

05-5943-cv(L)
06-0223-cv(CON)

To Be Argued By:
CHARLES S. SIMS

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

EDWARD ROEDER,

Appellant,

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

Objectors-Appellants,

—against—

MICHAEL CASTLEMAN INC., E.L. DOCTOROW, TOM DUNKEL, ANDREA DWORKIN,
JAY FELDMAN, JAMES GLEICK, RONALD HAYMAN, ROBERT LACEY, RUTH LANEY,
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 VAUGHAN, 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., EBSCO INDUSTRIES, INC. and
PARTICIPATING PUBLISHER TRIBUNE COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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FRAP 26.1 STATEMENT

Pursuant to F.R.A.P. 26.1, and to enable judges of the court to evaluate possible disqualification or recusal, defendants-appellees – Reed Elsevier Inc., Thomson Corporation, Dialog Corporation, Gale Group, Inc., West Publishing Company, Inc. D/B/A West Group, Dow Jones & Company, Inc., Dow Jones Reuters Business Interactive, llc, D/B/A/ Factiva, EBSCO Industries, Inc., Knight-Ridder Inc., Knight Ridder Digital, Copley Press, Inc., Mediastream, Inc., The New York Times Company, Newsbank, Inc., ProQuest Company, and ProQuest Information and Learning Company – certify that the following are all of the corporate parents and other publicly held companies owning 10% or more of any defendant-appellee’s stock:

Reed Elsevier plc

Thomson Corporation

Dow Jones & Company, Inc.

Reuters Group plc

Knight-Ridder, Inc.

ProQuest Company.

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ISSUES PRESENTED FOR REVIEW

After three-and-a-half years of intensive mediation led by Kenneth Feinberg, plaintiffs reached a Settlement Agreement with the databases and newspaper publishers who are defendants in this copyright infringement class action, as well as thirty-five additional publishers who will be funding more than half the settlement amount. The district court approved the Settlement Agreement as fair, reasonable, and adequate after considering and overruling five objections from a dozen members out of a class of thousands of eligible freelance author class members, thousands of whom have now submitted claims.

This appeal on behalf of ten objectors, by counsel whose website is “www.classobjector.com,” raises four questions:

1. Did the district court abuse its discretion by concluding that the class representatives had fairly and adequately protected the interests of the class under Rule 23(a)(1)?

2. Did the district court abuse its discretion by approving a Settlement Agreement that did not include articles in scientific or medical journals?

3. Did the district court abuse its discretion by approving a Settlement Agreement that provided, in exchange for compensation with respect to the works in suit, for broad releases of infringement claims against the defendants, their content providers, and the licensees of either?

4. Did the district court abuse its discretion by reason of the process by which or the record on which the Settlement Agreement was approved?

STATEMENT OF FACTS

Since the decisions in *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 1999), *aff'd*, 533 U.S. 483 (2001), holding that 17 U.S.C. § 201(c) did not itself provide a defense to infringement claims of freelance authors with respect to their periodical freelance articles included in databases under license from newspaper and magazine publishers, this class action, first filed in September 2000, has been a topic of enormous interest, reporting, and internet postings within the community of freelance authors.

Articles in newspapers, magazines, and other periodicals are authored by either staff writers or freelance authors. The rights conveyed by freelance authors range widely, from assignment of the full copyright to nonexclusive licenses of electronic rights, and may be conveyed in writing or, for nonexclusive licenses, orally or by conduct. For more than two decades, publications have been licensing their complete contents to third-party databases and for at least a decade many have made the complete text available as well on their own archival websites, along with representations of adequate rights and promises to indemnify the database in the event of any breach. In view of representations and promises to indemnify from highly reputable publishers, databases such as the defendant

database companies typically lack any knowledge with respect to any given article as to whether the author is an employee or freelance author, and any factual basis for the publisher's representation. *See generally* A1568-69, 1587-91.

The infringement claims lodged in these lawsuits against database defendants (and only a few publishers) therefore implicated a much more complex set of potential liabilities, and a much more complex litigation, than was evident from the face of the complaints. As a result of the settlement finally reached last March after three-and-a-half years of mediation, however, thousands of freelance authors have gained the right to submit claims for all freelance articles in the databases which they did not license electronic rights to in writing. Thousands of freelance authors submitted such claims with respect to hundreds of thousands of allegedly infringed copyrighted newspaper and magazine articles, for which they are awaiting payment under the Settlement Agreement.

After seven motions by these objectors, and three hearings at which with extraordinary patience the Court heard extensive oral argument, sometimes for hours,¹ Judge George Daniels entered an Order for Final Approval of Settlement

¹ In addition to Objections (A728), Supplemental Objections (A1247), Addendum to Supplemental Objections (A1378), and further supplemental objections (A1721), counsel for objectors filed *seven* motions: a motion to vacate preliminary approval and to establish revised procedures for approval of settlement and award of attorneys fees (docket 54-56, *see* A427); a motion for an emergency stay of order of preliminary approval and to postpone mailing and publishing of notice (docket 61, 64, *see* A613); a motion for production of information by named

and Final Judgment (“Final Order”) finding the Settlement Agreement fair, reasonable, and adequate. A1725. His judgment is fully supported by the record, and there is no merit to any of the scatter-shot arguments asserted for vacating the settlement. To the contrary, the Settlement Agreement here is uniquely resistant to criticism by reason of the lengthy, careful, closely watched mediation process in which the Settlement Agreement was reached, the substance of the settlement terms that carefully address and fairly resolve the interests of freelance authors, publishers, databases, and the public, and the support of the nation’s three largest authors’ rights organizations who, as plaintiffs, watched carefully to ensure that the settlement was crafted to benefit the class rather than the class’s attorneys. The record overwhelmingly supports affirmance of the judgment below.

The statement of facts set forth in the brief of the plaintiffs-appellees is faithful to the record, and therefore we incorporate and rely on it here in the interests of judicial efficiency. However, we have particular familiarity with the facts, relevant on this appeal, concerning the participation in the mediation of the

plaintiffs and class counsel (docket 72, A671); a motion for an order to show cause regarding an alleged violation of the Court’s prior order concerning notice, and for continuation of the fairness hearing and related deadlines (docket 102-104, *see* A1192); a renewed application for an order to show cause re violation of the Court’s Order regarding Notice of Amended Settlement (docket 106-108); and separate motions for discovery related to attorneys fees and costs and settlement approval (docket 112-114, *see* A1234-42).

Transcripts from the three hearings on these motions are at A617, A1131, and A1739. Other hearings are transcribed at A193, A414, and A1072.

defendant databases and the publishers, including the publishers' commitment to fund a major portion of the settlement, thereby making it possible.

The mediation. After hearing an explanation of the complexity of the dispute underlying the complaints which commenced this action, the district court suggested mediation at the initial scheduling conference on July 19, 2001. The defendants – which included databases (*e.g.*, Reed Elsevier Inc., owner of Lexis-Nexis, Thomson Corporation, owner of Westlaw), aggregators who license the complete contents of numerous publications to databases (*e.g.*, EBSCO, Gale, and ProQuest), and four publishers which maintain archival databases of their own contents (*e.g.*, The New York Times Company, Dow Jones Inc., Copley Press, Inc., and Knight-Ridder, Inc.) – agreed that the participation in the mediation of leading publishers would be indispensable if the mediation were to have any chance of succeeding. Any settlement reached by the databases without the consent of the publisher-indemnitors would have risked the benefit of the representations, warranties, and promises of indemnification given by the publishers to the databases on which the databases relied and depended. A1569-70, 609-12.

Moreover, as the plaintiffs and the mediators were advised, the databases lacked knowledge or even information as to which articles were freelance articles and, of those, which the publishers lacked adequate rights to license. The database defendants knew only that:

- they received content from responsible publishers together with representations, warranties, and indemnities as to the publisher's right to convey the article for distribution on the databases;
- presumably only a small proportion of the contents of publications was freelance;
- if the case were litigated the defendants would have to add the publisher-content providers as additional parties and assert third-party claims against them; and therefore
- any settlement must include the publishers, account for their responsibility to the databases pursuant to their representations and indemnities, and resolve all potential claims arising from the plaintiffs' assertion that for thousands if not millions of articles the publishers had not obtained (and therefore could not license or use) such rights – and the publishers' opposing assertion of adequate rights to license the millions of freelance articles potentially implicated by the class action complaint.

