

# 05-5943-cv

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

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IRVIN MUCHNICK, ABRAHAM ZALEZNIK, CHARLES SCHWARTZ, JACK SANDS, TODD PITOCK,  
JUDITH STACY, JUDITH TROTSKY, CHRISTOPHER GOODRICH, KATHY GLICKEN AND ANITA  
BARTHOLOMEW,

*Objectors-Appellants,*

v.

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

*Defendants-Appellees,*

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,*

EDWARD ROEDER,

*Appellant.*

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

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**COMBINED REPLY FOR OBJECTORS-APPELLANTS**

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## INTRODUCTION

The parties give an unbelievable description of their intention to exclude scientific/medical works from the class definition. The settlement documents were designed to deny compensation and provide releases for the defendants. They simply fail to address the Category C compensation structure which penalizes higher paid authors with unregistered copyrights. In an attempt to avoid the implication of the C Reduction, they describe evidence outside the record. Even if it is considered, it confirms that they could not have had a reasonable belief that the C Reduction could never happen. They continue to try and torture a copyright license into a release.

## ARGUMENT

### **I. The Ad Hominem Attack Is Unjustified.**

Plaintiffs and defendants separately call counsel for appellants a professional objector. (PB2, DB14) The seriousness may not be clear if the Court is unfamiliar with this term. Professional objectors are those “who seek out class actions to simply extract a fee by lodging generic, unhelpful protests.” *Shaw v. Toshiba Corp.*, 91 F.Supp.2d 942, 973 (E.D.Tex. 2000)(the opinion also describes “beneficial objectors”). It has been used by a Supreme Court opinion. *Devlin v. Scardelletti*, 536 U.S. 1, 21-22 n.5 (2002) (Justices Scalia, Kennedy and Thomas,

dissenting). It has been used extensively in the legal and daily press. In short, a professional objector is a type of extortionist.

Objectors are beneficial to class action practice. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 288 (7th Cir. 2002)(desirable because of the risk of collusion); *In re Prudential Ins. Co. Am. Sales Practice Litig. Actions*, 278 F.3d 175, 193-194, 202 (3d Cir., 2002)(render a service to the class and the court); *White v. Auerbach*, 500 F.2d 822, 828 (2nd Cir. 1974)(“valuable and important role to perform in preventing collusive or otherwise unfavorable settlements”). A law review article reports that amicus curiae in *Devlin* reported that of the forty-four published appeals by objectors between 1971-2000 32 percent resulted in reversals, compared to an overall reversal rate in federal civil appeals in 2000 of 12 percent. Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 441 n170.

The parties started name calling below, so objectors briefly described their counsel’s work representing objectors. (A676-677) He has practiced for 34 years and never been sanctioned or criticized for unprofessional behavior. *Id.* This is the seventh matter he has undertaken for class members. In five out of the first six he obtained a beneficial change in the settlement, or a reduction of the attorneys’ fees sought by class counsel. (*Id.*) One court stated: “Chalmers’s written and oral presentations were helpful to the Court in assessing and improving the Settlement

and Class Counsel's Fee Application." *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 377 (S.D.N.Y. 2005). Counsel for appellants states as an officer of the court that he has never, and will never, use an objection in an attempt to extort compensation.

"In the ordinary litigated matter, the court and counsel are not involved except in their professional capacities, and irrelevant personal or ad hominem attacks on them merely distract from the merits of the litigation."

*Revson v. Cinque & Cinque*, 221 F.3d 71, 82 (2d Cir. 2000). The Local Rules require briefs to be free of irrelevant, immaterial or scandalous matter. Second Circuit Local Rule 28.1. A distinguished Ninth Circuit judge noted:

Generally, you injure yourself and your client's case if, in your brief or at oral argument, you vilify or belittle your opponents or their legal positions. ... The reader wonders why disparagement is necessary. Is it a device to divert attention from a vulnerable position?

Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. Rev. 431, 436 (1986). Appellants devote attention to this because they are concerned that it is an attempt to suggest to the Court that appellants' arguments are disingenuous, and presented to extort compensation.

## **II. Appellants Have Standing.**

Defendants raise, without discussion, objectors' standing to challenge the license/release and the requirement of appearing to object. DB14-15. Standing can be raised at any time, including on appeal for the first time, and can be raised *sua sponte*. *Cent. States Southeast & Southwest Areas Health & Welfare Fund v.*

*Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 198 (2d Cir. 2005). The review of this question is *de novo*. *Id.* at 197. The standing question is whether the party has stated such a personal stake in the outcome of the controversy as to warrant federal-court jurisdiction, such as when that party has suffered some actual or threaten injury resulting from the challenged action. *Id.* at 197-198.

Objectors have standing on these issues. The requirement for personal appearance injured objectors in two ways. First, they had to bear the burden of appearing. Otherwise they could have simply submitted their objections in writing. This is exemplified by objector Anita Bartholomew. She filed her objections and arguments without counsel. (A1191) However, when she could not, for personal reasons, attend the fairness hearing, she was required to engage counsel to insure that her objections were considered. (A1746, pg 26, line 18) Second, the burden has the natural tendency to suppress objections from the members of the class. The number of objections is a factor for the court to consider in relation to settlement approval. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005). The plaintiffs relied on the low number of objections in the district court, and do so again before this court. (A1421-1422; PB15) Thus, objectors have been injured by this restriction on potential objections.

Objectors have standing to challenge the license/release because they face the threatened injury of granting a license to one or more of their copyrighted

works without knowing it. The proper way for a class member to preserve claims against the effect of the release is to object to the settlement. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 385 (1996). The parties say that the “subject works” involved in this case are clearly known. For instance, plaintiffs state that the case involves “a finite, identifiable universe of works as of the time of the Notice.” PB29. The objectors’ submitted extensive evidence to show that this is not true, and that class members have substantial difficulty in identifying their works that are subject to the settlement.

Objector Muchnick is a long-time activist on the issue of the infringements alleged in this action. (A427-436) After reviewing some of his experience, he states that it is impossible to identify the works of a class member that have been on one of the databases. (A435, ¶ 21) The definition of “subject works” includes those that have been on any of the databases at any time since August 15, 1997. (A335-336, §1.f.) The claim form, the only method for a class member to deny the license, requires specific identification of the work. (A750) We are dealing with works that may have been written and published in the early 1980s, when some publishers first began placing these works in databases. The settlement does not provide a way for a class member to know what has been on a database in the past. There isn’t even a way to know what’s on there now, except to look at all the

various databases involved (which are not identified) and many of these are subscription only databases.

Objector Bartholomew, a member and former officer of one of the organizational plaintiffs, describes the problems. “It is almost impossible to determine with certainty if one has a claim by reading the information available on the website ...” (A1189) “It is impossible to search the Defendants’ databases for evidence of both past and present infringement.” (*Id.*) Ms. Bartholomew provides a very apt analogy to squatters on real property who have long departed. (A1189-1190) Objector Goodrich found 100 additional articles for which he has claims by taking a class given only to the members of an organizational plaintiff. (A1254-1255) Objector Stacey has written articles for publications listed on the settlement website, but she could not find them in databases. (A719) Objector Trotsky has found some of her articles in a database, but they were written for a publication that is not listed on the settlement website. (A1285-1286) The settlement website list is not inclusive, and the parties have never said that it is. Edward Hasbrouck says the difficulty in determining if he is a class member led him to opt out to keep from granting licenses. (A1291-1293)

The foregoing establishes that objectors have standing.

### **III. Objection to Evidence Outside the Record.**

The parties rely on evidence regarding actual claims filings. PB13 n7, 35 n12, 37 n15; DB21. Objectors object to this information as outside the record. Fed. R. App. Pro. 10. Objectors would stipulate to expanding the record with information about the claims if it were sufficiently complete and verified. No request was made by the appellees.

