

05-5943-cv

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

IN RE LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT
LITIGATION

IRVIN MUCHNICK, ET AL.,
Objectors-Appellants

MICHAEL CASTLEMAN INC., ET AL.,
Plaintiffs-Appellees

THOMSON CORPORATION, ET AL.,
Defendants-Appellees.

(For Full Caption See Inside Cover)

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR OBJECTORS-APPELLANTS

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Full Caption

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Objectors-Appellants,

v

MICHAEL CASTLEMAN INC., E. L. DOCTROW, TOM DUNKEL, ANDREA DWORKIN, JAY FELDMAN, JAMES GLEICK, RONALD HAYMAN, ROBERT LACEY, PAULA McDONALD, P/K ASSOCIATES, INC., LETTY COTTIN POGREBIN, GERALD POSNER, MIRIAM RAFTERY, RONALD M. SCHWARTZ, MARY SHERMAN, DONALD SPOTO, ROBERT E. TREUHAFT AND JESSICA L. TREUHAFT TRUST, ROBIN VAUGHN, ROBLEY WILSON, MARIE WINN, NATIONAL WRITERS UNION, THE AUTHORS GUILD, INC. AND AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,

Plaintiffs-Appellees,

THOMSON CORPORATION, DIALOG CORPORATION, GALE GROUP, INC., WEST PUBLISHING COMPANY, INC., DOW JONES & COMPANY, INC., DOW JONES REUTERS BUSINESS INTERACTIVE, LLC, KNIGHT RIDDER INC., KNIGHT RIDDER DIGITAL, MEDIASTREAM, INC., NEWSBANK, INC., PROQUEST COMPANY, REED ELSEVIER INC., UNION-TRIBUNE PUBLISHING COMPANY, NEW YORK TIMES COMPANY, COPLEY PRESS, INC. AND EBSCO INDUSTRIES, INC.

Defendants-Appellees.

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PRELIMINARY STATEMENT

This appeal is from a judgment of the Southern District of New York, the Hon. George Daniels. The decision is not reported. The appeal is by class members who objected to a class action settlement.

JURISDICTIONAL STATEMENT

The actions arose under the Copyright Act, 17 U.S.C. § 101 et seq. Jurisdiction exists under 28 U.S.C. §§ 1331 and 1338. The judgment approves a class action settlement. It is appealable. 28 U.S.C. § 1291. Judgment was entered September 28, 2005. Notice of appeal was filed October 24, 2005. (A-1821)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was it an error of law to approve a settlement which grants defendants and non-parties an irrevocable license to class members' copyrights? This issue presents a novel question of law: Does a class representative have the capacity to bind class members to a license of their copyrights?

2. Was it an abuse of discretion as a matter of law to find the class representatives of a unitary settlement class adequate under Rule 23(a)(4) when:

a portion of the class, owners of unregistered copyrights, had no separate representation despite conflicting interests with the class representatives;

the settlement favors a tiny portion of the class containing the class representatives (registered copyrights) to the prejudice of the vast majority of the class (unregistered copyrights); and

the settlement abandons part of the class?

3. Was it an abuse of discretion as a matter of law to approve the settlement as fair and reasonable under Rule 23(e) when:

it abandons a subset of class member claims;

it grants a class-wide license for the use and sublicensing of class members' copyrights without compensation to, or agreement by, the class members, and;

it unreasonably and unfairly favors the owners of registered copyrights at the expense of unregistered copyright owners?

4. Was it an error of law under Rule 23 and a denial of Due Process to:

to use a Notice that fails to describe the copyright license grant by non-claimant class members;

to require that class members personally appear at the fairness hearing as a condition to making an objection;

to grant preliminary approval to a settlement, without a preliminary determination that the settlement is fair, adequate and reasonable under Rule 23(e)?

5. Does the district court's failure to provide any analysis, particularly in light of substantial objections, prevent review for abuse of discretion and require a remand?

STATEMENT OF THE CASE

This appeal involves four cases. Three of them, filed in 2000, were consolidated. (A-94) The fourth, *The Authors Guild, Inc. et al. v. The New York Times Company* (hereafter "NYT"), No. 01 CV 6032, was filed in 2001.¹ (A-83) A consolidated complaint ("Consolidated Complaint") for the three cases was filed September 26, 2001. (A-103) NYT was coordinated with the consolidated cases. (A-95)

The Consolidated Complaint is by 21 individuals and three organizations, The Authors Guild, Inc. ("Guild"), the National Writers Union ("NWU") and the American Society of Journalists and Authors ("ASJA"). (A-106-110) The defendants are corporations alleged to operate databases. (A-111-114) It alleges copyright infringement and seeks damages and injunctive relief. (A-118-123) The complaint in NYT is by the Guild and two individuals. (A-84-86) The New York Times is alleged to operate a database. (A-85) This action alleges copyright infringement and seeks damages and injunctive relief. (A-89-91)

¹ Objectors note a procedural anomaly concerning the judgment and this appeal. The plaintiffs in the NYT case are an organization, The Authors Guild, Inc., and two individuals, Derrick Bell and Lynn Brenner. None are class representatives for settlement. (A-339) Objectors did not observe or raise this below.

The 2001 pretrial order specified the time to answer or otherwise respond. (A-97, ¶ 11; A-98, ¶ 12) No responsive pleadings were ever filed. There was no mandatory case scheduling order in either action. Fed. R. Civ. Pro. 16(b). Between November 2001 and March 31, 2005, there was no activity in the consolidated action except changes of address, admissions and withdrawals of counsel. (A 3-6) In the NYT action there was no activity until October 14, 2004, when there was an pre-trial conference at which the parties said a settlement would soon be presented. (A-20B)(A-195-197)

On March 31, 2005, the plaintiffs sought preliminary approval of a settlement. (A-7, Docket No. 29) They appeared the same day. (A-415) The motion was granted. (A-418-425) Objector Muchnick moved to vacate preliminary approval and to establish revised procedures for settlement approval. (A-8, Docket No. 54) The motion was denied. (A-616) Objectors sought information about the settlement, including the damage study. (A-671) The request was denied. (A-705) Objectors filed objections. (A-728) On July 26, 2005, plaintiffs sought preliminary approval of an amendment. (“Amendment”) (A-12, No. 94) It was granted. (A-1126) Objectors filed a motion for discovery, again seeking, *inter alia*, the damages study. (A-1234) It was denied. (A-17, No. 148) Objectors filed additional objections. (A-1188; A-1247; A-1721) The parties filed pleadings supporting final approval. (A-16, Nos. 128-136, 139-141) On September 27, 2005, the court

conducted a hearing and announced its approval of the settlement. (A-1739) Orders approving the settlement and denying objectors' motions for discovery were entered. (A-17, Docket Nos. 148 & 149)

STATEMENT OF FACTS

I. The Background of the Litigation.

This litigation stems from this Circuit's decision in *Tasini* which was affirmed by the Supreme Court. *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, *New York Times Co., Inc. v. Tasini*, 533 U.S. 483 (2001)(“*Tasini*”). In *Tasini* the Court said that the first publisher of a literary work written by a “freelancer” (a non-employee writer) does not, absent an explicit agreement, obtain the rights to republish the work, except in certain limited ways. 533 U.S. at 499, 506. This resulted from changes made by the 1976 Copyright Act, particularly 17 U.S.C. § 2019(c). *Id.* This applied to the practice of periodicals of obtaining articles from freelance writers. The problem giving rise to *Tasini*, and these actions, was that publishers have been selling copies of the articles to database companies for republication and distribution.

II. The Scope of the Class.

The class consists of every person who owns the copyright to a literary work that has, at any time after August 15, 1997, without the owner's permission, resided on the digital storage of any of the database defendants. (A-335, ¶ 1.f.) The

class definition uses the terms “has been reproduced, displayed, adapted, licensed, sold and/or distributed in any electronic or digital format.” In practical terms the most inclusive qualification is simply that the work have been “in” the database. “Inclusion” in the database is an infringing act. *Tasini*, 533 U.S. at 487.

The date the work was written is irrelevant. The date the work was placed in the database is irrelevant, so long as it was in the database after August 15, 1997. The work need not be in the database at any particular time so long it was “any time on or after August 15, 1997.” (A-336, ¶ 1.f.) Nor is the class limited to works appearing in the defendants’ databases. It also includes works in any database of the defendants’ “subsidiaries, affiliates, or licensees.” (*Id.*). They are not identified. There has been an extensive pattern of licensing the content of the databases, over many years, by the database defendants. (A-431-436; A-1056-1057; A-1059-1060, ¶ 14-16; A-1063, ¶ 21; A-1285-1287)

Publishers began to place the articles in databases in the early 1980s. There is nothing in the record to indicate that is the only way that covered works came to be in a database. The parties placed a list of publications covered by the settlement on a settlement website. The list has over 26,000 publications.² A quick sampling

² The list of publications is Exhibit B to the Decl. of Irvin Muchnick, Docket No. 86. It is not in the Appendix because it is hundreds of pages. It can be viewed on the Internet at <http://cert.gardencitygroup.com/edb/fs/publications>. It is the list named “Original.”

shows that many are not periodicals. For instance, the list contains 35 encyclopedias, including: The World Book Encyclopedia, The Columbia Encyclopedia and Funk & Wagnall's New Encyclopedia.