A1569, 1587-92, 609.

The mediation participants were therefore more numerous than the parties to the lawsuit. Tribune Company and Time Inc. joining The New York Times Company and the other defendant-publishers (Dow Jones, Knight Ridder, and Copley Press) as the publisher caucus of the defense group. The thirty-six "Parti-

pating Publishers” whose commitments they eventually obtained are listed in Exhibit A to the Settlement Agreement. A381.

What became known as the “defense group,” comprised of the defendants who were principally database proprietors (the “Database Defendants”) and leading publishers (defendants and non-defendants alike), negotiated jointly against the plaintiffs, aiming always to obtain complete peace with the putative class with respect to all alleged infringements by or attributable to the content providers or the Database Defendants with respect to all the articles allegedly infringed by the defendants. Their objective was to resolve all the claims of the class against the databases as well as the databases’ inchoate claims against the publishers for indemnification, so that defendants and their content providers could proceed with their businesses without further risk of infringement as regards articles they had already licensed in good faith. A1569-70.

Under the guidance of court-approved mediators Kenneth Feinberg and his colleague Peter Woodin, the mediation commenced in the fall of 2001. Defendants and the publishers agreed to provide extensive information sought by class counsel, which was provided during the first quarter of 2002. A1688, 1567-69, 1467-69. That information was provided together with a brief arming the mediators by assessing the strength of the legal and factual defenses to class certification, liability and/or damages (discussed at greater length below). Citing cases, the brief

addressed the defense group's substantial defenses with respect to any liability at all with regard to the bulk of works in suit (which were unregistered), as well as the enormous risks plaintiffs faced as to liability, damages, and class certification. A1571, 1574-1649. The mediation brief was intended to, and did, play a key role in tempering plaintiffs' expectations.

The mediation was exceedingly complex and lengthy because it entailed effectively three separate yet interdependent sets of negotiations. Agreements needed to be hammered out between not only the defense group (defendants and publishers and their insurers) and the plaintiffs over the size of the settlement amount, the scope of the releases, and other important terms; but also (before progress could be made on that front) between four different lead class counsel representing different named authors and leading authors organization, who had different ideas about what could be achieved; and between defendants and publishers of the content they carried (whose representations and associated indemnities were implicated) over the settlement amount to be offered, how to fund that sum, the scope of releases necessary, and other important terms. A1569. Each time positions shifted or new issues or demands were raised, intra-side disagreements needed to be ventilated and resolved before progress could be made on the main front. *See generally* the two declarations of Kenneth Feinberg, A608-12, 1687-91.

The mediation was “one of the most difficult, time consuming and protracted mediations” Mr. Feinberg had undertaken, precisely because it entailed so many parties, including essential parties whom plaintiffs had neglected to sue. A609.

Risks and likely rewards. Both the outcome of any settlement and the court’s assessment of fairness, adequacy, and reasonableness are a function of the risks faced by plaintiffs in proceeding to trial, and an assessment of “the terms of the compromise with the likely rewards of litigation.” *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995).

As the defendants explained in their pre-mediation brief detailing and summarizing those risks (A1574-1649), and then in their brief to Judge Daniels on the motion for final approval (which annexed the pre-mediation brief), plaintiffs faced very considerable risks of not establishing liability for most of the works for which they were seeking recovery. *See* A1597-98, 1601-02 and *Morris v. Business Concepts, Inc.*, 259 F.3d 65, 71-72 (2d Cir. 2001) (dismissing infringement action under 17 U.S.C. § 411(a) for failure to register articles, and holding that registration by collective work owner did not satisfy §411(a)). Surveys defendants undertook indicated that only a small fraction of the freelance works in suit were likely registered – on the order of 0.08 percent, or one in 1200. A1597, 1643-49; *see also* A1464.

Plaintiffs also faced substantial risks that no class would be certified at all because of the difficulty of litigating such claims in a single trial, or if initially certified then maintained through trial. As the pre-mediation memorandum and arguments made to plaintiffs repeatedly stressed, no court had *ever* certified a litigated Rule 23(b)(3) class action for copyright infringement damage claims, while courts had denied such motions. A1602-06. If claims had been litigated, the law appeared to foreclose certifying any class action that would have encompassed claims respecting unregistered works. Even with respect to registered works litigated claims necessarily require individualized determinations of liability (as to whether freelance authors had granted electronic rights pursuant to written, oral, or implied-in-fact licenses) and damages that precluded any finding that a class action for damages was manageable and a superior way of proceeding and that class issues predominated. A1607-15. (Notwithstanding defendants' pre-mediation arguments that plaintiffs' claims could not be adversarially *litigated* as a class action, defendants agreed with plaintiffs that, in the context of a settlement, all the requirements of Rule 23 were met. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) (although the requirements of Rule 23 must be met when a class is certified for settlement purposes only, "a district court need not inquire whether the case, if tried, would present intractable management problems"); *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277,

299 (3d Cir. 2005) (same); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004) (Lynch, J.) (same)).

Apart from the risk of not obtaining or maintaining class certification for a litigated claim, particularly as to unregistered works, plaintiffs faced a serious risk of not succeeding even with respect to the relatively few claims for registered works, because (a) many claims were barred by the statute of limitations, (b) many claims were barred by express or implied licenses, and (c) many claims were barred by estoppel, acquiescence, and/or laches. A1625-29.

Additionally, statutory damages were generally unavailable for most of the works for which plaintiffs sought recovery (17 U.S.C. § 412), an award of “reasonable royalties” or profits was unavailable as a matter of fact and law, and putative class members could show, at best, only *de minimis* revenue attributable to use of their articles. *See generally* A1616-24. For example, dividing total gross revenue by the number of archived documents yields a gross revenue-per-article figure of only pennies (or fractions of pennies). A1622-24. Moreover, the articles in the databases evidently lack economic value there, as the value of the databases is essentially in the facts they make easily available, not in expression. For example, the removal of millions of articles because of liability concerns caused by the decisions in *Tasini* did not cause any decline in either license fees received by databases from subscribers who pay a flat fee for database subscription or royalty

fees paid by database to publishers. A1592-95. The reason is that most users are seeking information, not expression, and accordingly obtain what they seek (and full value for their subscription fees) when their database searches pull up the facts sought in *any* article, regardless of whether additional, unlicensed freelance articles would have contained additional sources for that same information as well.

The settlement. After three and a half years of effort, a settlement agreement was executed shortly before its presentation to the court on a motion for preliminary approval on March 31, 2005. While the Settlement Agreement (A332) as amended (A1102-04, 1126) needs to be read as a whole to understand all its details, a brief summary will be helpful.

The Settlement Agreement provides for a total settlement amount of a minimum of \$10 million, and up to \$18 million depending on the number and value of claims. A340 ¶3. Objectors' assertion (Br. 9) that "there are two alternative settlement funds" is wrong and reflects a fundamental misunderstanding of the settlement, which was to be funded in tranches, with an initial deposit of \$5 million from the Database Defendants, and commitments by participating publishers to the next \$4 million (plus published notice worth at least \$1 million), and any additional balance funded by the publishers whose works draw the claims. A340-42, 1570.

The Agreement provides for claims to be filed by class members, and for valid claims to be paid pursuant to a schedule that takes into account whether the

claimant had registered a copyright in the claimed work sufficient to trigger eligibility for statutory damages under 17 U.S.C. §412, or at all; the price paid for the work by the publisher in the first instance, and the age of the work. A344-52 ¶4, A383-87. The works subject to the Settlement Agreement and thereby eligible for claim and release (“Subject Works”) are all freelance works for which publishers did not have “express authorization” that had been distributed, displayed, or transmitted by one of the defendants, except for letters to the editor, non-English language works, and works in scientific or research-based medical journals. A335-36 ¶1.f, A752. Works registered in time to be eligible for statutory damages are classified as “Category A works”; works registered but ineligible for statutory damages are classified as “Category B works”; and unregistered works are “Category C works.” A345.

