consultants ("BCs") to give Authors the impression that the "consultant" possesses the relevant background to guide them through the publishing or book marketing process. Instead, the "consultant" is simply a sales person with an aggressive quota, typically based in the Philippines, though this is never disclosed to Authors (and the email insignias provide Indiana as the "consultant's" address). In other words, AS does not invest in helping Authors succeed. Instead, it employs hundreds of salespeople – manipulated to look like the author's partner, guide, and "consultant" – to sell expensive services and thousands of

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[1] *See, e.g*, Press Release, Author Solutions, New York Attorney Sergio de la Pava Receives $25,000 Award for Winning the 2013 PEN/Robert W. Bingham Prize (Aug 19, 2013), http://www.authorsolutions.com/News.aspx?id=1062 (last visited May 21, 2014); and AS's LinkedIn profile, https://www.linkedin.com/company/author-solutions-inc. (Giskan Dec. Ex. 22.)

[2] Description under heading "Get primed for retail success," iUNIVERSE, iuniverse.com (last visited July 16, 2013, 6:00 PM).

[3] The deposition testimony ("Dep.") and documents referred to herein are attached as exhibits to the declaration of Plaintiffs' counsel, Oren Giskan ("Giskan Dec.").

[4] ECs exist for iUniverse only. (Giskan Dec. Ex. 8, Pierson Dep. 66.)

the Authors' *own books* back to the Authors themselves, but employs no one to sell the Authors' books to the general public, the "retail channel." (Giskan Dec. Ex. 7, Ogorek Dep. 166; *id.* Ex. 9, Seitz Dep. 54-55.) AS bombards *every* Author with the same aggressive tactics and the same worthless services. (*Id.* Ex. 4, Dunn Dep. 15, 22, 30, 39-40, 42, 47, 54-55, and 79; *id.* Ex. 7, Ogorek Dep. 44; *id.* Ex. 10, Weiss Dep. 55.)

Unlike an "indie publisher" or a traditional publisher, an Author's retail success is largely irrelevant to AS. Authors would be shocked to learn that book sales are in fact "*not* one of the goals of AS's marketing services." (Giskan Dec. Ex. 4, Dunn Dep. 56) (emphasis added). Instead, AS takes a struthious approach and pretends it has "no idea whether the services help authors sell books." (*Id.* Ex. 7, Ogorek Dep. 127.) AS never analyzes whether marketing services yield increased book sales for Authors or whether Authors recoup their initial investment through sales. (*Id.* Ex. 5, Gregory 30(b)(6) Dep. 71-72; *id.* Ex. 1, Becher 30(b)(6) Dep. 53; *id.* Ex. 3, Bunner Dep. 30, 54; *id.* Ex. 7, Ogorek Dep. 43, 48, 50, 52, 127-29.) AS does not even find this data relevant, because "[t]hat's not necessarily why [Authors] buy services." (*Id*. Ex. 10, Weiss Dep. 64-65, 163-64.) Conveniently, AS never asks Authors whether that is why they are buying services. (*Id*. Ex. 3, Bunner Dep. 30; *id*. Ex. 4, Dunn Dep. 56.) Of course, AS's private litigation stance does not match its public statements made on its website: "The key to getting read, is getting book sales. At iUniverse, we're committed to helping you reach your book sales goals."[5]

[5] "Publishing the iUniverse Way," iUNIVERSE http://www.iuniverse.com/why-iUniverse/publishing-the-iUniverse-way/selling-your-book.aspx (last accessed Feb. 13, 2015). (Giskan Dec. Ex. 23.) AuthorHouse makes similar representations. AuthorHouse claimed that: "Statistics show that authors who actively market and promote their works sell more books. We offer a wide array of marketing services to help your book get the attention it deserves. The following are the services AuthorHouse provides to promote your book." Marketing Services, AuthorHouse, Wayback Machine https://web.archive.org/web/20131206041103/http://www.authorhouse.com/Servicestore/ServiceList.aspx?Service=CAST-1582 (last accessed on Feb. 13, 2015). (Giskan Dec. Ex. 24.)

AS's deceptive tactics permeate every aspect of its relationship with Authors, because ultimately, AS willfully exploits the premise upon which the relationship between an author and publisher is based: that AS, as a publisher, invests in its Authors' retail success and helps them achieve that goal. AS is not a publisher in any sense of the word, but a sales organization that makes money from authors, not for them.

The evidence common to all class members will prove that Author Solutions deceptively sold Publishing Packages and other Services by making false, untrue, or misleading statements,[6] and by concealing critical information from Plaintiffs and the Class.

These deceptive practices include the following facts:

(1) AS represents to Authors on its websites and through sales calls that it is invested in the Authors' success and that it has expertise in helping Authors accomplish their publishing goals but conceals that it has never determined or even sought to determine the effectiveness of its Services at driving book sales;

(2) AS conceals from Authors the nature of the role of the PCs, MCs, and BCs. The "consultants" are not required to have any relevant experience but are rather commissioned telemarketers with a sales quota;

(3) AS conceals its lack of affiliation with Barnes & Noble, the chief carrot AS uses in luring authors to buy expensive services required for its Recognition Programs, such as Rising Star;

(4) AS is not interested in the Authors' finished product and rushes it to publication, or "title live," so that AS may claim revenue, at its completion, for the publishing package;

(5) AS does not know whether Authors succeed in the retail channel and makes no effort to find out. No employees are tasked with selling books to stores and, internally, AS recognizes that it does not promote Authors' books;

(6) The services are not reasonably designed to help Authors sell books or to accomplish their stated goal and are effectively worthless. The value of these services is best evidenced by the Editorial Services Manager of AS, Joel Pierson who published seven books with AS but did not purchase a single AS marketing service, despite his goal of retail success; and

[6] AS uses the website as its "script" for the Publishing Packages and Services it offers to Authors. (Giskan Dec. Ex. 7, Ogorek Dep. 15, 36, 65-67.)