### **IV. The Unregistered Owners Lacked Adequate Representation.**

There is a “fundamental” conflict because the settlement itself discloses non-speculative prejudice to the owners of unregistered copyrights. Unfortunately, we know nothing about how this group of plaintiffs actually operated. Being told that six of them filed only C claims comes as a dramatic shock, suggesting there was always the potential for adequate representation for the owners of unregistered copyrights. Unfortunately, the record strongly suggests that it was the organizations which managed the settlement negotiations. Even in the responding briefs the parties attempt to justify adequacy of representation by the involvement of the organizations.

**A. The Claims Confirm the Conflict of Interest.**

The class representatives are not without conflict because they have some unregistered copyrights.<sup>1</sup> The objections state:

“Even if they hold some Category C claims their interests are dominated by their A and B claims under the settlement.” (A728)

“Some of the named, individual, plaintiffs may hold Category C claims but they all hold such A and B claims as to place them in a conflict of interest with respect to representing the interests of the C claimants.” (A732)

The value of their registered copyright claims creates the conflict under this settlement.

There are 20 named plaintiffs. Defendants suggest that less than all filed claims. (“All of the twenty plaintiffs who submitted any claims ...”) DB21. Therefore, 20, or less, of the plaintiffs submitted 1,355 A claims, 115 B claims and 3,698 C claims. The value shows an actual conflict, not a potential or speculative one. The A claims are worth between \$875 to \$1500 each, depending on how many of each plaintiff’s articles were published by the same publisher. (A345, ¶ 4.a.) Using \$1200 per claim as a middle number, the 1,355 A claims are worth \$1,626,000. Since six plaintiffs filed only C claims (DB21), that \$1.6 million is

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<sup>1</sup> Objectors’ statement about plaintiffs’ registered copyrights was based on the Consolidated Complaint, which contains no suggestion that any plaintiff holds an unregistered copyright involved in this action. (¶ 32, referencing Ex. A, A108, 127-192) The parties reference superseded complaints. They could have presented the actual information below.

going to 14, or less, of the named plaintiffs. That's 15% of all filed claims. The total of all plaintiffs' C claims is \$184,900. Clearly, those 14 plaintiffs are much more interested in their A claims than their C claims.

The C Reduction creates the conflict. Examining two alternate claim reduction schemes shows it. To demonstrate, assume that total claims are \$13.8, exceeding the \$11.8 cap by \$2 million. Also assume that 75% of total claim value are C claims, as a rough estimate based on 99% of the claims being unregistered. That makes C claims \$10.35 million. Applying the C Reduction would reduce the C claims by \$2 million, or 19%. ( $\$2\text{m} \div \$10.35\text{m}$ ) That's a \$35,150 reduction of the plaintiffs' C claims. ( $19\% \times \$185,000$ ) Alternatively, applying a prorata reduction among A, B and C claims (it is prorata between A and B) the \$2 million excess would require a 14.5% reduction of all claims. ( $\$2\text{m} \div \$13.8\text{m}$ ) That's a \$232,000 reduction of the plaintiffs' A claims. ( $14.5\% \times \$1.6\text{m}$ ) For each of the 14 plaintiffs the difference is a \$16,570 reduction under a straight prorata reduction, versus a \$1,758 reduction under the C Reduction. This analysis doesn't change much if you assumed only 50% of the claim value was for C claims. In that event a 28% reduction of C claims is required. ( $\$2\text{m} \div \$6.9\text{m}$ ), That's \$2,590 for each plaintiff under the C Reduction, versus the \$16,570 under a straight prorata reduction. Those 14 plaintiffs will clearly risk the C Reduction to protect their A and B claims.