Publishers will be responsible for 50% of the settlement amount if the settlement does not exceed the \$10 million minimum settlement amount, rising up to 72% of the entire settlement amount if the \$18 million maximum settlement were reached. A1570.

In exchange for these promises and the broad waiver of defenses that could have been asserted (*see* A1574-1649), class members agreed to release the defendants and the publishers and their licensees from *all* infringement claims relating to Subject Works, effectively providing members of the defense group with the non-

exclusive right to continue displaying, transmitting, or licensing the Subject Works, unless the class members designated during the claim period such works as ineligible for such continuing use. A358-61, particularly ¶13.b, and A1102 ¶2. Notably, class members have a three-fold choice: they may submit claims for the full specified payment due a work of that vintage and registration, in exchange a complete release of claims flowing from the publisher's use or licensing of that work; decline to release such future claims (and nonetheless receive two-thirds of the otherwise allowable claim); or opt-out and retain the right to assert an infringement claim (neither releasing any claims nor conveying any future use rights). A348-50 ¶5.

Objections. Counsel, who appears to be a professional objector, filed objections on behalf of ten freelance authors and a blizzard of motions. *See* n. 1 *supra*. Neither in the district court nor here has counsel shown that his objections are other than abstract issues identified by parsing the Settlement Agreement, or indeed that his clients actually have standing to raise the points he argues. For example:

- Counsel objected (and complains on appeal) that the Agreement permits only class members filing claims, and not class members who do not file claims, to withdraw works from the “future use” provision in ¶ 5.a (A348) – but the record does not disclose that any

of his clients failed to file claims and yet want to exclude their works from future use.

- Counsel objected that the requirement that objectors appear at the hearing (in person or by counsel) deprived them of due process or their rights under Rule 23. But they all did appear (A744, 1131), either in person or by counsel, and there is no evidence that *any* objector wanted to appear but could not do so.

Approval. After having considered objector’s seven motions and three sets of objections, Judge Daniels heard a day-long argument on September 27, at which he extensively questioned objectors’ counsel (and other counsel as well). The transcript reflects that the court carefully attended to objectors’ contentions (*see, e.g.,* A1746-52, 1794-1802), but found them “hypothetical,” “purely speculation” and “simply invalid.” A1812-14. Late in the afternoon session of that hearing, Judge Daniels delivered findings and conclusions justifying certification of the class, rejection of the objectors’ contentions, approval of the Settlement Agreement, and entry of the Final Judgment. A1811-14.

This appeal followed.²

SUMMARY OF ARGUMENT

Objectors’ attack on class certification rests solely on alleged conflicts between holders of claims for unregistered works and the named plaintiffs, who are

² At the direction of the Clerk, the caption reflects as well an additional appellant, Edward Roeder, whose appeal was dismissed on May 17, 2006.

assumed to have only claims for registered works. There is no conflict. Plaintiffs do have claims for unregistered works, and in any event the distinctions drawn by the Settlement Agreement are between works, not class members. All freelance authors (plaintiffs and others alike) are likely to have claims for unregistered works, and shared the common goals of obtaining for the entire class the largest settlement amount in total, and the most per category (registered, late-registered, and unregistered works). Nor can inadequate representation be predicated on a provision for ratcheting down claims for unregistered work in the event that total claims exceed \$18 million, when the total claims submitted by the expiration of the claim period leave the settlement amount below that ceiling, the provision was never expected to take effect, and its impact would have been felt by authors generally, all of whom write unregistered work. Point I.

Judge Daniels did not abuse his discretion in approving the settlement as fair, reasonable, and adequate. The Settlement Agreement was reached in a deliberative mediation, supervised by Mr. Feinberg, under the watchful eye of not-for-profit authors' organizations (who stood to gain no financial benefits) ensuring that the interests of authors generally, and not just plaintiffs, were served. Claims for works in scientific or research-based medical journals were not "sold out" or "abandoned" at the last minute, as objectors complain, but excluded from both claim and release prior to provisional class certification, along with other categor-

ies of work whose authors were not professional writers or similarly situated with named plaintiffs. The attack on the so-called “license for future use” fails because that so-called license is in fact just the effect of the releases provided for, which are lawful under the identical factual predicate rule of *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 107-113 (2d Cir. 2005), *cert. denied sub nom Leonardo Pizza by the Slice v. Wal-Mart Stores, Inc.*, 125 S. Ct. 2277 (2005). Point II.

The district court carefully considered the objections, and its questioning and oral decision rendered at the lengthy final approval hearing reflect its independent judgment and afford a record more than adequate for appellate review. The approval proceedings neither infringed the due process interests of class members nor violated any provisions of Fed. R. Civ. P. 23. Point III.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, AND WAS CORRECT, IN FINDING ADEQUACY OF REPRESENTATION

The objectors’ attack on class certification aims solely at adequacy of representation and does not challenge the district court’s findings concerning all the remaining Rule 23 criteria. Neither of the two alleged conflicts identified as reasons for finding that the court abused its discretion in finding adequacy of representation – that the Settlement Agreement disadvantages authors of unregistered works relative to the class members, who assertedly represent only registered works, and that “the C reduction provision favors one part of the class at the

expense of another part of the class” – provides any basis for reversing the district court’s certification.

The standards governing the adequacy assessment have recently been summarized by this Court:

Fed. R. Civ. P. 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” *See also Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2d Cir. 1999). Adequacy must be determined independently of the general fairness review of the settlement; the fact that the settlement may have overall benefits for all class members is not the “focus” in “the determination whether proposed classes are sufficiently cohesive to warrant adjudication[.]” *Ortiz*, 527 U.S. at 858 (internal quotation marks omitted). Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members. *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 170 (2d Cir. 2001). A conflict or potential conflict alone will not, however, necessarily defeat class certification – the conflict must be “fundamental.” *In re Visa Check/Master-Money Antitrust Litig.*, 280 F.3d 124, 145 (2d Cir. 2001).

Denney v. Deutsche Bank Sec., Inc., 443 F.3d 253, 268 (2d Cir. 2006).

“Speculative conflict should be disregarded” *In re Visa Check/Mastermoney Antitrust Litigation*, 280 F.3d at 145 (citation omitted). The district court’s finding of adequacy is reviewable for abuse of discretion, and entitled to considerably

more deference than if certification were denied. *Caridad v. Metro-North Commuter R.R.*, 191 F.3d at 291.³

A. The Class Representatives Had the Same Interests as Other Class Members

Objectors try to force this case into the mold of *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), where different putative class members had fundamentally different objectives, with some seeking larger immediate payments and persons as-yet-unharmed seeking assurance of a larger future fund for such later time, if any, as their injuries materialized. They complain that the Settlement Agreement’s terms reveal inadequate representation of “part of the class,” by “prejudice[ing] the unregistered owners to the benefit of registered owners.” (Br. 26). That attack, and the resulting complaint that the Court should have certified subclasses with unregistered owners as class representatives, reflect a fundamental misunderstanding of fact and law.

First, and dispositively, there is no conflict at all between the named plaintiffs and freelance authors holding C claims (for unregistered work), much less a conflict sufficiently “fundamental” to defeat adequacy, because there are not diff-

³ See also *Lange v. Union Bank of Switz. (In re Holocaust Victims Assets Litig. Pink Triangle Coalition)*, 424 F.3d 158, 165 (2d Cir. 2005) (internal citations omitted) (“[A] district court abuses or exceeds the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) 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.”)

erent categories of freelance authors but only a single category of writers who have written both registered and unregistered works. Objectors' picture of two independent categories of authors – named class representatives with only A or B claims, and class members with only C claims – is a fantasy.

Authors were not in different categories akin to the differences identified in *Amchem* between those seeking generous immediate payments and those (as yet knowable, and some of them as yet unborn) seeking an ample, inflation-protected fund for the future. *All* freelance authors create unregistered works. A tiny few then proceed to register a very few of their works. Few if any freelance authors of newspaper and magazine articles – and certainly not these plaintiffs – register *all* their works for periodicals, because registration generally is economically sensible only for works with long-lasting value beyond the price paid. (Authors Guild president Paul Aiken explained that months of searching for plaintiffs identified only two authors who had registered before infringement, and two others who registered but too late to be eligible for statutory damages. The balance of plaintiffs registered on the way into court. A1464.) Because registration carries costs and makes little economic sense for freelancers writing newspaper and magazine freelance contributions, each class member (including the named plaintiffs) would share the interest in maximizing recovery for C claims, which were always likely to greatly exceed the number of other claims.