(7) AS avoids any analysis of whether Authors recoup their initial investment because it knows that few, if any authors ever do.

Plaintiffs respectfully request that the Court certify a Class defined as follows: "All Authors who, during the period 2007 through the present, purchased a Publishing Package or Service from AS (the "Class") in conjunction with their written work(s).[7]

Plaintiffs respectfully request that the Court certify the following subclasses:

California: All persons residing in California who purchased a Publishing Package and/or Services from Defendants in conjunction with their written work(s) who were deceived pursuant to California's Unfair Competition Law, since April 24, 2009;

Colorado: All persons residing in Colorado who purchased a Publishing Package and/or Services from Defendants in conjunction with their written work(s) who were deceived pursuant to Colorado's Deceptive Trade Practice Act, since September 27, 2010.

Premier Publishing Package: All iUniverse Authors who purchased Publishing Packages that included Editor's Choice, Star, or Rising Star elibility, such as the Premier Publishing Packages and above,[8] from April 24, 2009 to the present.

Cases like this, where large subclasses of individuals are aggrieved by the same deceptive practice, are ideally suited for class treatment, and in this case the requirements of Rule 23 are easily satisfied.

Numerosity. Author Solutions has 180,000 authors. Plaintiffs do not believe Defendant will contest numerosity.

Predominance of Common Issues. There are common questions of law or fact that predominate over any individual issues, including the central, overriding issues of whether AS marketed its Publishing Packages and other Services deceptively.

[7] Plaintiffs are not seeking to certify their breach of contract claim based on royalties.

[8] Currently, Premier, Premier Pro, Bookstore Premier Pro, Book Launch Premier Package include eligibility for Editor's Choice and above.

Typicality. As authors who purchased publishing packages and marketing services from Defendant, Plaintiffs' claims are typical of those of other class members, and Defendant's liability as to Plaintiffs and the Class will depend upon the same legal theories.

Adequacy. Plaintiffs are adequate class representatives with no interests antagonistic to the other members of the class, are represented by experienced counsel, and are committed to the vigorous prosecution of this action as demonstrated by their willingness to step forward and represent the class, produce extensive amounts of documents, respond to interrogatories, jeopardize their relationships with current publishers who AS subpoenaed for documents, and sit for lengthy depositions.

Superiority. By combining all of the Class members' claims challenging AS's deceptive practices, those claims are presented far more fairly and efficiently than they would be in individual actions.

For these reasons, as set forth more fully below, the Court should grant Plaintiffs' motion for class certification.

STATEMENT OF FACTS

Background

AS was acquired by Bertram Capital, a private equity firm, in 2007 and quickly hired Kevin Weiss as its C.E.O. to prepare the Company for acquisition or to take it public. (Giskan Dec. Ex. 10, Weiss Dep. 22.) Mr. Weiss was tasked with increasing revenue and growing the business. (*Id*. Ex. 10, Weiss Dep. 21.) To do so, AS began acquiring imprints. When Mr. Weiss joined in 2007, AS operated AuthorHouse, iUniverse, and another imprint. (*Id*. Ex. 10, Weiss Dep. 18.) AS subsequently acquired Trafford (2009) and Xlibris (2009). These four imprints are referred to as AS's "core imprints." When AS acquired Xlibris, a small self-publishing company with operations in Cebu, Philippines in 2009, it moved part of its operations to Cebu. (*Id*. Ex. 1, Weiss Dep. 27-28.)

By 2012, most of the "consultants" were based in Cebu – only 79 out of 365 remained in Indiana. (*Id*. Ex. 13, 39-41.)

AS also increased revenue by forming partnerships with traditional publishing companies to create new imprints, or "partner imprints." For instance, in 2009, AS formed a partnership with Thomas Nelson, the largest Christian publisher at the time, called Westbow Press. (*Id*. Ex. 9, Seitz Dep. 11.) AS has continued the expansion of its partner programs, including a partnership with Nook Press, by Barnes & Noble. (*Id*. Ex. 9, Seitz Dep. 49.) The role of the partner, to whom AS pays a royalty, is to "contribute and assist in lead generation." (*Id*. Ex. 9, Seitz Dep. 11.) In other words, they would generate a potential pool of Authors to whom AS's "consultants" could sell the same services, except for a higher price so that the partners could share in the profits. (*Id*. Ex. 9, Seitz Dep. 21; *id*. Ex. 7, Ogorek Dep. 116.)

AS implemented a sophisticated sales structure and aggressively increased sales to Authors. At AS, "the term lead [is] used interchangeably with author" and is "someone that you could sell services to." (Giskan Dec. Ex. 3, Bunner Dep. 58.) "Consultants" are incentivized with commissions and high quotas. (*Id*. Ex. 5, Gregory 30(b)(6) Dep. 109-111.) By 2012, a PC's quota was to make [redacted] worth of sales per month, with an average order of [redacted], and to make [redacted] calls per day with [redacted] of call time. (*Id.* Ex. 13) MCs had a sales quota of [redacted], with the average order at [redacted], and the same amount of calls per day. *Id.* Finally, BCs, tasked with selling the Author's very own book *back* to the Author herself, had a quota of [redacted], with an average sale at [redacted], and the same call metrics. (*Id.*) "Consultants" make [redacted] plus commission, and, in the Philippines, approximately [redacted] per month. (*Id*. Ex. 3, Bunner Dep. 65-66.)