## **B. The C Reduction Was a Real Threat.**

Defendants say it would be “absurd” to question adequacy in light of actual claims of \$10.76 million. PB13 n7. The hyperbole can not conceal that class representatives lacked any reasonable basis for certainty that the C Reduction would not occur. “[T]he risk is exceedingly remote.” (A490) “[N]o basis in reality.” (A611) “As a factual matter there is no chance ...” (A1446) [I]t appears inconceivable ...” (A1571)

This is a claims made settlement, so any opinion about reaching the C Reduction trigger has to consider the anticipated claims rate. The parties never state an estimated claims rate. Objector Bartholomew’s work, showing that two newspapers alone could produce over \$12 million in C claims, demonstrated how large the eligible class members claims could be for just two out of the 26,000 publications involved here. It is beyond question that the total of all possible claims would greatly exceed the \$11.8 million C Reduction trigger.

The president of a company that administered more than 175 class action settlements recently testified that claim rates are 10% or less in the vast majority of claims made settlements. *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34, 44 (D. Me. 2005). If the \$10.76 million in claims here is a 5% claims rate, the potential value of all possible claims is \$215,200,000, and it would take a rate of 5.5% to trigger the C Reduction. If the \$10.76 million is a 10% claims rate, the potential value of

all possible claims is \$107,600,000, and it would take an 11.2% rate to trigger the reduction. Small percentage changes in the claims rate would trigger the Reduction.

Combining this reality with the parties' statements raises a serious question about their belief. They said: "Plaintiffs were closely advised by the Associational Plaintiffs and presented with convincing evidence on this issue, and have concluded that the risk is in fact exceedingly remote." (A490) No such "evidence" has ever been presented. There is the strongest possible suggestion that the parties had no basis at all for confidence that the Reduction would not occur. There was a real threat to the value of the class representatives' registered claims and they protected themselves from it with the C Reduction, demonstrating a conflict of interest.

### **C. The Parties Ignore the Category C Compensation Structure.**

The second settlement feature that reveals a conflict for the class representatives is the structure of C compensation compared to B compensation. Objectors' showed it is irrationally different and prejudicial to the C claims. AB33-35. This difference would suppress claims for unregistered copyrights. *Id.* Objectors asked these questions: "[T]he 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?"

They did not address the issue. They argue that lower compensation is justified by the registration issue, but they simply did not address the illogical difference in compensation structure.

**D. Case Authority Does Not Support a Finding of Adequacy.**

There are two types of certification decisions: those made on the plaintiff's motion and opposed by the defendant, and those made as part of settlement. The difference is recognized in *Amchem*. The Court stressed that the Rule 23 specifications for class certification:

“demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, because a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.”

*Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). An example of the first type is *In re Visa Check/Mastermoney Antitrust Litig. v. Visa, United States*, 280 F.3d 124 (2d Cir. 2001). This Court upheld certification over objections about the potential for conflict between parts of the class, finding that the potential was speculative and therefore not fundamental. *Id.* at 145. The district court would have the opportunity and the tools to address the conflicts if they became more concrete as the case progressed, and that sub classing is one of those tools. *Id.*

Had certification been sought in this case by a motion, objections about the potential for conflict might well have been viewed as speculative. There would

have been no evidence, as there is now in the settlement, of a concrete conflict between the A and B registered on one hand, and the unregistered on the other.

The parties rely on *In re Paine Webber Ltd. Pshps. Litig.*, 171 F.R.D. 104 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2<sup>nd</sup> Cir. 1997). It doesn't support them, because in rejecting an adequacy challenge the district court noted that the different class groups were represented by separate counsel and experts in the allocation process. *Id.* at 124, 133-134. Plaintiffs rely on *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001). The case involved distinct, separately represented, subclasses, and the allocation among the subclasses was recommended by a court-appointed special master. At 185-187. That is much different than here, where conflicted class representatives are recommending an allocation which benefits them vis-à-vis another part of the class. They also cite *In re Lucent Techs., Inc. Sec. Litig.*, 307 F. Supp. 2d 633 (D.N.J. 2004). The "allocation" scheme in *Lucent* is routine in securities class actions. There were no separate categories of compensation, as there are here. There was no challenge to the allocation. *Id.* at 648-649.