Objectors’ assertion that “The class representatives hold only registered claims” (Br. 28) is a fabrication cited to nothing. Plaintiff Letty Pogrebin, for example, had written hundreds of freelance articles in newspapers and magazines, and registered copyright in only 21 such articles. A64 ¶¶8(c). The complaints pleaded comparable facts for ten further plaintiffs.⁴ Further, now that the claim period has concluded, the claims experience – not in the record, but reported to the parties by the claim administrator – shows that the named plaintiffs filed 3,698 C claims, but only 1,355 A claims and 115 B claims. All of the twenty plaintiffs who submitted any claims submitted at least one C claim, *and six submitted only C claims*. The named plaintiffs were more than adequate class representatives of all freelance authors.

Second, at the threshold, the objectors’ argument would be invalid even if the facts did not show named plaintiffs with C claims (and six with only C claims), because there was no alternative here to having the named plaintiffs, with works in

⁴ *See, e.g.*, A65-67 ¶¶9, 12 (plaintiffs James Gleick and Marie Winn both authored numerous freelance articles, in only some of which copyright was registered); A26 ¶¶11 (Robin Vaughn is “a freelance author and the owner of the copyright in numerous articles,” at least one of which is registered); A26-27 ¶¶12-15 (same for plaintiffs Mary Sherman, Miriam Raftery, Paula McDonald, and P/K Associates, Inc. (Franklynn Peterson)); A85 ¶¶6-7 (same for plaintiffs Derrick Bell and Lynn Brenner); and A71 ¶¶17 (Robert Lacey, who as a citizen of the United Kingdom whose freelance articles are not “United States Works” is not subject to the Registration-precondition of 17 U.S.C. § 411(a)). We are advised that all plaintiffs have unregistered works, but in view of 17 U.S.C. 411(a) the framers of their complaints did not in each instance see any reason to so allege.

all three categories, represent authors with unregistered works. No named plaintiff did – and no person intervening as a named plaintiff to serve as a class representative *could* – assert claims only for unregistered works. Because the Copyright Act confers jurisdiction over suits for infringement of United States works only if those works are registered – and requires every infringement plaintiff to allege registration – the district court would have lacked subject matter jurisdiction over any complaint for infringement of articles in U.S. newspapers and periodicals filed by a person whose “claims” all involved unregistered works. 17 U.S.C. § 411(a); *Morris v. Business Concepts Inc.*, 259 F.3d 65, 68 (2d Cir. 2001). No plaintiff could have sued over only unregistered works, and no freelance author who did not allege infringement of at least one registered work could have intervened to represent such a subclass.

All freelance authors have a common interest in maximizing the recovery pot as a whole. *No one had a conflicting interest because the settlement did not allocate the Settlement Amount into separate pots for each category of work.* The cost of registration, and the fact that its benefits accrue essentially to works with greater and longer lasting economic value than newspaper and magazine articles, effectively guaranteed a community of interest.

The facts thus refute any structural or fundamental antagonism of interest here. Unlike cases where some class members have one kind of claim and others

have conflicting claims, here it was clear that all class members would have C claims, and, in addition, a tiny fraction of those would also have claims for registered work. Given the very difficult legal hurdles any freelancer faced in monetizing claims for unregistered works, all plaintiffs would share the goal of maximizing what could be obtained as a whole from the defense group, and, as well, the largest per work amounts that could be obtained for registered, late-registered, and unregistered works.

In addition, the participation of the associational plaintiffs whose mission is to protect the interests of authors generally, which sued on behalf of all their members but neither sought nor obtained any financial benefit from the settlement, provided further structural assurance that the interest of all authors in maximizing claims for unregistered works was front and center throughout the negotiation, as Mr. Feinberg attests. A610-11 ¶¶9-10; *see also* A1471.

The same reasons addressed above for concluding that no fundamental conflict was implied or created by different payment schedules for registered works (categories A and B) and unregistered works (category C) compel that same conclusion with respect to the differences between payment schedules for late-registered (B) works and unregistered (C) works. That the settlement agreement provides greater compensation for registered work (which would have survived a motion to dismiss) than for unregistered work (which would not), and greater

compensation still for work eligible for statutory damages, reflects the kind of compromise that settlements entail – *i.e.*, simple settlement value – and not any inherent or structural conflict between different categories of claimants rendering a conclusion of adequate representation an abuse of discretion. In view of the registration requirement of 17 U.S.C. §411(a), the risks plaintiffs faced with respect to including claims for such works in any certified class, or of such works being subject even to (economically practicable) individual suits, were obviously enormously greater than the risks they faced with respect to B category works, justifying lower payments. *In re Paine Webber Ltd. P’ship. Litig.*, 171 F.R.D. 104 (S.D.N.Y.), *aff’d*, 117 F.3d 721 (2d Cir. 1997). Further, objectors ignore that the awards for unregistered works are effectively worth an additional \$30 per work, since authors will have avoided the registration fee that is ordinarily a precondition to any infringement suit.

B. Valid Category C Claims Will Be Fully Paid, and Were Never Seriously in Jeopardy

Objectors’ remaining theory of a conflict requiring separate representation for authors of unregistered works (notwithstanding their inattention to the showing that the registration requirement precluded any subclass representatives for such authors) is what they term the “C reduction,” under which, *if* sufficient valid claims of sufficient value had been asserted to take the prima facie settlement amount upward of \$18 million, then claims for unregistered works (C claims) would have

been ratcheted down to hold the Settlement Amount at the guaranteed \$18 million maximum.

What objectors call “the C reduction” was inserted by the parties to cover what they deemed to be the extremely unlikely event that sufficient claims came in at sufficient value (whatever the mix) to take the settlement amount above \$18 million, which would require some means to ratchet claims down to the \$18 million maximum settlement amount. A1571 ¶10, 610-11 ¶10, 1464. It would be absurd to reverse class certification on this ground, since the claim period expired last September and the submitted claims as reported by the claims administrator make plain that there will be no C reduction whatever, even if every claim asserted were valid. Inadequate representation cannot be predicated on a contingent provision that the parties reasonably believed would not be triggered,⁵ that harmed no one and diminished no one’s claims, and whose impact would have fallen not on any discrete group but rather on *every* author’s claims for unregistered work, a line that the Copyright Act itself draws.

17 U.S.C. § 411 is the answer to objectors’ question (Br. 30-31), “If they believed there was no chance of a reduction, why did they place the entire risk on one part of the class?” – although the question needs rephrasing to accord with the

⁵ A610-11, 1571 ¶¶ 10-11, 1464 ¶16. Nor did the parties have any obligation to credit objector Bartholomew’s implausible scenarios and calculations (A1207-13, *see* Br. 29), all of which have proven fanciful.

fact that the risk was placed not “on one part of the class” but on unregistered works of all class members. Because only registered (and no unregistered) works would have been eligible for relief had the case been litigated and plaintiffs prevailed, the class representatives concluded that it would be unfair to place the burden of any necessary reduction anywhere else. Having paid for registration precisely so as to be eligible for seeking damages, owners of registered works seemed entitled, in fairness, not to bear the burden of any “C reduction” if, contrary to all expectation, one were ever triggered. A1447. *See In re Paine Webber, supra.*

The experience of the named plaintiffs (including freelance author organizations) was, and defendants’ studies confirmed, that few freelance authors incur the \$30 fee and effort to register their freelance contributions to newspapers and magazines, so that it was extremely implausible that claims in categories A and B (for registered works) would exhaust the available \$18 million Settlement Fund. Even if the cap were triggered, the ratcheting down would have applied not to some separate subclass of authors but to the unregistered works of all authors, class representatives (many of whom pled only a single registration) and others alike.⁶