"Consultants" are not required to have marketing or publishing experience, nor are they required to read the Author's work. (Giskan Dec. Ex. 3, Bunner Dep. 42, 63.) For AS to maximize revenue opportunities, when an Author's book is just published (or about to be published), the Author is assigned a "Tier 1" MC, but after a certain amount of time, or if the Author purchased a Service, she is moved to a "Tier 2" MC. (*Id*. Ex. 3, Bunner Dep. 57-58.) Once the title is live, the Author becomes an "active lead" for the BC. (*Id*. Ex. 2, Becher Dep. 152-53.) In other words, the Author is passed around and bombarded with calls from several levels of "consultants." Authors have complained to AS about this practice. (*Id*. Ex. 10, Weiss Dep. 55.) Authors were never made aware that their "consultants" were commissioned salespeople who would say anything to make a sale to earn their living.

AS accomplished its goal of impressive revenue growth and was acquired by Pearson PLC in July 2012 for $116 million.

The Publishing Process

Authors first purchase a Publishing Package to initiate the publishing process with AS. A Publishing Package is a bundle of Services that can include Marketing Services, among others. AS lures Authors to purchase expensive Publishing Packages by promising higher royalties[9] than traditional publishing and a commitment "to helping [Authors] reach [their] sales goals." All the while, AS has no basis to believe that its Authors could ever reach their "sales goals." (Giskan Dec. Ex. 5, Gregory 30(b)(6) Dep. 71-72; *id*. Ex. 1, Becher 30(b)(6) Dep. 53; *id*. Ex. 3, Bunner Dep. 30, 54; *id*. Ex. 10, Weiss Dep. 163-64.)

[9] "Publishing the iUniverse Way," iUNIVERSE, http://www.iuniverse.com/why-iUniverse/publishing-the-iUniverse-way/selling-your-book.aspx (last accessed on Feb. 13, 2015). (Giskan Dec. Ex. 25.)

AS's evaluations of Authors' works paints a harrowing picture of how AS feels about its Authors. *See infra*, p. 9, n. 14. In monitoring their online reputation, AS noticed that a former employee posted on a blog that "[s]alespeople brag about pushing customers to overextend themselves, promising them the world, laughing about how they'll probably only sell a dozen copies" and that "Keith Ogorek has a shelf of the worst books in his office that he laughs about." (Giskan Dec. Ex. 16; *id*. Ex. 7, Ogorek Dep. 194-95.) When asked if he had such a shelf, Ogorek did not deny it and stated only: "I have a shelf of books in my office that has all kinds of books on there." (*Id*. Ex. 7, Ogorek 195-96.)[10]

Plaintiffs Foster and Simmons both published with iUniverse and purchased the Bookstore Premier Pro Package. (Second Amended Complaint ("SAC") ¶¶ 13-14.) On AS's website, where the package is described, AS makes several misleading statements, including that the package is designed to help the Author become "a serious contender in today's competitive publishing environment."[11] AS has no basis to make that statement, as it avoids any analysis of its Authors' success. AS goes on to claim that "[t]he Bookstore Premier Pro publishing package is focused on enhancing your chances of success with major bookselling chains such as Barnes and Noble. Bookstore Premier Pro includes everything you would find in our Premier Pro package, plus our high value Bookseller's Return Program."[12] From the beginning, AS plants a seed of retail success, of placement in Barnes & Noble, enticing Authors to invest in its expensive packages. AS and the

[10] Examples of AS's callous indifference toward its Authors are legion. In an email to Susan Dunn, another AS employee facetiously writes, "But when have we stopped selling services to bad books?" (Giskan Dec. Ex. 4, Dunn Dep. 81.)

[11] This language from iUniverse's website is a description offered for the Premier Pro Package: the Bookstore Premier Pro package "includes everything you would find" in the Premier Pro Package. "Premier Pro Package," iUniverse, http://www.iuniverse.com/Packages/Premier-Pro.aspx (last visited on Feb. 13, 2015). (Giskan Dec. Ex. 26.)

[12] "Bookstore Premier Pro Package," iUniverse, http://www.iuniverse.com/Packages/BookstorePremierPro.aspx (last visited on Feb. 11, 2015). (Giskan Dec. Ex. 27.) The language quoted above in the offer has not changed since it was offered to Plaintiffs Foster and Simmons.

major chain bookstores know that Authors rarely have "genuine sales potential beyond the author's friends and family. . ." (Giskan Dec. Ex. 17.) Instead, it is "the [A]uthor himself or herself [that is] the biggest source of sales on average for any given book." (*Id*. Ex. 10, Weiss Dep. 95.) Few books will ever be returned through the Bookseller's Return, for which AS charges over $700[13] but costs AS next to nothing to fulfill -- only the cost of the printing and the Author's royalty for the returned book. (*Id*. Ex. 2, Becher Dep. 43-46.) As was common throughout AS's witnesses' testimony, AS could not testify about the actual value of that service. (*Id*. Ex. 2, Becher Dep. 46.)

Authors who have purchased Premier Pro packages receive an Editorial Evaluation, which "is an analysis of a book's strengths and weaknesses over several categories, such as marketing material, point of view, grammar, form, style." (Giskan Dec. Ex. 8, Pierson Dep. 33). Once an Author receives the evaluation of her work, she only reviews the work with her EC, because "the [A]uthor can talk to a salesperson about their evaluation *but they cannot talk to the editor*." (*Id*. Ex. 8, Pierson Dep. 68-69.) (Emphasis added.) The quality of the Author's work is meaningless to AS. To AS, a manuscript is a sales vehicle used to push Marketing Services and book sales on the Author. Interestingly, even the most poorly written books with no marketing potential that receive scathing internal reviews[14] are not spared from receiving sales calls from their "consultants" to purchase Marketing Services. (*Id*. Ex. 8, Pierson Dep. 33-34; *id*. Ex. 3, Bunner Dep. 104.)