#### **E. The Conflict Here Is Fundamental.**

This Court recently rejected an alleged conflict in the settlement certification context, upholding a lengthy analysis of the district court which found that it was not "fundamental." *Denney v. Deutsche Bank Sec., Inc.*, 443 F.3d 253, 269 (2d Cir.

2006)(affirming *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 332-333 (S.D.N.Y. 2005). This decision demonstrates why the conflict here is fundamental. The claimed conflict in *Denny* was not allocation between parts of the class; the settlement provided for allocation to be done by court-appointed special masters. *Denney v. Jenkins & Gilchrist*, *supra* at 323 n21. The claimed conflict in *Denny* was the assertion that the class representatives all knew their full injury because they had been audited, and the objectors' group did not. At 331. The district court found that the claim was not factually supported. At 332. The Court of Appeals said the objectors would know their "full damages" by the time they went before the special masters for allocation. *Denney v. Deutsche Bank*, at 269.

A principal flaw of the *Amchem* settlement was that "the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." *Amchem* at 627. An essential allocation decision is a fundamental conflict. Plaintiffs acknowledge that the C Reduction is an allocation procedure. PB12. Objectors described how the Category C compensation structure was likely to limit defendants' liability by reducing, and suppressing, the value of C claims. AB35. This is the point that respondents do not address. It has actually occurred, since the claims at \$10.7 million leave \$1.1 million that the defendants do not have to pay.

## **F. Options For Unregistered Copyright Owner Representation.**

Defendants argue there was no option to having holders of registered copyrights represent the unregistered in negotiations because the unregistered could not pursue litigation. First, the parties advise us that six named plaintiffs filed only Category C claims, suggesting that notwithstanding the allegations they did not have registered claims. Presumably they, or some of them, were candidates for that representation. Second, the representative could have a registered claim. A class member whose financial interest was heavily dependent on unregistered claims, but who qualified as a plaintiff by having one or a few registered claims, would surely have been adequate.

Even without that, when defendants proposed to include the unregistered in the settlement, there were options to provide the “structural assurance” required by *Amchem. Amchem*, at 627. The certification of this class has been accomplished by agreement. If the settlement is not approved the certification terminates. (A396, ¶ 20) In a similar way, the parties could have agreed to a class member holding only unregistered claims for the purpose of negotiations and a settlement agreement. Such a course seems obvious in light of the defendants’ desire to settle with the unregistered copyright owners.

## V. The Scientific/Medical Works “Exclusion” Is Not Tenable.

The parties prepared settlement documents that deny compensation, and do it so that the record would show those claims were released. The judgment must define the class. Fed. R. Civ. P. 23(c)(3). It is a fundamental requirement. *See i.e., Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975)(per curiam)(noting absence of compliance with 23(c)(3) in holding no class was certified). Those described in the judgment “are full members [of the class] who must abide by the final judgment, whether favorable or adverse.” *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 548-549 (1974). A primary function of the district court is to describe the members of the class. *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 344 (3d Cir. 2003). “Defining the class is of **critical importance** because it identifies the persons (1) entitled to relief, (2) **bound by a final judgment**, and (3) entitled ... to the “best notice practicable” in a Rule 23(b)(3) action.” (emphasis added) Manual for Complex Litigation, Fourth, §21.222.

The Agreement specifies by exhibit the final judgment that the parties would submit to the district court. (A-356-357, § 11, and A-410-413, Exhibit F) It states the class definition of the Agreement. (A-411-412, ¶ 5.) That definition includes scientific/medical works. The parties do not dispute this. They rely solely on exclusionary language in the Notice, which is not an exhibit to the Agreement.