⁶ Objectors’ charge that defendants “said they would oppose any effort of the plaintiffs to represent a class including unregistered copyright owners on the grounds of inadequate representation (*see* Br. 9, citing A1598-99) is not accurate, as checking that spurious citation demonstrates.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, AND WAS CORRECT, IN APPROVING THE SETTLEMENT AS FAIR, REASONABLE, AND ADEQUATE

The process that led to the Settlement Agreement, and the Agreement itself, amply support the district court's conclusion that the Settlement Agreement was fair, adequate, and reasonable, and none of the objections pressed on appeal suggest otherwise.⁷

A. The Process Effectively Guaranteed the Fairness, Reasonableness, and Adequacy of the Settlement Agreement

First, the mediation was conducted with the active assistance and supervision of Kenneth Feinberg, perhaps the most distinguished and lauded mediator in the nation. As the Second Circuit has repeatedly observed, “a court-appointed mediator’s involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure.” *D’Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir. 1990). Mr. Feinberg attested that the mediation was “one of the most difficult, time consuming, and protracted mediations” he had ever experienced; that “arms-length negotiation characterized the

⁷ The settlement is reviewed for abuse of discretion, except for errors of law, which are reviewed de novo. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). Given the substantial exchange of information during the mediation, we believe that the settlement agreement is also entitled to a presumption of fairness, adequacy, and reasonableness, since it was reached in “arm's-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

negotiating positions of the parties”; that there “was absolutely no evidence of collusion during the entire mediation process”; and that “all sides exhibited great skill and determination during the mediation process, resulting in a comprehensive settlement of a very complex matter *which I believe is the fairest resolution which could be obtained.*” A610 ¶8. Contrary to objectors’ attack, Mr. Feinberg had no conflict and no interest whatever other than assisting the parties in reaching a settlement they considered fair, adequate, and reasonable. *See* A1689-90.

Second, the process was lengthy and intensely adversarial, and entailed an extraordinary series of disagreements and disputes that needed to be – and were – resolved before a settlement could be agreed to. What the objectors paint as a simple two-sided dispute was much more complex, with disagreements not only between plaintiffs and defendants but between defendants, between defendants and the publishers of the content they carried (whose representations and associated indemnities were implicated), and between various defendants and publishers, on the one hand, and their insurers, on the other. *The defendants made plain that there could be no settlement whatsoever unless their related disputes with the publishers were resolved; it was the contribution of those content providers that was the key to any settlement at all.* A1569. All these disputes added to the complexity of the process, which lasted three-and-a-half years; that they were all worked through, and the participants’ interests reconciled by a comprehensive

settlement to which all these participants were eventually agreeable, effectively guarantees that this settlement is reasonable and the opposite of collusive. *See* A1567-72, 608-12, 1687-88, 1466-70.

Third, the process entailed a substantial provision by defendants and publishers of the information sought and needed to assess the *real* value of plaintiffs' claims. That informal but extensive discovery was followed by extended negotiation and struggle over every material point, with the mediators' active and sustained assistance. The various defendant databases were required to and did disclose to Mr. Feinberg and plaintiffs extensive information on such topics as royalty payments paid to content providers, revenues received from subscribers and/or users, licensing terms, and articles that had been removed from databases in anticipation or in the wake of *Tasini*. A1466-68, 1471, 1567-69. Plaintiffs engaged economic experts to process the data provided. A1466, 1666.

Content providers participating in the mediation, including the Copley Press, Knight-Ridder, Inc., The New York Times Company, Time Inc., and Tribune Company, disclosed comparable information, including, for example, information regarding license fees, the numbers of articles (and such information as existed about numbers of freelance articles) per year; the (generally tiny) percentage of articles that are freelance articles in each publication's database; and expense and

revenue for publication archives, if available. Additional information was sought and provided on request. A1567-69, 1688.

Among other matters, information was disclosed to plaintiffs that:

- recent articles (less than 60 days old) were enormously more likely to be accessed than articles of older vintage, demonstrating that the economic value of articles in the database declined sharply after a short period;
- neither licensing revenue, nor users, nor user revenues declined when the publishers had withdrawn hundreds of thousands of articles from the database (overbroadly, out of an abundance of caution and lack of ability to pinpoint freelance works lacking clear electronic rights), establishing that the genuine economic value of freelance works without adequate rights was \$0;
- publishers had begun to routinely obtain electronic rights from freelance authors without *any* corresponding increase in license fees; and
- freelance articles were extremely unlikely to be accessed, much less copied – in one case, by examining the set of nearly 80,000 documents purged (removed) by The New York Times over a 10-month period, one of the largest databases was able to ascertain that only 5% of those documents had been “hit”.

A1568-69; *see also* 1469-71.

Thus, contrary to objectors’ inaccurate premise, plaintiffs did not negotiate from a position of factual blindness. Rather, defendants and representative publishers supplied substantial material information as requested by plaintiffs, on a

wide range of topics, so as to facilitate a clear-sighted, realistic evaluation of the risks plaintiffs and the class faced and the premises and assumptions on which the complaints were initially based. *See generally* A1567-69, 1688. The parties briefed and the court reviewed the relevant *Grinnell* factors.⁸ A1394-1458, 1545-72, 1811-14.

Finally, the 3½ year intense mediation process guaranteed that there is not a shred of truth to any claim that the settlement agreement is collusive. A proposed settlement is “collusive” when class counsel reaches an agreement with defense counsel to advance the interests of class counsel or the named plaintiffs at the expense of those they are pledged to represent. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 53 (2d Cir. 2000). Here, far from benefiting class counsel or named plaintiffs by selling out class members, the proposed settlement was almost uniquely insulated from danger of collusion by the process through which it was reached, as the declarations of Mr. Feinberg explain. A609-12, 1687-88.

The Agreement treats all freelance authors of Subject Works identically. Class counsel (and the named plaintiffs they represented) were consulting throughout with three independent not-for-profit organizations of freelance authors, ensuring that the interests of *all* absent class members were considered and served. A610, 1471 ¶20. The Agreement on its face demonstrates that the not-for-profit

⁸ *See Robertson v. NBA*, 556 F.2d 682, 684 & n. 1 (2d Cir. 1977).

organizations obtained no financial benefit from the settlement and had nothing to gain from the settlement other than the best possible result for freelance authors (who are all either members or potential members, and were treated without distinction). A1535, 1465. The very purpose of the organizations is to advance the interests of freelance authors generally. A610-11. With this structural mechanism to ensure that the plaintiff class representatives and counsel were fully informed on an ongoing basis of the views and interests of class members, the interests of absent freelance author class members were fully considered and protected in a process that was highly adversarial, not “collusive.” *See generally* A609-12, 1687-88.

B. Exclusion of Works in Scientific and Medical Journals Was Proper

The district court also acted properly, and did not abuse its discretion, in concluding that the parties did not “sell out” or “abandon” (as plaintiffs claim) a portion of the class by excluding at “the last minute” works published in scientific or research-based medical journals, and in rejecting objectors’ contention that the exclusion amounted to a violation of the notice requirement of Fed. R. Civ. P. 23(e)(1).

In the first place, objectors’ condemnation of the settlement for allegedly “abandoning [sic] the Authors of Scientific and Academic Works” and doing so “in a deceptive manner” proceeds from erroneous factual premises. Letters to the editor and non-English language works were excluded as well, at the same early

time and for comparable reasons. A752. *None* of the named plaintiffs wrote works for “scientific and research-oriented medical journals,” and no such articles were ever included in the settlement for any purpose – whether for claim or release, since such works had been excluded by the time the settlement was presented to the court for preliminary approval in March 2005. In view of the fact that writing for such journals is an entirely different business from the freelance authorship in newspapers and magazines that underlay the plaintiffs’ claims, and none of the plaintiffs was an author of such a work, it was doubtful that plaintiffs could have represented the authors of such works.

