

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division  
CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually  
and IDAZ GREENBERG, individually,  
  
Plaintiffs,

v.

NATIONAL GEOGRAPHIC SOCIETY, a  
District of Columbia corporation,  
NATIONAL GEOGRAPHIC ENTERPRISES,  
INC., a corporation, and MINDSCAPE, INC., a  
California Corporation,

Defendants.

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' DEMAND FOR A JURY**

Defendants National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc., (collectively the "Society"), by their attorneys, Weil, Gotshal & Manges LLP, respectfully submit this Reply Memorandum of Law in support of their Motion to Strike Plaintiffs' demand for a jury trial on the issue of damages.

**ARGUMENT**

**I. PLAINTIFFS' JURY DEMAND WAS UNTIMELY.**

No legal authority is necessary to conclude that Plaintiffs' jury demand was not timely filed. A timely jury demand is linked to the last pleading. As a result of Plaintiffs' own actions, the pleading on which they base their "timely" filing was stricken and it is not, therefore, a pleading. See INVST Fin. Group, Inc., v. Chem-Nuclear Systems, Inc., 815 F.2d 391, 404 (6th Cir. 1987); Owen v. Mark Twain Boat Co., Inc.,

1990 WL 70418, \* 3 n.3 (N.D.Ill. 1990). Had the Society failed to file an answer altogether, there would be no question that the demand was untimely pursuant to Rule 38 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 38(b).

It is immaterial that “[a] jury trial as to statutory damages was not authorized under any law until the Supreme Court decided Feltner on March 31, 1998.” (Pl. Mem. p.4). A jury trial on liability and compensatory damages was certainly available when Plaintiffs filed their complaint, yet they did not demand one. See Feltner v. Columbia Pictures Television, 523 U.S. 340, 346 (1998) (citing 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.10[B] (1997)).

**II. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE ENTITLED TO A JURY TRIAL PURSUANT TO RULE 39(b).**

The Court should deny Plaintiffs’ motion pursuant to Rule 39(b) of the Federal Rules of Civil Procedure. In deciding the motion, the Court must give considerable weight to the movant’s excuse for failing to make a timely demand. Parrott v. Wilson, 707 F.2d 1262, 1267-68 (11th Cir. 1983). Plaintiffs’ only argued “excuse” for failing to make the demand until four years after the last timely pleading is that a jury trial on statutory damages was not authorized until the Supreme Court’s decision in Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998). (Pl. Mem. p. 4). As established above, Plaintiffs could have demanded a jury trial on all triable issues within ten days of the amended complaint. Fed. R. Civ. P. 38.

Moreover, contrary to Plaintiffs’ assertion, the Supreme Court did not hold that statutory damages are best tried by a jury. The Court simply held that there was a constitutional right to a jury on issues regarding statutory damages. Feltner, 523 U.S. at 355. Indeed, if Plaintiffs’ argument were adopted, there would never be an analysis of

whether a particular case was best tried by a jury. The right to a jury trial would make that analysis unnecessary.

Finally, Plaintiffs merely proclaim that they will be prejudiced by the denial of a jury that has been sanctioned by the Supreme Court. (Pl. Mem. p. 5). No reasons are given. Here, too, if merely being denied a jury trial is sufficient prejudice, there would never need to be a formal analysis under Rule 39(b).

For all the same reasons stated in the Memorandum of Law in Support of the Motion to Strike Plaintiffs' Demand For a Jury, the issue of statutory damages is not best tried by a jury, and there is no reason why Plaintiffs' four year delay in filing, what under the Federal Rules is an untimely jury demand, should be sanctioned by this Court.

#### CONCLUSION

For the foregoing reasons, the Society respectfully requests that the Court grant its motion to strike Plaintiffs' demand for a jury trial.

Dated: New York, New York  
October 24, 2002

Respectfully submitted,



EDWARD SOTO, ESQ. (265144)

[edward.soto@weil.com](mailto:edward.soto@weil.com)

JENNIFER ATOR, ESQ.

[jennifer.ator@weil.com](mailto:jennifer.ator@weil.com)

WEIL, GOTSHAL & MANGES LLP

701 Brickell Avenue

Suite 2100

Miami, Florida 33131

Telephone: (305) 577-3100

Facsimile: (305) 374-7159

and

ROBERT G. SUGARMAN, ESQ.

[robert.sugarman@weil.com](mailto:robert.sugarman@weil.com)

NAOMI JANE GRAY, ESQ.

[naomi.gray@weil.com](mailto:naomi.gray@weil.com)

WEIL, GOTSHAL & MANGES LLP

767 Fifth Avenue

New York, NY 10153-0119

Telephone: (212) 310-8000

*Attorneys for Defendants*

National Geographic Society, National

Geographic Enterprises, Inc. and

Mindscape, Inc.

and

Terrence B. Adamson, Esq.

[tadamson@ngs.org](mailto:tadamson@ngs.org)

Executive Vice President

National Geographic Society

1145 17th Street, N.W.

Washington, D.C. 20036-4688

Of Counsel

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that the foregoing has been sent by mail this <sup>24<sup>th</sup></sup> day of October, 2002 to Norman Davis and David A. Aronberg, Steel Hector & Davis LLP, 200 South Biscayne Boulevard, 40th Floor, Miami, Florida 33131-2398, attorneys for Plaintiffs.

By: Jennifer A. Ator  
Jennifer Ator, Esq. (0120911)  
[jennifer.ator@weil.com](mailto:jennifer.ator@weil.com)  
WEIL, GOTSHAL & MANGES LLP  
701 Brickell Avenue  
Suite 2100  
Miami, FL 33131  
(305) 577-3100  
Attorneys for Defendants