The book is moved through production as quickly as possible so that the Author can then be targeted with marketing services and book offers. Once the Author submits her manuscript, she

[13] The Booksellers Return Program is included in several Publishing Packages. Its standalone value is $749.

[14] For instance, as part of iUniverse's Editorial Evaluation, an editor submitted the following internal review of the quality of an Author's work: "A shapeless, soggy memoir by a woman who divorced after 34 years and has been rejected by her son and his family. She presents letters, diary entries, quotes from Garth Brooks songs strung together with endless hyphens and ellipses and includes notes that indicate this is nowhere near a "finished product," though she thinks of herself as a "writer." (Giskan Dec. Ex. 10, Weiss Dep. 144-45.)

becomes a lead for the MCs, and once her title goes live, she becomes bait for the BC. (Giskan Dec. Ex. 2, Becher Dep. 153; *Id*. Ex. 15.) Authors who delay submitting their manuscript or final work are referred to as "languishing" Authors. (*Id*. Ex. 2, Becher Dep. 158.) Since AS cannot recognize revenue until the Author's title goes live (*Id*. Ex. 10, Weiss Dep. 218-19), AS has various tactics in place to rush the process. AS employs a team of "submission miners" who "entice [A]uthors to submit material" and offers promotions. (*Id*. Ex. 2, Becher Dep. 156-58.) AS is only interested in the quantity, not the quality of its books.

Authors often find errors, such as typographical, grammatical, or formatting errors in their published work, even after purchasing several rounds of editing. Errors occur for a variety of reasons, including "a conversion error during book design, when the manuscript goes from Microsoft Word to In Design," or because an editor "overlooked . . . or accidentally introduced . . . a typo during the editing process." (*Id*. Ex. 8, Pierson Dep. 38.) The main safeguard against such errors is for Authors to identify and correct publisher errors (*Id*. Ex. 8, Pierson Dep. 45), a process that can be taxing and time-consuming for the Author, as an editor can overlook "hundreds" of errors, creating work, expense, and confusion for the Author. (*Id*. Ex. 12, Simmons Dep. 95; *id*. Ex. 11, Foster Dep. 122; SAC ¶¶ 71-72, 97.) Contrary to what iUniverse claims on its website and to what Authors reasonably expect, Authors do not "[w]ork with an editorial team to make [their] book the best it can be."[15] Authors do not even know the name of their editor and cannot speak with them, and they have only one chance, per service, to improve the quality of their book. (*Id*. Ex. 8, Pierson Dep. 68-69.) In other words, an Author is "held hostage" in the process (*Id*. Ex. 11, Foster Dep. 91), because any changes an Author makes after she has submitted her work for the editing Service, and any errors that AS itself has made, become the Author's fault. (*Id*. Ex. 12, Simmons

[15] iUniverse Homepage, http://www.iuniverse.com/ (last accessed Feb. 13, 2015.) (Giskan Dec. Ex. 28.)

Dep. 95.) Ultimately, unlike a traditional publisher, the quality of the Author's book is irrelevant to AS, since AS's primary source of revenue is the Authors themselves.

Recognition Programs

On its website, iUniverse claims that "[m]any of our authors have gone on to find greater retail success or even traditional publishing success as a result of these programs,"[16] but has no basis to make this claim: AS has never performed any analysis of whether this is true. (Giskan Dec. Ex. 1, Becher, 30(b)(6) 53; *id*. Ex. 7, Ogorek Dep. 188.) Part of the incentive for Authors to publish with iUniverse is the chance to be awarded Editor's Choice and Rising Star, which are unique to iUniverse. (*Id.* Ex. 14.) Prior to Rising Star, AS had a similar program called "Publisher's Choice," which guaranteed bookstore placement in Barnes & Noble. As AS recognized, "[t]he connection to B&N is . . . a driver for submissions and purchase of the Premier Pro package, our highest cost package." (*Id.* Ex. 14.; *id.* Ex. 11, Foster Dep. 81.) Though AS attempted to continue the "B&N store placement promise as part of the Rising Star offering to [A]uthors," Barnes & Noble told AS "thanks but no thanks" (*id.* Ex. 17) because, as AS explained to Barnes & Noble in an email, AS "has work to do" regarding the quality of its books presented to Barnes & Noble (*id.* Ex. 18).[17] The soured relationship with Barnes & Noble did not stop AS from making the misleading claim on its website that Rising Star Books would be "presented" to Barnes & Noble. But AS did not in fact "present" Rising Star books to Barnes & Noble in any meaningful way. AS simply emailed Barnes & Noble's small press department with book information (*id.* Ex. 4, Dunn Dep. 114-15), which *any* author could do – the process is the same, and Rising Star books are treated no differently.[18]

[16] iUniverse Recognition Programs, iUniverse http://www.iuniverse.com/why-iuniverse/recognition-programs.aspx (last accessed on Feb. 12, 2015). (Giskan Dec. Ex. 29.)

[17] This is from an email from an AS employee, Terry Dwyer, to B&N's Vice President of Merchandizing, Antoinette Ercolano.