The parties agreed early on that such works should be excluded because scientific and research-oriented medical journals presented an entirely different problem than the named plaintiffs’ articles in suit, and the named plaintiffs were not comparable to the scientists and physicians who create such works. None of the articles named in the Consolidated Amended Complaint was written for a scientific or research-oriented medical journal. Articles in scientific and research-based medical journals are written not by “freelance authors” as that term is understood in the trade (persons who write for a living) but by professional scientists or physicians whose trade is researching, not writing. *See Weissmann v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989) (noting that scientific researchers generally write not for financial gain but for professional benefits). Publishers of

scientific and medical journals did not need or want releases for such works, and did not want to be obliged to pay for releases that they neither needed nor wanted.

Objectors also misstate the facts when they assert that the decision to exclude such articles was made at “the last minute,” and only after objection (Br. 21). The agreement that such works were not included as Subject Works came before provisional class certification and any objections. Even before the court provisionally certified the class on March 31, 2005, the parties had agreed that claims with respect to such works were “excluded from the settlement,” and accordingly the Notice submitted with the proposed order for preliminary approval, whose distribution the Court ordered pursuant to Rule 23(e), Fed. R. Civ. P., expressly advised potential class members that “**YOUR SUBJECT WORKS ARE EXCLUDED FROM THE SETTLEMENT IF . . . THEY ARE LETTERS TO THE EDITOR, SCIENTIFIC AND RESEARCH-ORIENTED MEDICAL JOURNALS**” A752 (emphasis in original). Objectors’ image of a collusive effort to make claims regarding such works releasable but not compensable, changed at the last minute when someone blew a whistle, is either a fantasy or deliberate falsehood, because the Notice ordered distributed by the March 31 Order makes plain that the parties had already agreed, and proposed to notify the class, that such works were excluded “from the settlement” altogether, not merely from entitlement to compensation. *See* A419 ¶5, A421 ¶10, and A752.

Because such claims were comprehensively excluded, left untouched and unimpaired by the Settlement Agreement, as class members were informed in the Notice (A752), there is no conceivable “collusion” or unfairness here as a matter of law. The handful of cases objectors cite (Br. 40, 53) which condemn settlements where class counsel sell out certain claimants by providing defendants with releases for those claims without obtaining any compensation for the claimholders are entirely inapposite here. The claims in question are *not* released without compensation; they are subject to neither compensation nor release. Excluding certain claims from both compensation *and* release trades not something for nothing, but nothing for nothing. The exclusion afforded neither side any unfair, unilateral, or disproportionate advantage, and left such claims, if there are any, unimpaired and subject to litigation. Objectors have cited no case, and we have found none, where a settlement specifying that certain claims (dubiously in the complaint at all) would not be settled and would be excluded from both compensation *and* release has been held indicative of collusion or deemed unfair.

Nor was Rule 23(e)(1) violated. It provides:

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) (A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing

and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

If there were a “dismissal” of claims for works in scientific or medical journals at all, it was the dismissal of the claims of an *uncertified* class, because the claims were expressly “excluded from the settlement” before Judge Daniels ever certified (on September 28, 2005) or even provisionally certified (on March 31, 2005) the class. The March 31 Order by which the class was provisionally certified provided for distribution of a Notice which clearly excluded those claims from the settlement. A419 ¶5, A421 ¶10; *see* A751. Moreover, even assuming *arguendo* that Rule 23(e)(1) applied, its requirements were satisfied, because the same notice of the settlement sent by first class mail to thousands and published widely in newspapers and magazines across North America (which objectors do not attack) accurately advised that “**SUBJECT WORKS ARE EXCLUDED** **FROM THE SETTLEMENT IF**” they are works in “scientific and research-oriented medical journals,” letters to the editor, or non English-language works. A752. Rule 23(e)(1) was complied with by the court’s approval and the notice it directed, and required nothing more.

The sentence added to paragraph 7 of the Final Judgment (A1382) simply embodied in the Final Judgment itself the exclusion previously contained in the Notice (A751), in response to the rather vague objection the objectors filed on July 14 (A728), complaining only that the exclusion in the Notice was not embodied in

the class definition. *See* A743; *see also* Objectors’ Memorandum of Law (April 26, 2005) at 6 (complaining that “the Claim Form . . . instructs that ‘articles in scientific or academic journals are not considered Subject Works, and you should not complete Worksheets for them . . . there needs to be some explanation of why scientific or academic articles, which are nowhere mentioned in the Settlement Agreement, are not Subject Works . . .”). The added sentences clarified that point, consistent with the earlier Notice. The clarification was not a response to any objection, since, so far as we have been able to find, Objectors never complained to the district court that the settlement sold out or abandoned authors of works in scientific or research-based medical journals by subjecting them to release but not compensation.⁹ In any event, the parties agreed early on that the class of works subject to release should be coextensive with the class of works subject to compensation, and excluded from compensation and release works in scientific or research-based medical journals, letters to the editor, and non-English language works (A752, *see also* A1471 ¶18, A1448). By doing so they neither violated Rule 23(e)(1) nor treated the authors of such works unfairly.

C. The Release of Future Infringement Claims Was an Essential Element of the Settlement and Was Fair and Reasonable

What objectors now call a “license for future use” (A45), which they described below as “license by acquiescence,” is simply the consequence – the

⁹ Objectors’ objections and motions did not complain that uncompensated works were being released.

effect – of the releases as to Subject Works that are the keystone of the entire settlement. *See* A359 Settlement Agreement ¶13.b (“the releases shall be construed to provide, and this Settlement Agreement provides, that a Subject Work which class members do not elect to have removed or not restored under paragraph 5 may, under the authority provided by this Settlement and the releases and Orders provided in connection therewith, be electronically reproduced, distributed, displayed, licensed, sold or adapted by . . . each Defense Group Member”) and A1102 Amendment ¶2 (confirming that the nonexclusive use permitted includes relicensing).

The parties reached agreement on the Releases themselves (A358 ¶ 13, read in conjunction with A338 ¶1.n, A348-49 ¶5.b, and A1102), not on characterizing the releases as a license. Indeed, the Settlement Agreement specifically notes that while the broad releases are “*considered by plaintiffs* to constitute a non-exclusive license for future database use,” they are “considered by the Defense Group to be a compromise and restatement of preexisting non-exclusive rights obtained through oral or implied-in-fact agreements and provision for the expenditures occasioned by takedown or incomplete restoration.” A349 ¶5.b (last sentence). What the Agreement denominates as “Releases” – which were essential to any consensual resolution that might have been reached – may be described, if objectors care to, as licenses, but in fact the Agreement expressly provides for “releases” (¶13.b and

¶1.n). The effect is the same either way, since both these Releases and a non-exclusive license are simply covenants not to assert further infringement claims with respect to the very Subject Works in suit. *See Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) (a non-exclusive license is a waiver of the right to sue for infringement); *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997) (same); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338-39 (9th Cir. 1990) (same).

“It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other.” *Williams v. Gen. Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998); *see also Uhl v. Thoroughbred Tech. & Telecomm., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002). “Practically speaking, ‘class action settlements simply will not occur if the parties cannot set definitive limits on defendants’ liability.’” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) (citations omitted). *See also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 (9th Cir. 2006) (upholding releases of un-pled claims against non-defendants, and barring relitigating challenges to those releases by those whose objections on those grounds have already been rejected).

The global releases afforded with respect to Subject Works are not some “extra benefit” that was improperly added to an otherwise acceptable settlement

and should have been excised by Judge Daniels, but the heart and *sine qua non* of the parties' agreement. There was a dispute about whether the Database Defendants had the electronic rights conveyed to them by the content providers; the content providers had represented that they had such rights, and for any specific article may well have had them pursuant to oral, written, or implied-in-fact agreements; and yet the parties realized that litigation of the existence or not of those electronic rights would be ruinously expensive. Accordingly, they reached a compromise in which the defense group offered to pay certain sums (which they believed they had no legal need to pay), in exchange for a promise by the class that class members would not sue databases or publishers for continuing to distribute or display their works in their databases so long as the authors had a prior opportunity to decline to make such a promise for any given article. Nothing in Rule 23, or the cases objectors cite, precludes the exchange of releases such as these.¹⁰

The criticism that the releases affect “future claims” of class members (Br. 47) is at best spurious. The present dispute is precisely a dispute over the publish-

¹⁰ Objectors misread *Tasini* (Br. 5) as holding that the publishers do not have rights to the works at issue, and assert that it held that publishers could obtain electronic rights only with an “explicit” agreement. But *Tasini* held only that 17 U.S.C. §201(c) did not privilege the publishers’ provision of their complete contents to disaggregated databases, and did not disturb the long-settled rule that “nonexclusive licenses may . . . be granted orally, or may even be implied from conduct.” *Graham v. James*, 144 F.3d at 235. With §201(c) put to one side, the factual issue as to whether the publisher had electronic rights for any given work remained in dispute, and it is that dispute which is compromised by the Settlement Agreement.

ers' present rights to license and use known freelance contributions that have been in the databases, not a series of infringement claims as to future works or works to which defendants have no colorable claim of right derived from the publishers.