If parties intended to surreptitiously release claims without compensation they would do it exactly this way. Doing it openly invites disapproval. *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-783 (7th Cir. 2004); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d at 119; *Molski v. Gleich*, 318 F.3d 937, 953-954 (9th Cir. 2003).<sup>2</sup>

The Notice fails to confirm their intention. The phrase is: “Your subject works are excluded from the settlement if: ...” (A752) If this is an exclusion from the class definition, why not say exactly that? Excluding them from the “settlement” is ambiguous, and can carry the meaning that they are only excluded from compensation. It is significant to note that every other exclusion in the Notice but one (letters to the editor) are already excluded by the Agreement’s definition. One exclusion is for works by authors employed by the original publisher. (A752) Works by such a person are “works for hire” and they do not own the copyright in them. *Estate of Hogarth v. Edgar Rice Burroughs, Inc.*, 342 F.3d 149, 156 (2d Cir. 2003). Ownership of the copyright is required by the Agreement definition. (A335-336, ¶ 1.f.) Another exclusion is for works that the copyright owner licensed to the original publisher by written license. (A752) These are covered by the Agreement’s definition that the reproduction, etc. have been “without express

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<sup>2</sup> The actual judgment entered below, even with the modification about not releasing claims for scientific/medical works, still does not comply with Rule 23(c)(3) since it states a class definition which includes those works.

authorization.” (A335-336, ¶ 1.f.) Another exclusion is for “non-English language works. (A752) The Agreement definition specifies “English language” works. (A335-336, ¶ 1.f.) Another exclusion is for “content other than literary works.” (A752) The Agreement definition is explicitly for “literary work[s].” (A335-336, ¶ 1.f.)

This Circuit has already addressed a situation close to this one. *W. Alton Jones Found. v. Chevron U.S.A.*, 97 F.3d 29 (2d Cir. 1996). The case came up as a dispute as to whether a party (“Cities”) was included in the class definition of previous settlement. *Id.* at 30. The judgment defined the class consistently with the settlement. *Id.* at 32. However, the judgment also “expressly incorporated” other documents with a different definition which excluded Cities. *Id.* The appellant (Gulf) would be released by Cities for the pending claims if the class definition was that stated in the agreement and judgment. The lower court found, based on the documents incorporated in the judgment by reference and other evidence, that Gulf was not released. *Id.* at 33. Gulf appealed, and argued that the case should have been determined strictly by the terms of the settlement and judgment. *Id.* at 36. Cities prevailed, but it appears likely that it would have lost if the conflicting definition was not expressly incorporated in the judgment, because the Court relied on that express incorporation. *Id.* at 36-37.

If the parties' judgment had been entered, owners of copyrights in scientific/medical works would be members of the class whose claims were released. That judgment does not expressly incorporate the Notice. It is unlikely that anyone later raising a question would discover that the Notice contained a purported exclusion since there is no reference to it in the Agreement or the judgment. One can easily imagine that the parties crafted the settlement documents with *W. Alton Jones Foundation* in mind.

They do not say that this is an oversight. They make factual assertions to justify excluding such works, but there is no support for them in the record. DB33-34 They cite *Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989) as “noting that scientific researchers generally write not for financial gain for professional benefits.” That opinion makes no such statement, nor does any known holding suggest that, if true, that would justify allowing infringement of such copyrights without a remedy.

This is not a hypothetical illustration that the class representation has been inadequate, or that the settlement is unfair. Objector Charles Schwartz is a professor who has published in scientific journals. (A716-718) He identifies an article he wrote for Physics (“Phys.) Review. (A718) Physics Review is listed as a publication on the settlement website. Prof. Schwartz expresses his objection.