[18] Notably, approximately two months after the Second Amended Complaint was filed in this case, Author Solutions changed the wording of its representation to the more accurate representation that

Services

iUniverse claims on its website: "If you want your book to *sell*, you'll want to do more than just hope for the best. Our selection of promotional products and services allows authors to build a dynamic platform from which they can effectively promote and *sell their books*."[19] (Emphases added.) A reasonable person would believe that AS's marketing services were designed to help Authors sell books. AS takes a different position in this litigation, claiming that sales are "not the goal" of their Marketing Services. When asked to provide a definition of "marketing" with respect to Author Solutions, the Global Director of Author Marketing for AS, Susan Dunn, stated: "We are trying to provide authors with the best quality services we can in their position for them to be able to market their book. *I mean, it would be unrealistic for us to think that we could market our author's books.* Assisted self-publishing is marketing – assisted marketing." (Giskan Dec. Ex. 4, Dunn Dep. 123-124.) In truth, AS does not care about the efficacy of its Services.

Below is an example of some of AS's offered Services:

Hollywood Packages: these packages are allegedly designed with the goal of helping Authors option their books for movies and television. AS essentially pays its Hollywood partner, Thruline Entertainment ("Thruline"), to review synopses of Authors' books. AS does not disclose the astronomical odds of having a book optioned. From the over six thousand pages of documents that Thruline produced, Plaintiffs' counsel found only one option agreement, unexecuted -- for [redacted] – and that was not until 2014. Every other submission was rejected.

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such books would be "sent." *Compare* http://web.archive.org/web/20110809150834/http://www.iuniverse.com/why-iuniverse/programs-awards/rising-star.aspx (last accessed Feb. 13, 2015) (Giskan Dec. Ex. 29) with http://www.iuniverse.com/why-iuniverse/programs-awards/rising-star.aspx (last accessed Feb. 13, 2015) (Giskan Dec. Ex. 30).

[19] Marketing and Publicity Services, iUniverse, http://www.iuniverse.com/ServiceStore/ServiceList.aspx?Service=CAST-105 (last accessed Feb. 13, 2015) (Giskan Dec. Ex. 32.)

E-Mail Marketing Campaign: this "campaign" consists of an email with a book description, drafted by an employee in Cebu – and edited by no one else – sent to as many as ten million recipients. (Giskan Dec. Ex. 4, Dunn Dep. 61-62.) AS does not know anything about the recipients on the email list, even though it tells Authors it is sending the email to "book lovers," since the list is proprietary to a third-party vendor, Thrive Marketing. (*Id.* Ex. 4, Dunn Dep. 62-63.) Seemingly, AS charges Authors to send out spam. AS no longer offers this exact service as a standalone service, though it remains a part of some publishing packages.

Book Galleries: While AS tells Authors it will "showcase your book in front of thousands of attendees" at a book conference, the book is simply put on a shelf in the booth. The AS staff at the booth have never read the book. (Giskan Dec. Ex. 4, Dunn Dep. 17.) AS does not track how many event-goers stop by the booth, nor does it track sales. (*Id.* Ex. 4, Dunn Dep. 18; *id.* Ex. 7, Ogorek Dep. 48.)

Perhaps the best evidence that these Services are worthless is that Joel Pierson, the Editorial Services Manager, published seven books with AS. Although Mr. Pierson was interested in book sales, he did not purchase a single marketing service from AS. **Not a single one.** But like every author, Mr. Pierson "would have been thrilled if tens of thousands [copies of his book] had been sold." (*Id.* Ex. 8, Pierson Dep. 17.)

Plaintiff Foster

In or around March 2010, Plaintiff Foster purchased the "Bookstore Premier Pro" package for $1,499.00 for the publication of her book. (SAC ¶ 14.) The package came with various services, such as Bookstore Returnability, and made her eligible for iUniverse's Recognition Programs, such as Editor's Choice and Rising Star. (Giskan Dec. Ex. 11, Foster Dep. 74; SAC ¶ 82.)

On August 10, 2010, Plaintiff Foster submitted her manuscript for an Editorial Evaluation, which specifically recommended several Services (SAC ¶ 87), such as the Developmental Edit. On August 13, 2010, Foster also received a form email ("August 13 Email") from her EC stating that she had been "flagged as a possible Editor's Choice title." The August 13 Email encouraged Foster to purchase the Developmental Edit, which promised to provide "a professional editor who is not only an expert in your genre, but is also drawn from the same pool of editors used in major traditional publishing. This editor will help you bring your manuscript up to the traditional publishing requirements and the evaluation requirements." (*Id.* ¶ 91.)

Over the phone in August and September of 2010, Wittkamper again strongly advised Foster to purchase the Developmental Edit in order to improve the quality and marketability of her book. (SAC ¶ 93.) Eventually, Foster purchased the Developmental Edit in March 2011. (*Id.* ¶ 95.) Ms. Foster informed Ms. Wittkamper that she could not afford the Development Edit, and AS arranged a payment plan for her. (Giskan Dec. Ex. 11, Foster Dep. 106.) When published, Foster's book contained numerous errors when published, such as odd formatting of paragraphs and grammar mistakes. (*Id.* ¶¶ 89, 97.)

On May 2, 2011, Foster was notified that her book had received the Editor's Choice designation. (SAC ¶ 96.) On June 2, 2011, Foster was informed that she had also received the Rising Star designation. (*Id.* ¶ 98.) In a June 21, 2011 email, the Rising Star Board notified Foster that she was required to purchase Marketing Services or "the Rising Star distinction will be removed from your title." (*Id.* ¶ 99.) This email was the first time Foster was made aware of the requirement, which Foster's Marketing Consultant, Brian Hallbauer, confirmed. (*Id.* ¶ 99.) Foster purchased a marketing package for $3,999.00, but AS failed to deliver the services promised in the marketing package and ultimately fully refunded Foster for the marketing package. *Id.* ¶¶ 99-100.

Ms. Foster is a single mother who invested in iUniverse with the hope of supplementing her income by selling her books. (Giskan Dec. Ex. 22. ¶ 12.)