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*. The class had sought injunctive release from the outset. Whether future acts as to any given Subject Work (e.g., LexisNexis's distribution of a given article to its customers, or Westlaw's distribution of the same article to a new database for commercial distribution) would be infringing depends on the resolution of the existing dispute, and would have the same factual predicate (namely the publisher's possession, or not, of sufficient rights to license articles to the databases). It is not fairly characterized as some wholly separate, future disagreement, when it rests on the same factual predicate as the claims in the Consolidated Amended Complaint, namely the publisher's rights *today* sufficient to distribute the article on its own website and to license it to third party databases. A compromise of that very dispute, through an exchange by which authors received payments not otherwise obtainable without the expense and risk of trial in exchange for their promise not to sue for continued nonexclusive use of those articles authorized by the publishers, is

well within the scope of Rule 23(e). *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d at 107-113.

Because the releases pertain only to the works already distributed (and allegedly infringed) by the defendants by the time of settlement, and resolves the dispute concerning only those works, there is no basis for distinguishing *Wal-Mart*. The works subject to releases are the same works already in suit (having been reproduced for distribution by at least one defendant). If the participating original print publisher had the electronic database rights sufficient to use or license each of those articles, the defendants would prevail as to those articles in the Consolidated Actions, and the participating publishers could continue to use and license those articles; if not, not. Precisely because publishers make their contents available on both third-party databases (such as those operated by defendants) and their own websites, the Settlement Agreement defined “Released Claims” to include

each and every claim of every Class member. . . that has been or could have been asserted in the Action against any member of the Defense Group . . . (as if all Participating Publishers and Supplemental Participating Publishers had been named as defendants), with respect to any and all of the Subject Works, including but not limited to all claims arising out of the same facts as their claims of copyright infringement, past, present, or future, known or unknown, and all claims with respect to the electronic . . . reproduction, distribution, display . . . of Subject Works to or by the Defense Group or Supplemental Participating Publishers . . .

A338 ¶1.n. The publishers were willing to fund at least half the settlement, making possible a resolution that would not otherwise have been reached, but only if they

were released entirely from liability for their use and licensing of the Subject Works. They considered, after all, that they had and could prove their copyright ownership, or at least electronic rights, with respect to such works. They were willing to waive the right to so prove and to pay added compensation to already-compensated authors, in exchange for complete peace permitting them to continue using what they believed was already properly theirs to use. They were unwilling to pay and yet remain liable with respect to such articles – *i.e.*, to lose the right to continue the distribution rights which they considered were theirs to begin with.

In the context of the settlement as a whole, the releases are plainly neither unfair nor unreasonable.

First, and of fundamental importance, *no class member was coerced or put to any obligation to license anything*. Every class member had the right to opt out entirely, and every class member who did not opt out had the further right to not provide any right of continuing use (with compensation adjusted accordingly).

Second, there was an exchange for consideration, not an unfair exchange of something for nothing. The class got a promise of compensation for every Subject Work (registered and unregistered alike), which it was unlikely ever to have achieved in litigation, but had to give something in return - the broad releases with respect to continued use of the Subject Works. The defense group was willing to pay substantially in order to be able to go on with their business. They would not

have paid anything at all had publishers and their licensees (including the defendant databases) remained exposed to suit on all the many thousands of Subject Works still remaining on the databases, which had not been removed because they could not be practicably identified. A1569 ¶6.

Third, the release applies only to infringement claims with respect to the Subject Works already at issue, and compromises those particular claims. *See* A338 ¶1.n.

Objectors cite no authority whatever for their contention that a class action settlement cannot effectively convey a nonexclusive copyright license, or indeed any other comparable non-exclusive license, from absent class members. Since both releases and non-exclusive licenses are promises not to sue, the argument is absurd. Rule 23 does not constrain the breadth of releases parties bargain for. Moreover, courts in comparable contexts have found ample authority for class action settlements that convey comparable rights.

For example, in *Uhl v. Thoroughbred Tech. & Telecomm., Inc.*, 309 F.3d at 982, 985, noting that broad releases are common in class settlements, the Seventh Circuit affirmed approval of a settlement which required all class members to provide plaintiff with an easement without their further action. The Court found no problem in imposing easements on absent class members, assuming that the criteria for Rule 23 were met, holding that the fact “that each individual class

member did not know the full extent of the burden she would suffer is unimportant.” In *Alvarado v. Lindsey*, 2000 U.S. App. LEXIS 21259 (6th Cir. August 15, 2000), a suit by class of owners of land adjacent to airport was settled on basis of a payment representing compensation for release of past claims and easements conveyed by all class members pursuant to broad releases, which the Sixth Circuit held permissible under Rule 23(e). A settlement imposing easements on absent class members was also upheld in *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 616 (Iowa 2003). The Iowa Supreme Court upheld a settlement, in a case concerning installation of fiber optic cable, that traded the availability of payments by defendants for easements from class members, including absent class members.

Approval of these class action settlements that effectively obtained property easements from absent class members is compelling authority for the fairness of the releases here, which provides for releases that amount, in effect, to granting the initial publisher for each Subject Work a non-exclusive right – like an easement – to use those works on their own archival web sites and to license them to others.

Objectors’ further argument that the release of claims for infringement of Subject Works “raises policy considerations” (Br. 50-51) are baseless. *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 84 (2d Cir.), *cert. denied* 543 U.S. 1039 (2004), protecting a publishers’ right to publish poems by Dorothy Parker from an infringement suit by a compiler, is entirely inapposite. And the suggestion that this

settlement is “an end-run on the *Tasini* decision” is exactly backwards. Any law-and-economics or copyright professor, looking at the Supreme Court’s decision, would have concluded that the probable effect of the decision would be an industry-wide settlement, in view of the costs of litigation on a per-work basis. Indeed, Justice Ginsberg’s opinion for the Court expressly welcomed “an agreement allowing continued electronic reproduction of the Authors’ works . . . and remunerating authors for their distribution.” *Tasini*, 533 U.S. at 505. The settlement here is precisely that expected outcome, in which authors, publishers, and databases creatively reached a fair, reasonable, and adequate settlement respecting past articles which would enable the affected parties to move forward with their work.¹¹ The overall settlement – offering each class member the rights to be paid and to have their work taken down, in exchange for the release of claims concerning works already in databases – is plainly far better for the class of freelance authors than would be disapproval of the settlement and a return to litigation with the risks outlined above.

III. THE APPROVAL PROCESS MET REQUIRED STANDARDS OF DUE PROCESS AND COMPLIED WITH RULE 23

Finally, objectors’ remaining arguments – that the record reflects insufficient independent judgment by the district court, or was inadequate to support approval,

¹¹ Publishers advise that they have taken care of the prospective problem by routinely obtaining electronic rights for all freelance contributions.

or that requiring objectors to appear in person (or by counsel) violated their due process rights – ignore the record on appeal and are unsupported by precedent.

A. The Record Properly Reflects the District Court’s Careful and Independent Consideration of the Settlement Agreement and Class Certification

Relying on *In re Cmty. Bank of N. Va. & Guar. Nat’l Bank of Tallahassee Second Mortg. Loan Litig.*, 418 F.3d 277, 300 (3d Cir. 2005), which held that courts must independently consider class action settlements and found insufficient indication that the district court there had done so, objectors contend that the district court here did not engage in the necessary analysis, make the requisite findings, or sufficiently explain its reasoning to permit meaningful appellate review. But the lengthy, supervised process of mediation, negotiation, and settlement, and the district court’s deliberative process in considering the motion for approval (as well as the objectors’ manifold other actions), differ from *In re Community Bank* as night from day, as the summary of proceedings above (*supra* at 12-15, 26-32) establishes.