There is no information about the size of the class, either in terms of copyright owners, or covered works, except that the settlement involves over 26,000 publications.

The identity of class members is largely unknown. The defendants stated that identification is difficult if not impossible. (A-1589, fnt3) The plaintiffs stated that publications “typically do not maintain records of their freelance contributors” (A-222) This was confirmed when publishers submitted declarations about their efforts to identify class members. The Hearst Corporation, publisher of 20 newspapers and 24 magazines, had only manual records for prior to 1993 and it did not search them. (A-289, ¶ 6.) It had some information for 1993 to 1997. (*Id.*) Time Inc., the largest magazine publisher in the world, began putting content on the databases in 1982. (A-264-266) It developed a list of 1877 names but it could not provide addresses. (A-268) The New York Times, publisher of 18 newspapers, started placing materials on databases in 1980, but could find very little identifying information for any newspaper. (A-321-326) Chicago Tribune found some information for 6 papers, and none for 7 papers. (A-295-297) The other publishers reported similar experiences. The address problem was confirmed by the notice

program. Of 46,385 notices sent out by mail 13,274 were returned as undeliverable without a forwarding address. (A-1539)

III. The Proceedings and Settlement Negotiations.

The cases were pending for more than four years. There was no litigation. The only motion was for settlement approval. There were no discovery procedures, although the defendants provided information during a mediation. (A-1567-1568, ¶ 4, 5)

The Consolidated Complaint is brought by plaintiffs who own registered copyrights. (A-106-108) It alleges that it is brought on behalf of persons “similarly situated.” (A-105, ¶ 7., A-115, ¶ 55.) NYT is brought by plaintiffs who own registered copyrights. (A-85) It alleges a class holding registered copyrights. (A-87, ¶ 12.)

Settlement negotiations began in 2001. (A-1405) Defendants said that a settlement would have to resolve all infringements by publishers or databases and would have to provide “complete peace.” (A-1569, ¶ 6.) They wanted a “global” settlement. (A-1598) This requires that the settlement include owners of unregistered copyrights. The defendants also required a license for class member copyrights. (A-1555)

At the outset the defendants established that registered copyright owners were a tiny portion of all freelance writers. (A-1597-1598) Less than .08%

registered their copyrights. (*Id.*) The defendants said they would oppose any effort of the plaintiffs to represent a class including unregistered copyright owners on the grounds of inadequate representation. (A-1598-1599) They asserted that plaintiffs did not have claims “typical” (as required by Rule 23) of the unregistered owners. (A-1608) However, the defendants were willing to overlook these issues if the matter was settled. (A-1599, ftnt 12.)

The principal negotiators, aside from counsel, were executives of the Associational Plaintiffs. (A-610, ¶ 9.) The organizations do not have claims, and are not members of the class. (A-339, ¶ 1.p.)

IV. The Approved Settlement.

The Settlement Agreement (“Agreement”) creates a defined class, provides a settlement fund, and further provides three categories of compensation. Class members must file claims for compensation. There are two alternative settlement funds, the one to be used being determined by the total value of claims. The Agreement has a complex procedure by which publishers who provided articles to the databases can contribute to the settlement fund and receive the settlement release and copyright license.

Before summarizing the principal features it is necessary to describe some terms used in the Agreement, and to identify the shorthand references used herein.

1. “Database Defendants” are the defendants who operate databases. (A-336, ¶ 1.h.) It does not include two publisher/defendants, The New York Times and The Copley Press.
2. “Defense Group” is the “Defendants” and the “Participating Publishers.” (A-333)
3. “Participating Publishers” are those publishers identified on Exhibit A to the Agreement, and other publishers who agree within three days after preliminary approval to contribute to the settlement. (A-337, ¶ 1.k.) Exhibit A lists 36 publishers. (A-381) There is nothing to indicate if others made the necessary agreement.
4. There are two more terms for publishers. These are “Preliminary Supplemental Participating Publishers” (“Preliminary SPP”) and “Supplemental Participating Publishers” (“SPP”). (A-337-338, ¶ 1.m.) Preliminary SPP are publishers, besides the Participating Publishers, who supplied literary works to any database. (*Id.*) The Preliminary SPP “may” contribute to the settlement. (A-333) There is no identification of the Preliminary SPP. There are 26,000 publications, but there is no way to correlate those publications with publishers. (*See*, ftnt 2, *supra*) Somehow the Claims Administrator is to find out who Preliminary SPP are, and after all claims are processed the Administrator will produce a report showing how much each Preliminary SPP owes to the settlement. (A-341, ¶ 3.c.) If a

Preliminary SPP does not pay, it is “delisted” and does not become a SPP. SPPs by inference are the Preliminary SPPs who pay. (A-341-342, ¶ 3.d.)

Objectors will refer to all types of publishers as Publishers. For purposes of the appeal there is no difference between defendant publishers, Participating Publishers and SPP.

A. The Class and Compensation.

The settlement creates a class defined, in pertinent part, as:

“All persons who, individually or jointly, own a copyright ... in an English language literary work that has been reproduced, displayed, adapted, licensed, sold and/or distributed in any electronic or digital format, without the person’s express authorization by a member of the Defense Group or any member’s subsidiaries, affiliates, or licensees”

(A-335-336, ¶ 1.f.) This includes registered and unregistered copyrights. The settlement provides compensation in three categories, A, B and C.³ They are distinguished by whether, and when, the copyright was registered. (A-345) The size of Category B and C awards depends on the original sale price of the work. (A-345)

“A” claims are for works eligible for statutory damages under 17 U.S.C. § 412 (2). (A-345, ¶ 4.a.) The basic “A” award is \$1500 per work. (*Id.*) After the 15th work for a single publisher additional works receive \$1200, and after the 30th work the award is \$875. (*Id.*)

³ The Settlement Agreement defines the works that are eligible as “Subject Works.” (A-335-336, ¶ 1.f.) The term “works” is used herein.

“B” claims are for works registered before December 31, 2002, but not eligible for statutory damages. (*Id.*) These claims receive the greater of \$150 or 12.5% of the original sale price. “C” claims are all other works, meaning primarily unregistered. (*Id.*) Unregistered copyrights constitute more than 99% of the class. (A-218; A-1434; A-1597) “C” claims are compensated by an awkward system of flat payments, as shown here:

Price Paid for Article	B Gets	% of price	C Gets
\$250	\$150		\$25
\$500	\$150		\$25
\$1000	\$150		\$40
\$1200	\$150	12.5%	\$40
\$1300	\$162.50	12.5%	\$40
\$1500	\$187.50	12.5%	\$40
\$1800	\$225	12.5%	\$40
\$2000	\$250	12.5%	\$50
\$2500	\$312.50	12.5%	\$50
\$2800	\$337.50	12.5%	\$50
\$3000	\$362.50	12.5%	\$60
\$4000	\$500	12.5%	\$60
\$5000	\$625	12.5%	\$60

All awards are 65% for past infringement and 35% for future use. (A-348, ¶ 5.a.) A class member filing a claim can deny future use and receive only 65%.

The Agreement has a provision (hereafter “C Reduction”) which reduces the awards to C claimants only, should the total of all claims exceed the net settlement fund. (A-346, ¶ 4.f.)

B. The Settlement Fund.

The settlement fund is either \$10 million, or up to \$18 million, depending upon the value of all claims. (A-340, ¶ 3.a.) One million is the cost of Notice, so the net settlement fund is \$9 million or up to \$17 million. (*Id.*) Costs of administration, capped at \$800,000, and attorneys' fees of \$4.4 million are deducted from the fund. (*Id.*)

The cutoff for the settlement to be \$10 million is claims of \$3.8 million. $\$3.8\text{M (claims)} + .8\text{M (administration)} + 1\text{M (notice)} + \$4.4\text{M (attorneys' fees)} = \10M . If claims exceed \$3.8M the settlement is the amount of filed claims, plus administration, notice and attorneys' fees, up to \$18 million. In that case, the maximum fund available for claims is approximately \$11.8 million ($\$18\text{ M} - \$1.0\text{M} - \$0.8\text{ M} - \4.4 M). If the total claims exceed \$11.8 million, the C Reduction reduces C awards until total claims are below the \$ 11.8 million. (A-346, ¶ 4.f.)

C. The License of Class Member Copyrights.

The Agreement provides the Defendants and Publishers with a license of all copyrights within the class definition. (A-348-349, ¶ 5.a. and b.; A-359, ¶ 13.b., as amended by A-1102, ¶ 2) The license allows Defendants and Publishers to grant sublicenses, and to authorize the sublicensee to grant further licenses. (A-1102, ¶ 2.) The Agreement and Notice provide that a class member filing a claim can deny the right of future use. (A-348, ¶ 5.a.(Agreement); A-754-755, ¶ 5 (Notice))

However, all class members, except claimants who deny the right to future use, grant the Defendants and Publishers an irrevocable license. (A-359, ¶ 13.b., as amended by A-1102, ¶ 2) The right to deny future use is expressly restricted to those making claims. (A-348, ¶ 5.a.) The right of claimants to deny future use is described in the Notice. (A-754-755, ¶ 5) The fact that class members who do not file claims will grant the license is not described in the Notice.