(A717) Defendants and plaintiffs say objectors did not object on this issue. DB37 & n9; PB38. The objection is clearly made. (A730-731)

## **VI. A Copyright License Is Not a Release.**

A class action release operates on a distinctive category of claims. “Plaintiffs in a class action may release claims that were or could have been pled in exchange for settlement relief.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, supra at 107. The attempt to force the license into a “release” ignores copyright law. Copyright protection is “wholly statutory.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984). [A]nyone who is authorized by the copyright owner to use the copyrighted work in **a way specified in the statute** ... is not an infringer ... .” *Id.* at 433 (emphasis added). The statute uses the term “license” throughout. Notable examples are the definition of a “transfer of copyright ownership” and the section on terminations by authors of transfers and licenses. 17 U.S.C. §§ 101; 203.

The parties differed in terminology in the Agreement. Plaintiffs called it a license. (A349, ¶ 5.b.) Defendants called it ... a “compromise” of rights.” *Id.* These characterizations are found in a section of the Agreement entitled “Continuing Use of Subject Works.” (A348) The concept of it as a “release” occurs when that section is referenced in another section which explicitly deals with releases. (A358-359, ¶ 13.b.) Other than the statement of plaintiffs, the term “license” did

not appear in the Agreement. However, by the Amendment, the parties explicitly agreed it is a license. “The parties to this Settlement Agreement expressly confirm that the license conveyed by this Settlement Agreement permits .....” (A1102, ¶ 2.)<sup>3</sup>

Defendants’ justification of the license as a compromise of rights they claim against class members is completely hollow and without any support in the record. It can not possibly justify relief against the whole class, as they have never suggested that they have such rights vis-à-vis every member of the class. In early 2002 they said they had such rights against “many, if not most” of the class members. (A1626) Even this has to be treated with skepticism. First, there is no factual support in the record. Second, it is inconsistent with their statements. The defendants state that identification of class members is difficult if not impossible. (A-1589, ftnt3) The plaintiffs state that publications “typically do not maintain records of their freelance contributors” (A-222)

**A. The Easement Cases Do Not Apply.**

The parties rely on three decisions which present, in the facts, the grant of easements by class members. The parties analogize this to the grant of copyright

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<sup>3</sup> Objectors suspect that the terminology dance in the Agreement was an effort by the defendants to assert that this Agreement would eliminate author’s rights to terminate licenses pursuant to 17 U.S.C. § 203.

licenses. These cases are irrelevant because none of them consider the legal issues raised here.

The easements in *Alvarado* are inherent in the inverse condemnation action. Any successful prosecution, by an individual or the class, resulted in the defendant receiving the aviation easement. *Alvarado v. Memphis-Shelby County Airport Authority*, 2000 U.S. App. LEXIS 21259, \*20 (6<sup>th</sup> Cir. 2000). The opinion rejects a “public policy” objection to the release, but the release is not the easement and the public policy issue is not Rule 23 based. The “public policy” objection is rejected based on another Sixth Circuit decision which is not even a class action decision. *Forsythe v. BancBoston Mortgage*, 135 F.3d 1069, 1074 (6th Cir. 1997).

The only issue in *Barkema* is the adequacy of the notice to the class. *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (Iowa Sup. 2003). The third decision does not consider the easement as a release, within the context of the identical factual predicate or otherwise. *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 309 F.3d 978, 985 (7<sup>th</sup> Cir. 2002). Nor does it address the right of the class representatives under Rule 23, or due process, to grant prospective rights in the property of class members.

There is, however, an observation to be made about a factual difference between those cases and ours. It is raised by this statement by defendants:

The class of persons whose “future claims” are released is a known, existing class whose works are already at issue, not an indeterminate group

of persons, some not yet born and many not presently identifiable, as in *Amchem*. DB41

In the easement cases the identification of the class members subject to an easement was possible to a virtual 100% certainty. This is due to real property recording statutes, existing in every one of the 50 states. John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide For First Year Law Students*, 80 U. Det. Mercy L. Rev. 91, 101-102 (2002). Here, as noted above, the class members are to a great extent unidentifiable. Under the circumstances the parties developed a notice program which objectors have not challenged. But the circumstances, as outline in the affidavits submitted by some of the publishers, and statements by the parties, indicate that there is no reason to believe that the class members are “known.” If one were to conclude that under some circumstances a class representative could legally bind class members to a grant of their prospective rights in their property, surely the ability to actually give notice to those class members would be relevant to any due process analysis. Objectors believe this question never arises, because such grants are beyond the authority permitted by Rule 23.