Plaintiff Simmons

Plaintiff Simmons first learned of iUniverse in 2011 after conducting internet research. (*Id.* Ex. 12, Simmons Dep. 8-9.) On or about May 31, 2011, she purchased the Bookstore Premier Pro Publishing Package from iUniverse for her book *Corvus Rising: Part 1*. (SAC ¶ 13.) In or about February 2012, Plaintiff Simmons submitted her manuscript to iUniverse. (*Id.* Ex. 12, Simmons Dep. 13-14.)

In or about May 2012, Plaintiff Simmons purchased a Developmental Edit package for approximately $4659.78. (SAC ¶ 70.) Later, she also purchased a proofreading package for around $1,049 and spent an additional $450 for corrections of mistakes that still existed in her manuscript, but errors remained. (*Id.* ¶ 71-72.) She purchased these Editorial Services because she wanted her book to be eligible for the Editor's Choice Award. (Giskan Dec. Ex. 23, ¶ 5.) Plaintiff Simmons also filled out a Rising Star questionnaire because she believed that the Rising Star designation would help her market and sell her book. (*Id.* Ex. 12, Simmons Dep. 38.)

On or around December 13, 2012, Plaintiff Simmons purchased Marketing Services from iUniverse for $13,600. (Giskan Dec. Ex. 12, Simmons Dep. 36.) She purchased the package because she believed that the marketing services included in this package would help her book sales. (Giskan Dec. Ex. 23, ¶ 4.) The marketing services were delayed or not completed. (*Id.* Ex. 12, Simmons Dep. 23, 89-90.)

Procedural History

Plaintiffs Kelvin James, Terry Hardy, and Jodi Foster filed suit on behalf of a class of Authors on April 24, 2013. (Doc. No. 1.) Defendant moved to dismiss Plaintiff Hardy because,

among other reasons, his contract with Author Solutions contained an Indiana venue clause. In response, Plaintiffs filed a Second Amended Complaint on September 27, 2013 (Doc. No. 28), removing Mr. Hardy as a class representative and adding a new class representative, Mary Simmons. The SAC is the operative complaint in this action. Defendant moved to dismiss the action three times: on June 21, 2013 (Doc. No. 8); August 23, 2013 (Doc. No. 14); and, finally, on November 1, 2013, after Plaintiffs had filed the SAC. On April 11, 2014, this Court dismissed Penguin Group (USA) Inc. from this action, as well as Plaintiffs' unjust enrichment claim based on royalties, but upheld all other claims. (Doc. No. 50.) Plaintiff James withdrew from the suit on January 12, 2015. [20] (Doc. No. 92.) Discovery was completed on January 22, 2015.

ARGUMENT

I. ELEMENTS OF RULE 23(A) AND (B)(3) AND APPLICABLE STANDARDS

A party moving for class certification must meet the requirements of Rule 23(a) and, in addition, show that the action can be maintained under Rule 23(b)(1), (2), or (3). *Brown v. Kelly*, 609 F.3d 467, 475-76 (2d Cir. 2010). The requirements of Rule 23(a) are satisfied if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition, courts have read a fifth "implied requirement of ascertainability" with respect to the class definition. *In re Initial Pub. Offerings Sec. Litig. ("IPO")*, 471 F.3d 24, 30 (2d Cir. 2006).

[20] Among other claims, Plaintiff James brought a breach of contract claim for AS's failure to pay earned royalties. Defendant AS sent Plaintiff James a check on October 9, 2014 for $76.41, of which $58.13 should have been paid to Mr. James in 2009-2010 but was not.

Plaintiff moves for certification under Rule 23(b)(3). Certification under subsection 23(b)(3) is warranted if questions of law or fact "predominate over any questions affecting only individual members," and class resolution will be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Class certification is proper if "'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). As the Second Circuit explained in *IPO*:

> The Rule 23 requirements are threshold issues, similar in some respects to preliminary issues such as personal or subject matter jurisdiction. We normally do not say that a district court makes a "finding" of subject matter jurisdiction; rather, the district court makes a "ruling" or a "determination" as to whether such jurisdiction exists . . . . The same approach is appropriate for Rule 23 requirements. For example, in considering whether the numerosity requirement is met, a judge might need to resolve a factual dispute as to how many members are in a proposed class.

471 F.3d at 40.

While a district court should resolve any disputed factual issues necessary to making its determination that the requirements of Rule 23 have been satisfied, the "district court should not assess any aspect of the merits unrelated to a Rule 23 requirement." *Id.* at 41; *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.").

As demonstrated below, class certification is appropriate here.

II. THE CLASS IS ASCERTAINABLE AND THE REQUIREMENTS OF RULE 23(A) ARE READILY MET

A. THE CLASS IS ASCERTAINABLE

"Although not derived from the plain language of Rule 23(a), courts have held that in order for a class to be certified, the named plaintiffs must demonstrate that there is an 'identifiable

class,'" which is often referred to as "ascertainability." *Cortigiano v. Oceanview Manor Home for Adults*, 227 F.R.D. 194, 207 (E.D.N.Y. 2005). An "identifiable class exists" if members can be ascertained by reference to "objective criteria" and it is "administratively feasible" for a court to determine. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 337 & n.20 (S.D.N.Y. 2002) (citations omitted); *see also* Manual for Complex Litigation (Fourth) § 21.222 (2004) ("An identifiable class exists if its members can be ascertained by reference to objective criteria . . . . [M]embership in a Rule 23(b)(3) class ordinarily should be ascertainable when the court enters judgment.").

Here, Defendants' own records will identify the members of the Class. Accordingly, the proposed class definition here is based on objective criteria and meets the implied requirement of ascertainability.