The Notice states that only the Defendants and Publishers who were alleged to infringe have the right of future use. (A-755-756, ¶ II.D.3) The Amendment expanded the license by stating that Defendants and Publishers could sublicense, without limitation (“to any person”), and grant sublicenses the right to grant further sublicenses. (A-1102, ¶ 2) A supplemental notice was sent out advising that an amendment had been made which “clarifies the nonexclusive license” to make clear that the Defendants and Publishers can license to anyone. (A-1117, ¶ II.) There is no mention of a “license” and “nonexclusive license” in the original Notice.

V. The Objections.

Portions of the class were inadequately represented, the settlement is unfair, certain provisions demonstrate collusion “on the face” of the settlement, the license is barred as a matter of law and the Notice and the settlement approval procedures were a denial of Due Process.

A. Abandonment of Part of the Class Shows Inadequate Representation and Is Unfair.

The Notice states that no claims are allowed for “[works in] scientific and research-oriented medical journals.” (A-752, ¶ I.B.1.)(hereafter “scientific/medical works”) The Agreement releases all claims for works within the class definition and grants a license for the copyrights in those works. (A-358-361, ¶ 13.) The scientific/medical works are clearly in the class definition which covers all English language literary works. (A-335-336, ¶ 1.f.)

Long after objections were filed the plaintiffs said that they never intended to release those claims. (A-1471, ¶ 18) They submitted a judgment which states:

7. The releases contained in the Settlement Agreement are hereby effective, with the following provision: No claims shall be released with respect to works published in scientific or research-based medical journals.

(A-1382, ¶ 7.) No explanation was offered for the change from “research-oriented” as used in the Notice, to “research-based” as used in the judgment.

B. The Category C Reduction Shows Inadequate Representation and Is Unfair.

If total claims for all three categories exceed the \$18M settlement fund, Category C awards are reduced until the total of the A and B claims at full value, and the C claims at a reduced value, is equal to the net settlement fund. (A-346, ¶ 4.f.) The A and B awards are not affected until all C claim awards are reduced to zero. (*Id.* “Category C claims, and then, only if necessary, the Category B and

Category A claims will be reduced”) The approximate amount of total claims which would trigger the C Reduction is \$11.8 million. The settlement designates 65% of each award as compensation for past infringement and 35% as payment for future use of the class member’s work. The C Reduction means C claimants can receive no compensation, even for future use, but still be bound to allow future use by defendants and others, as well as to the release of their claims.

The C Reduction is unfair, collusive and demonstrates a lack of adequate representation for the Category C class members, who are overwhelmingly owners of unregistered copyrights. The representative plaintiffs have A and B (registered copyrights) claims. (*See*, A-127-192, presenting over four hundred fifty registrations of the 21 named plaintiffs.)

C. The Category C Compensation Shows Inadequate Representation and Is Unfair.

The C compensation system is arbitrary and prejudicial. No explanation or justification was presented for the Category C compensation. It strongly suggests inadequate representation for the class members with unregistered copyrights, who are in Category C and constitute more than 99% of the class.

Category B claimants receive 12.5% of the original price paid by a publisher, or \$150, whichever is larger. (A-345, ¶ 4.b.) Category C claimants receive awards under a complicated schedule best seen in table form. No reasons were given for the differences between B and C award structures or the strange,

fluctuating percentage, scheme for Category C. Examples demonstrate the incongruities:

Price Paid for Article	B Gets	% of price	C Gets	% of price
\$250	\$150	60 %	\$25	10 %
\$500	\$150	30 %	\$25	5 %
\$1000	\$150	15 %	\$40	4 %
\$1200	\$150	12.5%	\$40	3.3 %
\$1300	\$162.50	12.5%	\$40	3.1 %
\$1500	\$187.50	12.5%	\$40	2.6 %
\$1800	\$225	12.5%	\$40	2.2 %
\$2000	\$250	12.5%	\$50	2.5 %
\$2500	\$312.50	12.5%	\$50	2 %
\$2800	\$337.50	12.5%	\$50	1.8 %
\$3000	\$362.50	12.5%	\$60	2.0 %
\$4000	\$500	12.5%	\$60	1.5 %
\$5000	\$625	12.5%	\$60	1.2 %

D. The License Is Legally Improper.

The settlement grants the Defendants and Publishers an “irrevocable, worldwide, and continuing” license to electronically reproduce, distribute, display, license, sell or adapt” the works encompassed by the settlement. (A-348-349, ¶ 5 a. and b.; A-359, ¶ 13.b., as amended by A-1102, ¶ 2) Class members who file claims can choose to deny the license, at the cost of 35% of their compensation. The Agreement provides no right, or mechanism, for non-claiming class members to deny the right to future use.

The Notice advises that claimants can deny the right to future use. (A-754, ¶ II.A.5.) It does not describe that non-claiming class members are granting the

license. The Notice states that only the Defendants and Publishers who allegedly infringed a work will have the right of future use. (A-756, ¶ II.D.3.) After the Notice went out, the parties amended the Agreement and “confirmed” that the Defendants and Publishers are entitled to license others to use the works, and that such licenses may allow the licensee to in turn grant sublicenses. (A-1102, ¶ 2.)

The License is legally improper, unfair and unreasonable. The license, and the failure to describe it properly in the Notice, demonstrate a lack of adequate representation, collusion and the taking of property without Due Process. The class representatives do not have authority under Rule 23 to grant such a right.

E. The Approval Process Violated Due Process.

The Notice requires that to object a class member must appear at the fairness hearing in New York City.

If you wish to object to the settlement, you must follow these instructions:
(1) You must appear at the hearing in person or, if you are represented by an attorney, your attorney must appear in person

(A-756, ¶ V.)

When seeking preliminary approval, the plaintiffs made no showing, beside their own opinion, the settlement was fair, reasonable or adequate. The order of preliminary approval states: “The Court has reviewed the Settlement Agreement and determined it to be within the range of possible approval;” (A-419, ¶ 4.) The court had not seen any damage estimate or study at that time. Nor had it heard

any discussion of the claims and defenses, or the strengths and weakness of the plaintiffs' claims.

The plaintiffs' presentation of damages was submitted several days before the final approval hearing. (A-1666-1686) This was long after the deadline for class members to file objections, or to opt out of the class. (A-756) Objectors twice sought, and were denied, this damage study. There are important questions about the study, not the least of which is why it does not include any information for 2002 to 2005. (A-1683-1686)

F. Other Important Objections.

The objectors presented other objections below. (A-728; A-1188; A-1247; A-1721) They are not presented now for two reasons. First, those objections do not support an argument that, as a matter of law, the settlement is unfair, or the class certification improper. They would be reviewed for abuse of discretion. The failure of the district court to provide a record of its analysis of the objections, or the factors for settlement approval and class certification, prevent review of those objections. Second, the grounds presented on this appeal are sufficient to show that class certification and settlement approval must be reversed.

SUMMARY OF THE ARGUMENT

The settlement grants the Defendants and an extensive, but partially unknown, list of Publishers an irrevocable license to class member copyrights,

including the right to license others and to allow those others to license to others. Class representatives are limited, by Rule 23, and the requirements of Due Process, to the disposition of pending claims. The license can not be upheld as a release because it fails the identical factual predicate doctrine. The doctrine limits class action releases to claims based on the facts that underlie the action. Approving this license was an error of law.

The litigation was initiated for owners of registered copyrights. More than 99% of the class own unregistered copyrights, for which registration is a precondition to suit. The unregistered owners were incorporated into the settlement at the demand of the Defendants. The class representatives hold registered copyrights. Class certification was an abuse of discretion, as a matter of law, because the plaintiffs are not adequate representatives to represent the unregistered copyrights. This inadequacy is confirmed by settlement provisions, particularly the C Reduction and the compensation structure for unregistered owners. It is necessary to establish a structural assurance of fair and adequate representation for the unregistered copyright owners. This requires that they be defined as a subclass, with separate class representatives holding typical claims, and separate counsel, who understand that their role is to represent the members of that subclass.

The C Reduction and the C compensation structure are unfair and unreasonable on their face. The parties' justification for the C Reduction confirms

that the class representatives placed the entire risk that claims would exceed the settlement fund on the unregistered owners.

The Agreement and the Notice deny compensation to certain claims while releasing those claims and granting a license for the use of those copyrights. After objections the parties said these claims would not be released. The final order is a voluntary dismissal of these claims. The explanations are inherently unbelievable. These actions show that the plaintiffs are inadequate.. The dismissal was an error of law because it did not comply with Rule 23(e).

The approval procedures denied Due Process. Preliminary approval was granted without any showing the settlement was adequate. Since there was no litigation, and no pleadings in the court file, class members had no information before the deadline for opting out or objecting. Efforts by the objectors to obtain information were denied. The Notice required any class member wishing to present an objection to appear, in person or through counsel, at the fairness hearing.