**B. Plaintiffs’ Release Arguments Are Completely Off Point.**

Plaintiffs cite several decisions which have no application here. *McClendon v. Georgia Dep’t of Cmty. Health*, 261 F.3d 1252, 1254-1255 (11<sup>th</sup> Cir. 2001), is not a class action settlement. It was a settlement by 46 states against tobacco

companies. At 1253-1254. The release explicitly excluded individual citizen claims. *Id.* It does not discuss the identical factual predicate doctrine. Plaintiffs cite two other decisions for the proposition that the release of future claims is permitted. *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1370 (Fed. Cir. 1999); *Press Machinery Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 785 (8th Cir. 1984). They are not class action decisions. Objectors' position concerning the release/license is based on law unique to class actions.

Plaintiffs also make an argument concerning the release with citation to *Amchem*, which they describe as rejecting a release of claims for future injuries. PB28 (citing *Amchem, supra* at 625). There was no challenge to a release in *Amchem* and the Court did not reject a release, or discuss one, at that page or elsewhere in the opinion.

## **VII. The Approval Process Was Inadequate.**

Plaintiffs say that *In re Community Bank* is distinguishable because the district court judge there did not analyze class certification at all. PB44. *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277 (3d Cir. 2005). The decision actually notes that the judge made a statement in the final order that certification met the requirements of Rule 23, but the Court of Appeals found this to be an *ipse dixit* statement without any “discernable analysis.” *Id.* at 300. The exact same thing is true here. The final

order is the only place the district court mentions class certification, and it simply recites that certification conforms with the requirements of Rule 23. (A1726-1727)

Plaintiffs say that sample class action notices in an older version of the Newberg treatise show a requirement for personal appearance to object. PB45 These examples were submitted to the district court with the same characterization, which is untrue. A574-580; A581-584; A585-588, and A592. Each of them contain the common requirement that the class member who intends to appear at the fairness hearing should give notice of that intention. A579 (requiring a notice “if you plan to address the Court”); A583 (requiring that in order to appear the class member must file objections and, “if applicable” give notice of intention to appear); A587 (same as previous), and A593 (requiring that class member wishing to appear must file objections in advance). These are the opposite of the notice here. They condition appearing on filing objections and/or giving notice of intention to appear. Newberg explicitly disagrees with the appearance requirement of this case. The treatise says:

The basic format for registering objections generally requests an objector to submit written objections to the court and serve them on counsel for the parties on or before a specific date prior to the settlement hearing. It is unnecessary for objectors to appear personally at the settlement hearing in order to have their written objections considered by the court.

4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:56 (4th ed. 2002).

## CONCLUSION

We end with inherently unbelievable explanations for dropping the scientific/medical works and the C Reduction. Those provisions, in light of the unsatisfactory explanations, raise a real concern for collusion. We have no explanation for the Category C compensation structure, which penalizes the higher paid works in that category, as compared to the B structure. Since that C structure suppresses claims by the overwhelmingly largest part of the class, the defendants clearly were motivated to seek such a provision. It offered the possibility for, and we are told has achieved the reality of, reducing defendants' payout in the settlement. The class representatives, at least 14 of them, had little motivation to resist the defendants. In this negotiation there should have been someone facing both the defendants and the named plaintiffs whose real financial interest was in maximizing compensation for unregistered copyright owners.

Objectors request the relief stated in the conclusion of their opening brief.

Dated: June 12, 2006.

*S*  
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