B. THE PROPOSED CLASS SATISFIES RULE 23(A)

1. The Proposed Class Is Sufficiently Numerous

The first requirement under Rule 23(a) is that the class must be "so numerous that joinder is impracticable." Fed. R. Civ. P. 23(a)(1). "'Impracticable,' in this context, does not mean impossible; instead Rule 23(a)(1) only requires that, in the absence of a class action, joinder would be 'simply difficult or inconvenient.'" *Assif v. Titleserv, Inc.*, 288 F.R.D. 18, 23 (E.D.N.Y. 2012) (citations omitted); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Impracticable does not mean impossible."); *Nw. Nat'l Bank of Minneapolis v. Fox & Co.*, 102 F.R.D. 507, 510 (S.D.N.Y. 1984) (numerosity requires that the court "find that the difficulty or inconvenience of joining all members of the class makes class litigation desirable") (citations omitted). Additionally, "[c]ourts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement." *Robidoux*, 987 F.2d at 935.

AS has published the books of 170,000 authors. Given that "courts within the Second Circuit generally presume that joinder of all putative class members is impracticable if the class has more than forty members," *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 99 (E.D.N.Y. 2012), and the large populations of California and Colorado, this easily satisfies the numerosity requirement. *See also Robidoux*, 987 F.2d at 935-36 (class size of 40 or more may satisfy numerosity). Plaintiffs do not expect that numerosity will be contested.

2. There Are Common Questions Of Law And Fact

Rule 23(a)'s second requirement is the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To establish commonality, a plaintiff must identify an issue of fact or law whose resolution "is central to the validity of each" class member's claim. *Wal-Mart*, 131 S. Ct. at 2551. "The common question must lend itself to 'classwide resolution' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Sykes v. Mel Harris & Assocs. LLC*, 285 F.R.D. 279, 286 (S.D.N.Y. 2012) (quoting *Wal-Mart*, 131 S. Ct. at 2551), *aff'd*, 2015 U.S. App. LEXIS 2057 (2d Cir. Feb. 10, 2015). The requirement is satisfied by "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart*, 131 S. Ct. at 2551 (internal citation, emphasis and quotation marks omitted). "[E]ven a single common question" will suffice to establish commonality. *Id.* at 2556 (internal quotation marks omitted); *see also Brown*, 609 F.3d at 475 ("commonality requirement is met if there is a common question of law or fact shared by the class"); *Vitamin C Antitrust Litig.*, 279 F.R.D. at 99 ("A single common question of law or fact may suffice to satisfy this requirement if the question is capable of giving rise to a common answer through a class action."). "'[T]he individual circumstances of the class members can differ without precluding class certification,' so long as 'the common questions are at the core of the cause of action alleged.'" *Assif*, 288 F.R.D. at 23 (citations omitted).

This case involves a number of common questions of law and fact, including the following:

(a) Whether Defendant engaged in deceptive practices in violation of California's Unfair Competition Law, Business and Professions Code §§ 17200, *et seq.*, 17500, *et seq.*, ("UCL") and Colorado's Deceptive Trade Practices Act, Colo. Rev. Stat. § 6-1-105 (1)(u);

(b) Whether Defendant's representations of its Publishing Packages or Services have the capacity, tendency, or effect of deceiving or misleading consumers;

(c) Whether Defendant's representations relating to its Publishing Packages or Services suggest a sponsorship, approval, status, affiliation, or connection which it does not have;

(d) Whether Plaintiffs and the Class were injured as a result of Defendants' deceptive conduct;

(e) Whether Plaintiffs and the Class have conferred a benefit upon Defendant;

(f) Whether it is inequitable for Defendant to retain payment for Services that it misrepresented;

(g) Whether Defendant acted in such a manner as to prevent Plaintiffs and members of the Class from receiving the benefits of their contracts;

(h) Whether AS deceptively marketed its Publishing Packages and other Services;

(i) Whether a reasonable person would have purchased marketing services from AS if AS had disclosed that it knew of no correlation between its Services and sales;

(j) Whether a reasonable person would have purchased packages or other Services if AS had disclosed that its "consultants" were commissioned salespeople; and

(k) Whether a reasonable person would have purchased the Services had AS disclosed what it knew about their value.

These common questions are central to the litigation, and the answers to these questions will be fundamental to the resolution of the case. Accordingly, the commonality requirement is satisfied.

3. Plaintiffs' Claims Are Typical Of Those Of Other Class Members

The claims of the class representative must be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (citations omitted). "The typicality analysis focuses on whether the named plaintiff's interests align with the interests of the rest of the class." *Vitamin C Antitrust Litig.*, 279 F.R.D. at 105. "The purpose of this analysis is to ensure that, by prosecuting its own case, the named plaintiff simultaneously advances the interests of the absent class members.'" *Id.* (citations omitted). Typicality "does not require complete symmetry between the class representative's claims and those of the absent class members, but "[r]ather, the named plaintiff must simply raise claims that 'arise from the same course of events' as the class claims and make 'similar legal arguments to prove the defendant's liability.'" *Id.* (citations omitted).

Plaintiff Foster alleges the same deceptive practices as the Class. AS represented to her that AS would get her book "primed for retail success" and bombarded her with repeated calls from various "consultants" to encourage her to buy more Services. Enticed by the possibility of attaining Editor's Choice and Rising Star, Ms. Foster invested in Services, but errors remained in her book. Despite her Rising Star status, her book sales were abysmal. Plaintiff Simmons also alleges the same deceptive practices as the Class. AS made the same representations to her and put Ms. Simmons through the same revenue-maximizing sales scheme as the Class, but her published book contained errors and the Services failed to drive sales. Both Plaintiffs Foster and Simmons reasonably believed that the Services they purchased would get them "primed for retail success," would produce a book comparable in quality to a traditional publisher, and were reasonably designed to drive sales.