The district court failed to provide any analysis of certification or settlement approval, and did not reveal its reasons for rejecting the objections. The district court's discretion can not be reviewed without such a record.

If this matter is remanded for proceedings regarding this settlement the objectors should be granted discovery on three subjects: (1) negotiation of the

settlement; (2) the damage study on which the settlement is based, and; (3) the contingent compensation of the mediator.

ARGUMENT

I. The Standards of Review Are Abuse of Discretion and Error of Law.

Objectors present two grounds for appeal under the error of law standard. One is whether the license could be granted. The second is whether the approval procedures met due process requirements. Questions of law are reviewed *de novo*. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005). The remaining issues are reviewed for abuse of discretion. The decision can not be upheld because the district court has not provided a record of its decision. However, class certification and settlement approval should be reversed because they fall outside the permissible range of discretion as a matter of law.

A. Deference to the District Court Should Be Reduced In this Case.

Class certification and settlement approval are reviewed for abuse of discretion. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). A district court “exceeds” its discretion when (1) its decision rests on an error of law or a clearly erroneous factual finding, or (2) “its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of

permissible decisions." *Lange v. Union Bank of Switz.*, 424 F.3d 158, 165 (2d Cir. 2005).

Deference to the district court varies depending on the circumstances. The principle applies with less force when, as here, the settlement is negotiated before the class is certified. *Malchman v. Davis*, 706 F.2d 426, 432 (2d Cir. 1983).

Deference is premised on the judge's familiarity with the case. *Joel A. v. Giuliani*, 218 F.3d at 139. This case was pending for four years, but the district court had no occasion to become familiar with the issues. As defendants' counsel stated: "For a case this size, it has probably required less judicial time than any case in U.S. legal [history]" (A-198)

These certification and settlement approval decisions cannot be located within the range of permissible decisions. Discretion is exceeded when the decision "is not within the range of decision-making authority a reviewing court determines is acceptable for a given set of facts." *Zervos v. Verizon*, 252 F.3d 163, 169 (2d Cir. 2001). The class certification is improper due to clear, on the face of the settlement, inadequate representation for part of the class. The settlement agreement both reflects, and creates, conflicts between the class representative and 99% of the class. Further, abandonment of a part of the class, and the C Reduction provision, are manifestly unfair based on undisputed facts.

B. The Record Necessary to Support the District Court's Exercise of Discretion is Lacking.

Review for abuse of discretion is not possible due to the lack of any analysis. This Circuit expects district courts to “explore the facts sufficiently to make intelligent determinations of adequacy and fairness” *Malchman*, 706 F.2d at 433. “When a district court approves a settlement which is not based upon ‘well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors’, its decision will not survive appellate review.” *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982) (quoting *Protective Committee etc. v. Anderson*, 390 U.S. 414, 434 (1968)).

There are no findings. There is no record of analysis for class certification and settlement approval. There is no discussion of any objection. The final order simply states that the representation is adequate, and the settlement is fair. (A-1726-1727, ¶ 4, 5). “[M]ere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law” is not sufficient. *Protective Committee*, 390 U.S. at 434. The court states that it has considered the objections, but it never describes any objection, or its reasons for finding any objection to be “invalid,” “speculative” or “hypothetical.” (A-1811-1814)

This case is remarkably similar to *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277 (3d Cir. 2005). Certification and settlement approval were reversed because the record failed to

demonstrate that the trial court had exercised its independent judgment. *Id.* at 301. The district court in *Cnty. Bank* granted preliminary approval less than a week after a motion was filed, using an order proposed by the parties. *Id.* at 286. The district court below did the same thing. (A-418) The *Cnty. Bank* district court adopted findings prepared by the parties. *Id.* In the instant case there are no findings, but the final order, which states conclusions, was submitted by the parties. (A-1380-1393 and A-1725-1738) The Third Circuit was concerned that there was no serious Rule 23(a) and (b) inquiry for class certification required by the Supreme Court. *Id.* at 300. The approval order here states only that the representatives are adequate. (A-1727) This is almost identical to the order in *Cnty. Bank* which the Third Circuit called an “*ipse dixit*” statement unaccompanied by any analysis. *In re Cnty. Bank*, 418 F.3d at 300.

Special scrutiny was required here. The Supreme Court has called for undiluted, even heightened, scrutiny of certification when it is considered as part of settlement approval. *Amchem*, 521 U.S. 591, 620 (1997). “Particular care” is required when the class is broadly expanded after the litigation has been in progress and for the purpose of settlement. *Malchman*, 706 F.2d at 433. That is the situation here, where the class was expanded to include unregistered copyright owners, more than 99% of the settlement class. (A-1434; A-1597)

The plaintiffs conducted settlement negotiations for four years without conducting any litigation. A commitment to “vigorous prosecution” is a factor in determining the adequacy of a class representative. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170-171 (2d Cir. 2001). The vigor with which an action was prosecuted is a factor in considering the fairness of a settlement. *Malchman*, 706 F.2d at 433.

II. The Settlement Itself Demonstrates Inadequate Representation For Part of the Class.

A. The Settlement Reveals Inadequate Representation for the Owners of Unregistered Copyrights.

There was inadequate representation for the owners of unregistered copyrights. This is evident from the settlement terms. The class representatives hold registered copyrights. So far as the record discloses, that is all they hold.

1. The C Reduction Favors Part of the Class at the Expense of Another Part of the Class.

The C Reduction prejudices the unregistered owners to the benefit of the registered owners. In *Amchem* the Court affirmed reversal of class certification involving a single unitary class on the grounds of inadequate representation, where the settlement itself showed significant intraclass disparities. *Amchem*, 521 U.S. at 627-628. The chief lesson drawn from the *Amchem* analysis of adequacy is that when faced with a disparate class, there need to be "structural assurances of fair and adequate representation," both in the settlement terms and the structure of the

negotiations. Linda Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 Vand. L. Rev. 1687, 1714 (2004)(footnotes omitted). Two years later the Court reinforced its *Amchem* analysis when it reversed the approval of another single class settlement. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). The Court instructed that the “structural assurances” of *Amchem* include provisions such as sub classing and separate counsel. Mullenix, *supra*, at 1714-1715 (citing *Ortiz*, at 856).

There are close parallels here with *Amchem*. This settlement doesn’t just provide a general recovery, “rather, it makes important judgments on how recovery is to be *allocated* among different kinds of plaintiffs, decisions that necessarily favor some claimants over others.” *Amchem*, 521 U.S. at 610 (quoting *Georgine v. Amchem Prods.*, 83 F.3d 610, 630 (3d Cir. 1966)). As here, the *Amchem* settlement was negotiated prior to class certification. *Amchem*, 521 U.S. at 601-602. The Third Circuit in *Amchem* found inadequate representation by a close inspection of the settlement terms. *Georgine v. Amchem Prods.*, 83 F.3d at 630. The Court said this was “altogether proper.” *Amchem*, at 619-620.

The Court noted that “in significant respects, the interests of those within the single class are not aligned” and “the terms of the settlement reflect essential allocation decisions” *Amchem*, at 626-627. It held: “The settling parties, in sum, achieved a global compromise with no structural assurance of fair and

adequate representation for the diverse groups and individuals affected.” *Id.* The Court quoted an opinion of this Circuit:

The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

Amchem at 627 (quoting *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 742-743 (2d Cir. 1992), *modified on reh'g sub nom. In re Joint E. & S. Dist. Asbestos Litig.*, 993 F.2d 7 (2d Cir. 1993).

The C Reduction is a “significant” allocation decision. Unregistered owners alone can have their compensation reduced to zero. (A-346, ¶ 4.f.(2)) At the extreme, they are denied any compensation, including for future use of their copyrights, while registered owner compensation is untouched. The class representatives hold only registered claims. The conflict is utterly clear. Courts should “withhold approval from any settlement that creates conflicts among the class.” *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation* 55 F.3d 768, 809 (3d Cir. 1995), *cert. denied sub nom General Motors v. French*, 116 S. Ct. 88 (1995). This Circuit, in a case where settlement was negotiated before certification, stated: “The district judge also had to satisfy himself that ... plaintiffs had no interests which were antagonistic to those of other class members” *Plummer*, 668 F.2d at 658.

Objectors are not the first to say the plaintiffs were inadequate representatives for the unregistered copyrights. The defendants made the assertion early in the settlement mediation. (A-1598)(“named plaintiffs are, by that very fact [registered copyrights], unrepresentative of the thousands of freelance authors who never register their works at all”) The parties negotiated this settlement knowing full well that adequacy of representation was a serious question.

2. The Explanations for the C Reduction Heighten the Concern.

Their justification for the C Reduction is that claims will not trigger the Reduction. (A-1446-1447; A 1553) Objector Bartholomew demonstrated that the possibility was real. (A-1207-1233A) She is a member and former officer of ASJA. (*Id.*, ¶ 1.) She conducted research leading her to state: “[T]he maximum amount the Defendants agreed to pay under the terms of the settlement is barely sufficient even to pay all possible claims of all freelancers whose articles were originally published in The New York Times and Philadelphia Inquirer, two newspapers that sold their content to the database defendants.” (*Id.*, ¶ 8.)