Objectors’ conclusory assertions entirely ignore, and are contradicted by, the transcripts of the three hearings in which they participated, which appear in the Joint Appendix they prepared. *See* p. 3 n.1, *supra*. Those transcripts document the court’s willingness to hear counsel for the objectors at length and its patience with objectors’ extensive, repetitive argument. They demonstrate, as well, Judge

Daniels' knowledge, understanding, and familiarity with the facts of the case, the motions, memoranda, affidavits and declarations submitted by the parties (A618-24 (Tr. 4-25), A1141-56, A1746-52 (Tr. 26-52), A1791-1802), and his careful consideration of the issues and reasons for rejecting the objections, certifying the class, and approving the settlement. A1811-14. The district court issued findings of fact and conclusions of law in open court (*id.*) after more than five hours of oral argument, which were reflected in the Final Order signed contemporaneously. *See* A1739-1820 (argument, including lengthy argument by and questioning of counsel for objectors) and A1725-28 (findings and conclusions in Order for Final Approval of Settlement and Final Judgment). The district court

considered thoroughly and examined the negotiating process leading up to the settlement as well as the settlement's substantive terms. I have considered the substantive terms of the settlement as compared to other likely results that could be obtained at trial and the cost and efforts to that otherwise have to be further expended in that regard . . . [and found that the settlement] is the product of very aggressive and thorough examination, negotiation, and debate among the parties.

A1811. Among its findings were that the Settlement Agreement was "fair, reasonable, adequate, and in the best interests of the class . . . and not a product of collusion." *Id.*

Judge Daniels’ demonstrated engagement, consideration of all the objections, and findings comprehensively distinguish this case from *Community Bank*.¹²

The facts and procedure of the district court’s approval of the settlement are similar, if not almost identical, to the facts and procedure used in *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982), where the objectors argued that “the lower court’s two page opinion demonstrates that it did not adequately scrutinize either the substantive terms of the proposed settlement or the propriety of the process of negotiations.” Rejecting that argument, this Court held the lower court’s brief examination of the *Grinnell* factors sufficient in view of the preceding process, consideration, and record. *Id.*

The contention that the record was inadequate here (Br. 24, 52) is equally baseless. “This court will affirm if its review of the record shows that the court had before it sufficient materials to evaluate the settlement and came to the correct conclusion.” *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983), *citing Weinberger*, 698 F.2d at 74. The record upon which the district court based the decisions to certify the class and approve the settlement, including numerous

¹² A further sign of the court’s independent consideration of the issues, and deep engagement in his task, was its direction at the hearing on preliminary approval that class counsel include on the official settlement website (where claims could be made) a means for freelance authors to provide comments of any sort on the settlement, with which direction plaintiffs complied, and which comments (89 in all) reflected the fact that just 8 of 89 counts were critical of the settlement. A627 Tr. 40.

declarations, exhibits, memoranda and hearings, was more than ample to support the court's rejection of the objections below. That is particularly true with respect to the two *Grinnell* factors which objectors say were inadequately supported in the record – the “best possible recovery” and “recovery in light of all the attendant risks.” See A1666-70 (plaintiffs' expert report concerning ranges of maximal damages, *assuming that the claims of all members of the class for unregistered works, were valid and recoverable*) and A1574-1649 (defendants' memorandum demonstrating all the various risks plaintiffs faced); *see also* A611-12 (Mr. Feinberg's assessments that “class counsel were able to negotiate a better resolution of the dispute than could be achieved through continued litigation,” that “\$18 million is absolutely the most that good-faith negotiators acting at arms length could agree on,” and that “a fixed amount of \$18 million proved totally unacceptable to the defendant companies and would have prevented a mediated settlement from being achieved”). Judge Daniels expressly addressed those factors (A1811-12):

I have considered the substantive terms of the settlement as compared to other likely results that could be obtained at trial and the cost and efforts to that otherwise have to be further expended in that regard...I find that the only conclusion the evidence supports with regard to the negotiating process is that both sides aggressively fought for the best interests of their clients and that both sides have made a reasonable determination that a settlement of this action on these terms is the most appropriate course of action, given all other alternative considered.

Here, as in *Weinberger*, the record – including thirty-four declarations submitted by the parties, extensive legal argument, and two declarations from the nation’s most distinguished mediator, who had worked with the parties on this settlement for nearly 3½ years – fully demonstrates that “the *court had before it sufficient materials to evaluate the settlement and came to the correct conclusions.*” *Weinberger*, 698 F. 2d at 74 (emphasis added). *See also Handschu v. Special Servs. Div.*, 787 F.2d 828, 834 (2d Cir. 1986) “Taken together, these materials provided a satisfactory record on which the district court could base its decision.” *Weinberger*, 698 F. 2d at 74.

There is no legal support whatever for objectors’ further complaint (Br. 52) that they themselves lacked sufficient basis to comment on approval even if the court’s information were adequate. In any event, the briefs supporting final approval and supporting papers (including the expert study and defendants’ pre-mediation brief) were filed on September 19, and the court allowed objectors both to file supplemental written objections (A1794-95) and to be heard, at length, on any subject, at the September 27 hearing. *See* A1754-55.

B. The Approval Process Complied With Due Process

The district court’s procedures in regard to approval of the settlement and certification of the class complied with Due Process. Due Process required that the class receive notice and be given “an opportunity to be heard and participate in the

litigation, whether in person or through counsel,” to be provided with an opportunity to opt out, and “that the named plaintiff at all times adequately represent the interests of the absent class members.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). All class members were given an opportunity to opt out (A422), and 455 class members chose to do so. A1728. The parties made extensive showings in connection with preliminary approval, and again at final approval, justifying the Settlement Agreement as fair, adequate, and reasonable. Objectors were invited to respond in writing, on the official website, and in court. All members of the class were given an opportunity to be heard regarding their objections. The court reviewed all objections submitted, allowed objections to be submitted after the deadline, allowed opt-outs with no standing to participate in the final fairness hearing, and held a hearing previously scheduled as a final fairness hearing to allow objectors to present their arguments. Finally, as stated above, the named plaintiffs adequately represented the absent class members at all times.

Objectors argue (Br. 54) that the requirement of personal appearance “violate[d] the guiding principles” of the class action process. But they concede that there is no authority whatever for their argument, and direct authority to the contrary (*id.*, citing *Sparks v. MBNA*, 48 Fed. Appx. 385, 391 (3d Cir. 2002), which held “that a court, consistent with due process, may require an objector to be present, in person or by counsel, to present his objections and respond to inquir-

ies”). Moreover, these objectors did appear, and not a single class member notified anyone that he or she wanted to object but could not appear at the final fairness hearing. A744, 1740. Given the large numbers of freelance authors in the New York metropolitan region and the number of counsel here, any worthy argument could have been presented in person, by some freelance author or by their counsel, and surely all were. The fact that only five objections were received confirms that the requirement of personal appearance did not result in objections not being made and heard, or any harm to appellants (or others).

When “all interested parties were provided with an opportunity to make written and oral objections to the proposed settlement agreement,” the court has “read all of the papers filed in objection . . . and then made clear at the hearing that everyone had the opportunity to ask all the questions necessary to satisfy themselves,” and the court “considered all the objections raised, though it justifiably refused to allow minor quibbles to derail [an] expensive and intricate” settlement, due process is afforded, not violated. *In re The Drexel Burnham Lambert Group*, 995 F.2d 1138, 1145 (2d Cir. 1993).

CONCLUSION

For all the foregoing reasons, the Court should affirm final judgment of the district court approving the Settlement Agreement as amended.

Respectfully Submitted,

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The undersigned hereby certifies that:

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ANTI-VIRUS CERTIFICATION

Case Name: Roeder v. Castleman

Docket Number: 05-5943-cv(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/25/2006) and found to be VIRUS FREE.

/s/ Natasha R. Monell

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