4. Adequacy Is Satisfied

The final requirement of Rule 23(a) is that the representative party must fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). Adequacy is a two-pronged analysis: (1) the named plaintiff must not have claims antagonistic to or in conflict with other class members, and (2) class counsel must be qualified, experienced, and generally able to conduct the litigation. *See Marisol A.*, 126 F.3d at 378.

As to the first prong, "[i]n order to defeat a motion for certification, . . . the conflict 'must be fundamental.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (citations omitted); *see also Joel A. v. Guiliani*, 218 F.3d 132, 139-40 (2d Cir. 2000) (no "obvious conflict" found); *Vitamin C Antitrust Litig.*, 279 F.R.D. at 102 ("[A] conflict of interest will not destroy adequacy under Rule 23 unless the conflict is 'fundamental' and concrete; conflicts which are merely "speculative . . . should be disregarded at the class certification stage.'" (citations omitted)).

Here, Plaintiffs' interests do not conflict with those of the absent class members, Plaintiffs do not have any interests antagonistic to those of the other class members, and they are committed to the vigorous prosecution of this action. "The fact that plaintiffs' claims are typical of the class is strong evidence that their interests are not antagonistic to those of the class; the same strategies that will vindicate plaintiffs' claims will vindicate those of the class." *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 158 (S.D.N.Y. 2008). Plaintiffs' interests are aligned with other class members, as they seeks damages from Defendant's deceptive scheme.

As to the second prong, Plaintiffs are represented by experienced and able counsel who are highly experienced in handling class actions, particularly large complex class actions involving complicated legal and factual issues. *See* Firm Resume, attached as Exhibit 21 to the Giskan Dec. Since counsel have pursued this matter vigorously and competently on behalf of Plaintiffs and all

other members of the putative class, the second prong of 23(a)(4) analysis is satisfied. *See Marisol A.*, 126 F.3d at 378 ("Rule 23(a)(4) requires that plaintiffs demonstrate that class counsel is qualified, experienced, and generally able to conduct the litigation.") (internal quotation marks and citation omitted).

III. THE REQUIREMENTS OF RULE 23(B)(3) ARE MET

Rule 23(b)(3) requires a finding of "predominance" and "superiority"; i.e., a finding that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether these requirements have been met, the court should consider the issue of manageability, which is "peculiarly within a district court's discretion." *Seijas v. Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010).

A. Common Questions Of Law Or Fact Predominate As To Plaintiff's Claims

"The predominance requirement is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.'" *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (citations omitted), *cert. denied*, 134 S. Ct. 1938 (2014). The purpose of the predominance inquiry is to allow the Court to determine whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997); *accord Brown*, 609 F.3d at 476; *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006). The predominance test "asks whether a class suit for the unitary adjudication of common issues is economical and efficient in the context of all of the issues in the suit." 2 A. Conte & H. Newberg, Newberg on Class Actions § 4.25, p. 156 (4th ed. 2002). "Rule 23(b)(3) requires a showing that

questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen*, 133 S.Ct. at 1191.

Here, there are numerous common questions of law or fact, *see* Section III.B.2.a, above, that predominate over any issues affecting only individual class members. The central question in this case is whether Author Solutions deceptively marketed its packages and services to authors. The practices alleged here applied equally to all members of the Class, as AS made false, untrue, or misleading statements and concealed material facts from Authors in order to sell them packages and services. Because "Rule 23 seeks greater efficiency via collective adjudication and, relatedly, greater uniformity of decision as to similarly situated parties," the Second Circuit has stated "that when plaintiffs are 'allegedly aggrieved by a single policy of defendants,' such as the blanket policy at issue here, the case presents 'precisely the type of situation for which the class action device is suited' since many nearly identical litigations can be adjudicated in unison.'" *Nassau Cnty. Strip Search Cases*, 461 F.3d at 228 (citations omitted).

The resolution of Plaintiffs' claims will establish Defendant's liability for deceptive practices as to all members of the class. Although individual damages may have to be calculated as to the class members, this does not defeat predominance. *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 305 (E.D.N.Y. 2006)*; see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."), *superseded on other grounds by rule*, Fed. R. Civ. P. 23(g), *as stated in Attenborough v. Const. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006).

Accordingly, the requirement of predominance is satisfied.

B. A Class Action Is The Superior And Most Efficient Method For Adjudicating This Action

Rule 23(b)(3) provides that certification is warranted if a class-wide trial is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "Rule 23(b)(3) class actions can be superior precisely because they facilitate the redress of claims where the costs of bringing individual actions outweigh the expected recovery." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d at 130. "Other factors relevant to a finding of superiority include the manageability of a class action and the desirability of litigating the claims in a particular forum." *Vitamin C Antitrust Litig.*, 279 F.R.D. at 110; *see also* 5 J. Moore et al., Moore's Federal Practice - Civil § 23.46[1] (3d ed. 2011) ("In determining superiority, courts must consider alternative methods of adjudicating the dispute. Superiority is determined by comparing the efficiency and fairness of all available methods of adjudicating the matter.").

Here, class certification is far more fair and efficient than any other procedure available for resolving the factual and legal issues raised by Plaintiffs' claims. Denying certification would lead to hundreds if not thousands of cases challenging the same core deceptive practices. AS's practices affected every author who purchased a publishing package or Marketing Service. By combining all of class members' claims challenging Defendant's deceptive practices, those claims are presented far more efficiently than they would be in individual actions, which would require the same issues to be litigated multiple times.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for Class Certification.

Dated: New York, New York
February 13, 2015

s/ Oren Giskan

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