Her analysis is detailed and logical. She found the number of articles the newspapers eliminated from databases because of the infringement allegations. (*Id.* ¶¶ 9, 10.) She assumed that all articles were Category C because the vast majority of freelancers do not register their copyrights. (*Id.* ¶ 12.) She consulted the ASJA database which contains what freelancers were paid for their articles between 1994

and 1999. (*Id.* ¶ 11.) She estimated that for the Inquirer the total C claims were \$8,861,250. (*Id.*, ¶ 13.) Her estimate for The New York Times is \$3,427,000. (*Id.*, ¶ 14.) That's over \$12,000,000, which by itself triggers the C Reduction. There are hundreds of newspapers among the 26,000 publications.

The parties ignored this presentation. They filed a veritable avalanche of pleadings to support the settlement, including arguments, declarations and exhibits. They never mentioned her analysis.

They don't understand the Reduction provision, or they were trying to mislead the court. For instance, defendants' state: "The parties to the mediation concluded that there was no reasonable prospect at all that claims in categories A and B (registered works) would exhaust the \$18 million Settlement Fund." (A-1571, ¶ 10.) This completely avoids the point. The question is whether claims from all categories will exceed the trigger amount of \$11.8M, leading to a reduction of C awards. The amount of A and B claims is irrelevant. The plaintiffs' made the same misstatement. They state: "Plaintiffs knew that it was a virtual certainty that Category A and B claims would not consume the \$18 million settlement fund," (A-1146-1447)

The real flaw of their justification is what it shows about the negotiation. If they believed there was no chance of a reduction, why did they place the entire risk

on one part of the class? These were the representatives of a single, unified class. The representatives are all in the tiny part of the class which benefits from this allocation of risk.

3. The Interim Claims Data Does Not Moot the Issue.

The parties argued that the claims experience, though incomplete, showed that the C Reduction would not come into operation. (A-1482, ¶ 40.) The claims administrator stated that as of September 13, 2005, they had received 1220 claims. (A-1541, ¶ 17.) He also stated that “claims submissions have increased recently, and many of the recent claims represent a larger number of individual literary works.” (*Id.*) Plaintiffs’ counsel reported that the total of the 1220 claims was approximately \$3,200,000, or \$31,373 per day since notice went out. (A-1482, ¶ 40.)

The issue is whether the owners of unregistered copyrights were adequately represented in the negotiations, so the claims experience is of minimal relevance at best. But the numbers are not that reassuring. At \$31,373 per day in claims, and a total of 1220 claims in 102 days, there are 12 claims per day, with an average claim of \$2623. The Administrator said the 1220 claims covered 64,544 literary works, or an average of 63 works per claim. (A-1541, ¶ 17.) Reasonable assumptions, supported by the Administrator’s testimony, show that the threat is

not eliminated.

The 102 days is June 1, 2005 to September 12, 2005. It is reasonable to assume that class members didn't start filing claims immediately after the Notice went out on May 31, 2005.⁴ (A-1539, ¶ 6.) The claim form requires detailed information. (A-748-750) An Associational Plaintiff gave classes, as late as August 31, 2005, on how to fill out the claim form. (A-1254-1255, ¶¶ 3., 4.) The class included 28 pages of instructions. (*Id.*) The most frequent questions by class members were how to file claims. (A-1474, ¶ 6) In the earliest weeks after June 1st the claims rate was likely much lower than 12 claims per day. The average probably represents a much lower rate to begin with, and a much higher rate toward the end of the 102 days. The more pertinent data, which we don't have, is the claims rate as of September 12, 2005, but the Administrator stated "claims submissions have increased recently." (A-1541, ¶ 17.) The claims per day after the date of the interim report is certainly going to be substantially higher than 12 per day.

It is also reasonable to assume that larger claims, involving more works, will be filed later in the claims period, due to the greater effort required to prepare

⁴ Not all notices went out on May 31st. The administrator states they were still receiving class member identification until July, and notices were still going out as of September. (A-1558-1559, ¶¶ 5, 8.)

them. The Administrator confirmed this: “many of the recent claims represent a larger number of individual literary works.” (*Id.*) The average claim in the first 102 days was \$2,623, for 63 works. Some examples of how large later claims could be are found in the record. The plaintiffs presented the declarations of eleven plaintiffs as examples of class members filing claims. (A-1489-1526) The smallest claim (Wallace) has 200 C claims, which is a claim of about \$5000. (A-1490, ¶ 3) The rest are much larger, ranging from \$10,000 to \$110,000 and containing an average of 1545 works. (A-1495, ¶ 3; A-1498, ¶ 3; A-1502, ¶ 3; A-1505, ¶ 3; A-1509, ¶ 3; A-1513, ¶ 3; A-1516, ¶ 3; A-1520, ¶ 3, and; A-1522, ¶ 3 and A-1525, ¶ 3) Combining the increase in claims per day, with an increase in the size of claims, it is impossible to conclude from the interim data that the C Reduction will not be operative. But in the end the principal point is that the A and B class representatives, to protect their own compensation, agreed to place this risk on the unregistered Cs.

4. The B and C Compensation Schemes Show Inadequate Representation.

The A compensation should differ in structure from the B/C compensation, because the As alone are entitled to statutory damages. There is no reason for the B and C schemes to be different in structure. They are different, and the difference is prejudicial Cs. This is illustrated by the following table.

Price Paid for Article	B Gets	% of price	C Gets	% of price	C as % of B
\$250	\$150	60 %	\$25	10 %	16.7%
\$500	\$150	30 %	\$25	5 %	16.7%
\$1000	\$150	15 %	\$40	4 %	26.7%
\$1200	\$150	12.5%	\$40	3.3 %	26.7%
\$1300	\$162.50	12.5%	\$40	3.1 %	24.6%
\$1500	\$187.50	12.5%	\$40	2.6 %	21.3%
\$1800	\$225	12.5%	\$40	2.2 %	17.8%
\$2000	\$250	12.5%	\$50	2.5 %	20%
\$2500	\$312.50	12.5%	\$50	2 %	16%
\$2800	\$337.50	12.5%	\$50	1.8 %	14.8%
\$3000	\$362.50	12.5%	\$60	2.0 %	16.5%
\$4000	\$500	12.5%	\$60	1.5 %	12%
\$5000	\$625	12.5%	\$60	1.2 %	9.6%

The B structure is rational. It sets a minimum, and uses a fixed percentage of the original sales price. The C structure is irrational if the goal is fairness. It is a series of flat awards which increase in dollar size, but decrease as a percentage, in unexplained steps. The result is a substantial difference, compared to Bs, in how Cs fare. A C claimant paid \$1200 for the article gets 25% of a B award, while a C paid \$5000 for an article gets 10% of a B award. Whether any difference in awards to Bs and Cs is appropriate is discussed below. Here the question is why the B structure, with a lower percentage if it is justified, was not used for the Cs? For example, a minimum of \$30 (20% of the B minimum) and then a percentage of 2.5% (20% of the B percentage). The C compensation scheme, on its face, fails the reasonableness requirement of Rule 23. Fed. R. Civ. Pro. 23(e)(1)(C).

5. The Different Compensation Structures Will Suppress Claims By Owners of Unregistered Copyrights.

The Defendants and Publishers benefit from the C compensation structure. If the “up to” \$18M fund is operative, they benefit to the extent the claims do not consume the whole fund. They are only obligated up to \$18M. (A-340, ¶ 3.a.; A-342, ¶ 3.f.) The C structure disproportionately reduces the higher C awards when compared to a flat percentage. As Cs are more than 99% of the class, this structure reduces the total claims, and increases the chance that the Defendants and Publishers will not pay the full \$18M. Smaller awards also decrease the incentive to file claims, and this structure decreases that incentive for the largest C claims.

The claim form requires detailed information for each work. (A-749-750) Class members who do not file claims do not have the right to deny the license for future use. Defendants and Publishers said the license was “essential” to any settlement. (A-1555) This was an additional motivation to reduce the incentive of 99% of the class to file claims.

If these explanations are speculative, the questions to be answered are why is there a different structure for the unregistered copyright owners, and why was no explanation for the different structure presented?

6. The Different Compensation For Bs and Cs Also Raises The Adequacy Issue.

The class representatives justify lower compensation for Cs because the Cs are unregistered owners who cannot bring an action for infringement. 17 U.S.C. § 411(a). (A-1447) If the registration requirement is met, or not applicable, there is no difference in the measure of damages. 17 U.S.C. § 504(a). Defendants required that the unregistered owners be included for a “global” settlement. (A-1598) That was certainly not a charitable exercise. If they settled with just the registered owners, owners of unregistered copyrights could simply register and seek compensation, encouraged by the settlement.

In *Amchem*, one of the reasons for holding that the class representatives were inadequate was the lack of separate representation for “future” claimants – those who did not yet have a justiciable claim. *Amchem*, at 626-628. This issue was again at the fore in *Ortiz*, where the Court made clear the protections necessary when part of the class are persons with as yet unmaturing claims.

[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.

Ortiz, at 856.

This drive to extinguish claims not yet ripe is the hallmark of “global” settlements. The unregistered copyright owners have “future” claims. They have

no present claim because of the registration requirement. The holdings of *Amchem* and *Ortiz* compel the conclusion that the unregistered owners should have separate representation. Professor Issacharoff warns of the particular danger that in a settlement covering claims that could not have been brought in the action the plaintiffs' counsel may trade off the rights of those claims. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. Davis L. Rev. 805, 812-813 (1997). Prof. Issacharoff's declaration was submitted below. He confirmed that *Amchem* requires that a district court must "first and foremost [...] determine whether there are 'structural assurances of fair and adequate representation.'" (A-1694, ¶ 6.)

Professor Issacharoff supported the settlement. However, on the question of adequacy he does not discuss any of the particular aspects of the settlement which show a lack of adequate representation for owners of unregistered copyrights. He never mentions the C Reduction, or the difference in award structure between Bs and Cs. The C Reduction was a principal complaint of the objectors, and Prof. Issacharoff addresses some objections. This omission is telling. As the Seventh Circuit recently noted, "Law professors are no substitute for proper class representatives." *Smith v. Sprint Comm. Co.*, 387 F.3d 612, 614 (7th Cir. 2004)(reversing class certification for inadequacy).

The class representatives provided much greater compensation for themselves than for the unregistered owners. But the unregistered owners held the

key to any settlement because of the Defendants' requirement. If the Cs had been separately represented there would have been no C Reduction provision, and it is likely that their compensation would have been much closer to, or equal to, that for the Bs. If any reduction for the unregistered owners had been agreed it is extremely unlikely that it would have been the strange scheme used in this settlement. Some Cs get 25% of a B award, while others get less than 10%.

7. The Settlement Negotiations Were Conducted By the Associational Plaintiffs Who Are Not Class Representatives.

The mediator stated that the interests of the class were represented by the Associational Plaintiffs. (A-610, ¶ 9.) Plaintiffs said that it was the Associational Plaintiffs who protected the class interests. (A-488) Plaintiffs' counsel said that issues which arose during the negotiations were taken to the governing councils of the Associational Plaintiffs for approval. (A-1790) Only one of the individual plaintiffs, who are certified as the class representatives, is shown to have had any role in the negotiations. (A-610, ¶ 9.) The Associational Plaintiffs filed declarations supporting the settlement. (A-1459; A-1532; A-1716) Only one class representative (and not the one involved in negotiations) expressed support for the settlement. (A-1719) Objector Muchnick communicated with a representative plaintiff about settlement problems and received this reply: "I'm aware of the shortcomings of this settlement agreement. I've voiced them to Boni

[plaintiffs' counsel] et al. However, for reasons I'll not go into here, I'd prefer to see the agreement approved." (A-1303, ¶ 8.)

One of the Associational Plaintiffs was quoted: "[O]ur first choice is not to engage in a legal war that ties everyone up in court and creates an all-out war over rights. Such draconian actions serve only to create conflict and instability in the industry." (Paula J. Hane, "Freelance Authors Turn Up the Heat," *Information Today NewsBreaks*, August 21, 2000.)(available on the Internet at <http://www.infoday.com/newsbreaks/nb000821-1.htm>. Last visited on 3-27-06) During this litigation ASJA engaged in a joint marketing program with LexisNexis, run by defendant Reed Elsevier. (A-1242-1246)

It appears that the real representatives of the class were organizations that did not qualify. The Associational Plaintiffs could well have had goals or objectives, such as avoiding conflict in the industry, that are inconsistent with the goal of class members to recover damages for the infringement.

III. The Settlement First Sold Out a Portion of the Class and Now Abandons Them.

1. The Record Clearly Shows Both Sellout and Abandonment.

The exclusion for scientific/medical works is a red flag for concern about collusion. This is particularly true since the parties' acknowledged that releasing those claims was inappropriate, and proceeded to abandon those claims entirely. A

district court must carefully scrutinize a settlement to ensure that it is not the product of collusion. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001).

The settlement as first approved, and described in the Notice, released all class member claims for all works. (A-338, ¶ 1.n.; A-358-361, ¶ 13.; A-755, ¶ II.D.) The Notice states that scientific/medical works are not eligible for compensation. (A-752) This is strongly indicative of unfairness. *Wal-Mart Stores*, 396 F.3d at 110 (release of valuable claim for no compensation “could not be fair”)(citing *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981), *aff'd on other grounds, sub nom, Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-783 (7th Cir. 2004)(only if the class members’ “claims were worthless” could a settlement providing no compensation be fair); *Molski v. Gleich*, 318 F.3d 937, 953-954 (9th Cir. 2003) (“release [of] almost all . . . claims with little or no compensation . . . was unfair ...”)

Objectors first misnamed it an abandonment.⁵ It was an abandonment only in the sense that these class members were being “sold down the river.” *Mirfashi*, 356 F.3d at 785. The parties responded that they never meant to release those claims. (A-1471, ¶ 14.o.) They presented a final order which states that those

⁵ While it is a strong term, sellout is appropriate in the right circumstances. *Plummer*, 668 F.2d at 658.

claims are not released. (A-1382, ¶ 7.) That order.⁶, which was entered, is a true abandonment of those claims.

The claims for scientific/medical works were always in the pleadings. The Consolidated Complaint alleges that these type of journals are involved. (A-111-113, ¶¶ 41, 42, 49, 51.) West Publishing and Read Elsevier are alleged to distribute scientific journals. (*Id.*) Northern Light is alleged to offer medical publications. (*Id.*) Since 2000 the class members with such works had every reason to believe that their rights were protected. Now, instead of having to admit a sellout, the class representatives have abandoned them.

The important, undisputed, facts are: (1) the Agreement and Notice operate to provide no compensation to the scientific/medical works while dismissing all such claims; (2) the Notice clearly describes that such claims will be released, and; (3) the first mention that the parties did not intend to release those claims came long after the objections.

2. The Parties' Explanations Are Unbelievable.

The explanations are so illogical, or unbelievable, as to raise the concern about collusion. They say that it had never been intended to release those claims. (A-1471, ¶ 14.o.; A-1552) There are only two possibilities: (1) they intended to

⁶ The Notice states that works in “research-oriented medical journals” were excluded. The Order uses the term “research-based” medical journals. The reason for the change and the difference in meaning is nowhere explained.

release those claims and got caught, or (2) they did not intend to release them and made a mistake in presenting a settlement which did so. The record makes the second possibility very hard to believe. The principal terms of this settlement were agreed in April 2003, and “the parties have spent nearly two years thereafter negotiating with respect to the language of the settlement agreement and exhibits, as well as the notice and claims administration protocols.” (A-642) Plaintiffs’ counsel “have meticulously negotiated every issue, word and nuance of the settlement.” (A-652) They performed research on whether these articles should be in the class. (A-665) The lawyers for both sides “understood the consequences of literally every term and condition that constituted the comprehensive settlement.” (A-1688, ¶ 4.)

To justify the last minute exclusion, the defendants assert that none of the named plaintiffs wrote such works. (A-1552) They present no evidence for this assertion, which is irrelevant since the class definition clearly includes these works. They said such journals are not written by “freelance authors.” (A-1553, fnt 2) This is also irrelevant since the class definition says nothing about “freelance authors.” Finally, they said that none of the articles “sued on in the Consolidated Complaint” was written for a scientific or research-oriented medical journal. (*Id.*) This is very misleading. The Consolidated Complaint does not identify any publication. Defendants’ assertion does not distinguish these works from others.

More important, the Consolidated Complaint identifies scientific and medical journals as the type of publications involved in infringement by three different defendants. (A-111-114, ¶¶ 42, 49, 51.) These illogical, irrelevant and misleading explanations are presumably the best they can do to justify the last minute elimination of a portion of the class from the settlement.

3. This Was Not a Mistake.

The parties never said it was a mistake. They never explained why they presented a settlement which operated in this fashion. Instead they tried to avoid the obvious conclusion by a last-minute work around. The provision in the final order that those claims are not released, aside from being an abandonment, is otherwise inadequate. The holders of those claims were told in the Notice that their claims were included and released, so this last minute revision doesn't do them any good. They do not receive a copy of the final order or any notice of it. Further, the final order does not address whether the scientific/medical works are subject to the license for future use.

There is a clear indication that this was no mistake. A detailed objection was filed on July 14, 2005. (A-730-731, ¶ 3.) On July 26, 2005, the parties presented an amendment to the settlement and a supplemental notice. If the release was a mistake, and the plaintiffs intended to dismiss those claims, this was the opportunity to revise the class definition. It was also the opportunity to give notice

of this dismissal of those claims. The parties didn't mention this issue in the Amendment or the supplemental notice.

Moreover, Prof. Issacharoff says that this issue arises because the parties “were unable to reach closure on the value of [these] claims ...” (A-1698-1699, ¶ 16.) If that is true they knew they didn't want these claims in the class definition, and subject to the release, well before they submitted a settlement. Professor Issacharoff says that in “problematic” settlements defendants insist on the release of uncompensated claims. He says that problem is avoided here by not releasing these claims. (*Id.*) However, he doesn't discuss or even indicate he is aware of the fact that the settlement did exactly what he calls problematic, and that the decision not to release them came after objections.

4. The Final Order is an Improper Voluntary Dismissal.

There was a failure to follow the requirements of Rule 23. There is no other way to look at the last minute abandonment of these claims, since they are encompassed in the Consolidated Complaint and the NYT action, except as a “voluntary dismissal.” Rule 23(e) requires approval of any voluntary dismissal, after finding that it is fair, reasonable and adequate. It requires notice in a reasonable manner to class members who will be bound by the voluntary dismissal. Fed. R. Civ. Proc. 23(e)(1)(A) & (B). These were not done, or even considered. The requirement of notice is particularly important since the class was told the

claims were released. During the pendency of the case the statute of limitations for these claims was tolled. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Voluntary dismissal restarts the time. *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 627 (1986). Without notice of the dismissal, class members with the dismissed claims will not know of the necessity to file suit to protect their rights. *Id.*

IV. The License For Future Use Is Legally Improper.

If upheld this license would be a stunning extension of the capacity of class representatives to exercise class members' rights. Objectors do not challenge that a settlement may prospectively dispose of a class member's rights when the individual class member must affirm, such as through the claims process, their agreement to the disposition. That feature is present here and is not challenged.

This is a question of first impression. When, if ever, and under what circumstances, does a class representative have the capacity to bind class members, as part of a settlement, to a license of their copyrights?

A. Rule 23 and Due Process Prohibit Such An Exercise of Class Member Rights.

A copyright owner has the exclusive right to authorize the uses granted under the license. 17 U.S.C. § 106. The license exercises a class member's right to control their copyright. The term of a copyright is author's life plus 70

years. 17 U.S.C. § 302(a). The expected average term is about 95 years, so this is a long time. *See, Eldred v. Ashcroft*, 537 U.S. 186, 210 n17 (2003).

The authority for class actions is Rule 23. Fed. Rule Civ. Pro. 23. There is no imaginable civil action by which a class of copyright holders could force one or more defendants to license their copyrights. Similarly, there is no conceivable civil action that could have been brought by the Defendants to force the entire class to license their copyrights to the Defendants and Publishers. Under the guise of a settlement, the parties try to achieve what no civil litigation could have done.

While there is no known holding on point, judicial statements about the nature of class actions indicate this provision is far out-of-bounds. The Supreme Court noted: “Absent plaintiff class members are not subject to coercive or punitive remedies.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985). This Circuit stated: “The most fundamental principles underlying class actions limit the powers of the representative parties to the claims they possess in common with other members of the class.” *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exchange*, 660 F.2d 9, 16 (2d Cir. 1981), *aff'd on other grounds, sub nom, Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982). The word “claims” limits the class representative’s authority to existing claims. Fed. R. Civ. Pro. 23(a)(3)(“claims” of the representative must be typical of the class).

The “adequacy” requirement of Rule 23 also prevents this exercise of class member rights. Fed. R. Civ. Pro. 23(a)(4). To satisfy the adequacy requirement Due Process requires that the class representative have suffered the same injury as the class members. *Amchem*, 521 U.S. at 626. Future infringements by the Defendants, Publishers and unknown others yet to be sublicensed by the Defendants and Publishers have, by definition, not yet occurred. There is no way of knowing whether the class representatives will be infringed at the same time, or by the same infringers, as all the other members of the class. Since the class representatives hold valuable A and B claims they are likely to file claims, and likely to grant the right of future use to get the additional 35%. That immediately causes them to lack a future claim that is “typical” of the future claims of class members who do not file claims. Each act of infringement is a distinct harm giving rise to an independent claim for relief. *Stone v. Williams*, 970 F.2d 1043, 1049-1050 (2d Cir. 1992), *cert. den.* 508 U.S. 906 (1993). A copyright claim accrues when the copyright owner knows or has reason to know of the injury upon which the claim is premised. *Merchant v. Levy*, 92 F.3d 51, 56 (2d Cir. 1996). There is no way to find the present class representatives “adequate” to dispose of future claims of class members because that determination of adequacy involves facts in the future.

B. The License Can Not Be Justified As A Release.

The parties argued that the license is a form of release and is appropriate under precedent regarding class action releases. Both assertions are wrong.

1. No Release Works Like This License.

The license under the Amendment provides that all the Defendants and Publishers can license others. (A-1102, ¶ 2) It also allows those unknown licensees to grant further sublicenses. (*Id.*) A provision that allows a party to release other, unknown persons, at some unknown time in the future, for claims accruing after the original release, and to grant those unknown persons the right to release yet other unknown persons, is not a release. A simple, nonexclusive license (without the right to sublicense others) has been called a “waiver” to sue for infringement, or a covenant not to sue. *See, e.g., Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997). Releases are for causes of action which have arisen based on facts which have occurred. A license, or waiver of the right to sue, or covenant not to sue, are agreements not to sue on causes of action which arise in the future, based on facts occurring in the future.

2. These “Releases” Fail the Identical Factual Predicate Doctrine.

It is common for class action settlement release to use the term “future claims.” *Wal-Mart Stores*, 396 F.3d at 106-109; *Newby v. Enron Corp.*, 394 F.3d 296, 300 (5th Cir. 2004); *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d

978, 985 (7th Cir. 2002); *Williams v. GE Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998). In all cases this is a reference to claims which might be brought in the future based on the same facts, which have already occurred, that underlie the settlement. *Wal-Mart Stores*, at 106-107 (“settled conduct”); *Newby*, supra (“arising out of the Enron facts”); *Uhl*, supra (“that the parties might have brought”); *Williams*, at 271 (“which might have been brought”).

The recent *Wal-Mart* decision repeatedly stresses that the scope of permissible releases is limited by the identical factual predicate doctrine. *Wal-Mart Stores*, at 106-107. This doctrine means that only claims based on the same facts as those pled in the action can be released. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2d Cir. 1982).

Infringements after the date of settlement are not the same factual predicate. Even if by the same infringers they are new infringements, because each act of infringement is a “distinct harm” giving rise to an “independent claim.” *Stone v. Williams*, 970 F.2d at 1049-1050. If the future infringement is by totally new infringers, as contemplated by the right to sublicense, it is impossible to argue they are based on the same factual predicate.

The parties relied on *Williams v. General Electric*. It upheld the release of class members’ claims which were not yet justiciable at the time of the class action settlement. *Id.* at 273-274. However, the Eighth Circuit reached this result because

the “future” claim was based upon the same factual predicate as another claim which was asserted, and settled, in the class action. *Id.* The settled claim was that an automobile lease failed to properly disclose early termination charges. *Id.* at 273. The class members in *Williams* had these claims at the time of the settlement, but they had not yet suffered an early termination and been charged the improper fees. When that happened, they argued that they were not subject to the earlier release because their claim for improper charges had not yet arisen at the time of the settlement. The *Williams* decision, utilizing the identical factual predicate doctrine, found the later claim barred by the release. *Id.* at 274.

The *Williams* analysis doesn’t apply here. Claims for future infringements, by the Defendants or Publishers, or by other unknown persons, including those yet to receive a license, are not based on the same factual predicate as the past claims. They may involve the same copyrights, and they may or may not involve the same infringers, but the difference is that they have not yet occurred. The facts of those future infringement are not known.

C. The License Raises Policy Considerations.

There is a policy against forcing copyright owners to give licenses for their work. “In the copyright realm, it has been said that an injunction should be granted if denial would amount to a forced license to use the creative work of another.” *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 84 (2d Cir. 2004). This policy

has never been addressed in this context, which in every respect is unprecedented, but its application seems evident.

There is also a policy against the waiver or release of federal statutory rights. “[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.” *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 704 (1945) This rule has been applied to prohibit the release of future claims, by fully informed private parties, for violation of the antitrust laws. *Redel’s, Inc. v. General Electric Co.*, 498 F.2d 95, 99 (5th Cir.-OLD 1974). No known decision considers this rule in the context of the copyright laws, but it should apply, particularly to this issue. It was a change in copyright law by the 1976 revision which led to authors retaining the copyright in their contribution to a collective work. *Tasini*, at 494-496. The 1976 revision reflected congressional intent to shift the author/publisher balance in copyright toward the individual author as a legitimate implementation of the economic philosophy behind the [Copyright Clause], *i.e.*, the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare. *Tasini*, at 495 n3; (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)). The involuntary imposition of this license on the class members is an end-run on the *Tasini* decision and the copyright policies that decision upheld.

V. The Approval Process Violated Due Process.

A. Preliminary Approval Was Granted Without A Proper Showing.

There was no evidence of the settlement's adequacy presented with the motion for preliminary approval. The plaintiffs said they had a damages report from an expert but they didn't show it, or describe it, to the court. (A-216) When approving a settlement the court must evaluate the eight *Grinnell* factors. *Wal-Mart Stores*, 396 F.3d at 117. Factors eight and nine are: (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Id.*

Nonetheless, the plaintiffs' proposed order, which the district court signed, states: "The Court has reviewed the Settlement Agreement and determined it to be within the range of possible approval; ..." (A-419, ¶ 4.) Since the court had no information about the "best possible recovery" or the "recovery in light of all the attendant risks," the district court judge could not possibly have reached the conclusion stated in the order in a manner which accords with the legal requirements. *See, Sutton v. Bernard*, 2002 U.S. Dist. LEXIS 14357, *5-*6 (N.D. Ill. 2002).

As there were no pleadings in the file, and no information about settlement value in the preliminary approval proceedings, class members had no source of

information. Objectors twice sought the damages information by motion. (A-671, ¶ II.2.; A-1237, ¶ C.1.). Six days before the final approval hearing, long after the deadlines for opting out and objecting, the plaintiffs filed the damages study. (A-1666) Objectors discuss the deficiencies with this study, *infra* at p. 56. However, the procedure points to two conclusions. One, the plaintiffs were trying to keep the damages study from review by potential objectors or opt outs, until after the deadline. Two, class members were denied any opportunity to base an objection, or opting out, on the inadequacy of the settlement.

B. The Personal Appearance Requirement Denied Due Process.

The Notice required that a class member appear at the fairness hearing in person, or by counsel, in order to present any objection. Some recoveries are as low as \$5, and recoveries in Category C are subject to reduction, or even forfeiture, under the C Reduction. To require that a class member come from another state, not to mention another country, to state an objection, is unreasonable. This burden is so stunning that it adds to the suspicion that the parties were attempting to suppress objection.

Objector Muchnick challenged this requirement by a motion to vacate preliminary approval. The district court judge's comment regarding this burden strongly suggests that he was already committed to approval of the settlement. He said:

21 THE COURT: Well, but 500 bucks doesn't seem to be an
22 inordinate cost if the purpose of your appearance is to undo an
23 \$18 million settlement which would affect thousands of other
24 class members. It seems to me that class members have three
25 choices. If they want to try to undo the settlement, they can

1 come and object and be heard just like any party who has an
2 interest in undoing the total settlement. If they don't like
3 the settlement, they can opt out. If they like the settlement,
4 or if they're satisfied with the settlement, they can simply go
5 along.

(A-622, p. 17-18) One of the *Grinnell* factors for settlement approval is “the reaction of the class.” *Wal-Mart Stores, Inc.*, at 117. Plaintiffs argued that the low number of objections justified approval. (A-1421-1422) The appearance requirement made it likely that the court did not get a true picture of that reaction.

C. The Approval Procedures Denied Class Members Meaningful Participation In Settlement Approval.

There is no decision which declares either of these two procedures improper.⁷ However, they violate the guiding principles. The right to object is part of procedural due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-812. [P]rocess which is a mere gesture is not due process. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). “[T]he right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' [citations

⁷ Personal appearance to object was upheld against a due process challenge in an unreported Third Circuit decision. *Sparks v. MBNA*, 2002 U.S. App. LEXIS 19594 (3d Cir. 2002).

omitted] ... These essential constitutional promises may not be eroded.” *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648-2649 (2004). The basic premise of class actions is to afford relief to people with claims so small they could not otherwise obtain the benefit of representation. *Amchem*, at 617. Telling class members that if they don’t want to pay to object they should opt out perverts the whole rationale of the class action procedure.

VI. If There Is A Remand For Further Consideration of This Settlement the Objectors Should Be Granted Discovery.

If this Court remands for further consideration of this settlement the order should direct the district court to permit objectors discovery on certain subjects: the negotiations, the damage study and the mediator’s compensation.

A. Objectors Have Presented a Sufficient Basis For Discovery of the Negotiations.

Objectors have shown serious questions about the negotiation of this settlement. Discovery should be permitted to answer questions such as: (1) Why did the parties submit a settlement and form of notice releasing the .. claims, granting a license to those copyrights, and denying the claims any compensation; (2) What negotiations led to the difference in the Category B and C award structures; (3) What negotiations led to the C Reduction? Objectors have satisfied the requirement of showing that the settlement may be collusive. *Grant Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2nd Cir. 1992).

B. There Are Important Questions About the Damage Study.

The damage study contains no information about, and does not consider, any financial information after 2001. (A-1683-1686) It relies heavily on estimates of the percent that freelance articles represent in the content provided to the databases. The estimate is based on information from 15 “content providers” but they are not identified. They may be major newspapers, or magazines. It is important to determine if their data is sufficiently representative of the 26,000 content providers that are covered by this settlement. Large publications may rely more on paid staff, while smaller publications, or those that do not publish as frequently, may rely more heavily on freelance writers.

The estimated percentage of freelance articles is based on a “circulation weighted” calculation. The meaning is not clear. This may give greater weight to the freelance percentage of large circulation publications, which again might be more likely to rely on paid staff writers. Figures called “Total Revenues” for the database defendants play a major part in the damage analysis, but they are undefined. It is not clear that they include all the revenues that should be included. Also, do they include revenues from licensing of the databases to other database operations?

C. The Mediator's Contingent Compensation Is Relevant.

The parties relied heavily on the opinion of the mediator to support class certification and settlement approval. They filed two declarations by him. (A-608; A-1687) He was working under a contingent fee of some kind. (A-335) (“success fee”) The amount he was to be paid, as well as the terms, were not disclosed. The Model Standards for Conduct For Mediators discourages contingent fees. Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 Tex. L. Rev. 227, 242-243 (2003). The Comments specifically state that “[a] mediator should not enter into a fees agreement which is contingent upon the result of the mediation or amount of the settlement.” *Id.* This is due to the potential for abuse to diminish confidence in the process. *Id.* The Ethical Guidelines for Mediators of the Association of Attorney-Mediators bar contingent fees even more explicitly than the Model Standards of Conduct for Mediators. *Id.* at 244. The rules of many courts prohibit contingent fee agreements for mediation. *Id.* at 247, notes 91, 92.

Professor Peppet identifies three reasons for criticism of contingent fee mediation. The first is that it can distort the mediation process. “The mediator might push for settlement even when settlement is not in the parties’ best interests.” *Id.* at 259. The second is that it undercuts the parties’ self-determination. “If a mediator takes a stake in a dispute through . . . a success fee, the mediator

may be so motivated to push the parties in a particular direction that the mediated outcome can no longer be considered party-driven or self-determined.” *Id.* at 260. Third, the use of a contingent fee mediation may create the appearance of impropriety, even if none occurs. This is the reason many ethics codes for mediators prohibit the practice, particularly with court-connected mediations, where the mediator serves as an officer of the court. *Id.* at 260-261. Contingent fee mediation may ‘cast a shadow on the mediation process ...’ *Id.*

Mr. Feinberg, a well-known mediator, knows that using his fee structure is “very controversial.” Kenneth R. Feinberg, *Symposium On Mass Torts: Reporting From the Front Line – One Mediator’s Experience With Mass Torts*, 31 *Loy. L.A. L. Rev.* 359, 365 (1998). Many professionals in the dispute resolution field believe that contingent fees should never be used. Carrie Menkel-Meadow, *The Lawyer As Consensus Builder: Ethics For A New Practice*, 70 *Tenn. L. Rev.* 63, 96 (Fall 2002). The district court should know the details of Mr. Feinberg’s compensation.

CONCLUSION

Objectors request that the Court hold:

1. That the settlement approval was an error of law because the class representative did not have the authority to grant a license of class members’ copyrights.

2. That class certification was an abuse of discretion because the settlement makes significant allocation decisions between the holders of registered and unregistered copyrights and the class representatives are holders of registered copyrights.

3. That approval of the settlement as fair was an abuse of discretion, as a matter of law, because the C Reduction, the C Category compensation structure, and the abandonment of scientific/medical works are unquestionably unfair and unreasonable.

4. That the dismissal of claim for scientific/medical works violated Rule 23(e) because the district court made no finding that such a dismissal was fair and the district court did not order, or even consider, a notice to those class members.

5. That certification of the class was an abuse of discretion because the submission of a settlement that denied any compensation to claims for scientific/medical works, while releasing those claims, and the subsequent dismissal of those claims, demonstrate that the class representatives are inadequate.

6. That preliminary approval of the settlement without evidence of settlement adequacy and the requirement of personal appearance as a condition for objecting were denials of Due Process.

7. That the lack of district court analysis prevents review under the abuse of discretion standard.

8. That if the case is remanded for further proceedings regarding this settlement the objectors may have discovery concerning the settlement negotiations, the methodology of the damage study, and the mediator's compensation.

Dated: April 3, 2006.

S/
Charles D. Chalmers
Attorney for Appellants

Certificate of Compliance

Rule 32(a)(7)(C) Certificate

The undersigned certifies that Appellants Brief uses a proportionally spaced, 14-point, Times New Roman typeface, and the text of the brief comprises 13,535 words according to the word count by Microsoft Word.

S/
Charles D. Chalmers