05-5943-cv(L)

COUNSEL TO ARGUE: MICHAEL J. BONI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 HYMAN, ROBERT LACEY, RUTH LACEY, PAULA McDONALD, P/K ASSOCIATES, INC.,LETTY COTTIN POGREBIN, GERALD POSNER, MIRIAM RAFTERY, RONALD M. SCHWARTZ, MARY SHERMAN, DONALD SPOTO, ROBERT E. TREUHAFT AND JESSICA L. TREUHAFT TRUST, ROBIN VAUGHN, ROBLEY WILSON, MARIE WINN, NATIONAL WRITERS UNION, THE AUTHORS GUILD, INC. AND AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS,

Plaintiffs-Appellees,

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

Defendants-Appellees

EDWARD ROEDER,

Appellant,

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

BRIEF FOR PLAINTIFFS-APPELLEES

MICHAEL J. BONI
JOSHUA D. SNYDER
Kohn Swift & Graf, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
(215) 238-1700
Counsel for Plaintiffs-Appellees

(Additional counsel listed on inside cover)

Additional Attorneys for Plaintiffs-Appellees:

DIANE S. RICE
Hosie McArthur LLP
One Market Street
Spear Street Tower, 22nd Floor
San Francisco, CA 94105

A. J. DE BARTOLOMEO
Girard Gibbs & De Bartolomeo LLP
601 California St., Suite 1400
San Francisco, CA 94108

GARY FERGUS
Fergus, A Law Firm
595 Market Street, Suite 2430
San Francisco, California 94105

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, and to enable judges of the court to evaluate possible disqualification or recusal, plaintiffs-appellees Michael Castleman Inc., P/K Associates, Inc., and The Authors Guild, Inc. certify that there are no corporate parents or other publicly held companies owning 10% or more of any plaintiff-appellee's stock.

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II. Whether the district court properly approved a class action settlement where the class representatives provided more than adequate representation and their interests were at all times aligned with the Class's interests, the plan of allocation is fair and reasonable, and there has been no prejudice to the authors of scientific studies.

III. Whether the district court's approval of the settlement should be affirmed where it is based on a thorough record and independent judgment, and the approval process satisfied due process.

STATEMENT OF FACTS

I. INTRODUCTION

This appeal is from the Order of the Honorable George B. Daniels granting final approval of a copyright class action settlement ("Settlement"). The Settlement – the largest copyright class action settlement in history – provides for a fund of up to $18 million to be distributed to a class of freelance authors, with the fund paid for by commercial electronic databases and newspaper and magazine publishers. The district court approved the Settlement based on a detailed record,

including more than thirty declarations in support of approval of the Settlement, two of which were submitted by Kenneth R. Feinberg, who presided over a comprehensive mediation of this case. After no fewer than six hearings, including an all-day final fairness hearing at which the objectors to the Settlement were given every opportunity to contest the Settlement, Judge Daniels granted final approval and overruled the objections.

The Settlement received the overwhelming support of the authors community. In spite of such support, attorney Charles Chalmers, a professional class action objector whose website is www.classobjector.com, filed a notice of appeal on behalf of ten freelancers. His arguments, like his objections in the district court, are unfounded, mischaracterize the record, and rely on inapposite law.

Because the Settlement (1) provides exceptional relief to the Class; (2) is the product of hard-fought, arm's-length negotiations; and (3) was subject to a fair approval process that satisfied due process and Rule 23 of the Federal Rules of Civil Procedure, this Court should affirm the district court's grant of final settlement approval.

II. BACKGROUND OF THE LITIGATION

This case concerns a long-standing copyright dispute among freelance authors, the print publications for which they contributed literary works, and the electronic databases that digitally archived and sold those works. For years it was industry practice for freelance authors to sell their works to publications without a written contract. For a fee paid to the author, the author granted the publisher the first right to publish the work in a specified edition of the newspaper or magazine. The author retained copyright ownership of the work.

Beginning in the 1980s, when electronic databases such as LEXIS/NEXIS entered the market, print publishers entered into license agreements authorizing the databases to copy and sell the full text of the publications, including articles written by freelance contributors. The print publications typically did not obtain the freelance authors' written permission for this subsequent publication of their works in the electronic databases.

In 1993, six freelance authors filed a copyright infringement action against certain print publishers and electronic databases in which their works appeared. The district court granted summary judgment for the defendants. *See Tasini v. New York Times Co.*, 972 F. Supp. 804 (S.D.N.Y. 1997). In 2000, this Court reversed and directed the entry of judgment for the plaintiffs. 206 F.3d 161 (2d Cir. 2000).

In 2000, three class actions were filed on behalf of freelance authors whose works were published in electronic databases without authorization: *The Authors Guild, Inc. v. Dialog Corp.*, No. 00 Civ. 6049 (S.D.N.Y.); *Posner v. Gale Group, Inc.*, No. C-00-2913-MMC (N.D. Cal.); and *Laney v. Dow Jones & Co.*, Civil No. 00-769-RRM (D. Del.). *Posner* was voluntarily dismissed and refiled in the Southern District of New York as a related action to *Authors Guild*. In December 2000, the Judicial Panel on Multidistrict Litigation transferred *Laney* to the Southern District of New York for coordination or consolidation with *Authors Guild* and *Posner*. In August 2001, the district court consolidated these cases for all pretrial purposes. A fourth action, *The Authors Guild, Inc. v. New York Times Co.*, No. 01 Civ. 6032 (S.D.N.Y.), was coordinated with the consolidated cases.

The actions were brought on behalf of freelance authors whose works were published in electronic databases without authorization. Plaintiffs in the actions are 23 freelance authors, as well as three leading authors rights trade associations, The Authors Guild, Inc. ("Guild"), National Writers Union ("NWU"), and American Society of Journalists and Authors ("ASJA") (collectively, "Associational Plaintiffs").[1]

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[1] The named plaintiffs are Derrick Bell, Lynn Brenner, 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,

Defendants in the actions are: (1) electronic databases Reed Elsevier Inc.; The Thomson Corporation; The Dialog Corporation; The Gale Group, Inc.; West Publishing Corporation 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; Mediastream, Inc.; NewsBank, inc.; and ProQuest Information and Learning Company (collectively "Database Defendants"); and (2) two newspaper publishers, The New York Times Company and The Copley Press, Inc. In addition to the defendants, thirty-six print publishers participated in the Settlement by contributing funding, notice and information concerning their freelance authors' works ("Participating Publishers"). (A381.) The Participating Publishers and defendants are referred to collectively as the "Defense Group."[2]

After those actions were filed, the United States Supreme Court granted certiorari in *Tasini*. *New York Times Co. v. Tasini*, 531 U.S. 978 (2000). As a result, the parties requested and the district court ordered a stay of the proceedings pending the Supreme Court's decision in *Tasini*. On June 25, 2001, the Supreme

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Mary Sherman, Donald Spoto, the Jessica L. Treuhaft Trust, Constancia Romilly (as successor Trustee), Robin Vaughan, Robley Wilson, and Marie Winn.

[2] Other publishers that supplied works to the Database Defendants and that elect to pay claims under the plan of allocation for works they first published will be released from claims pertaining to those Subject Works. (A338.) Those publishers are referred to collectively as "Supplemental Participating Publishers."

Court affirmed this Court's decision in *Tasini*. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

III. THE MEDIATION

On July 19, 2001, the district court held a status conference and directed the parties to engage in mediation. (A101.) The parties retained Kenneth R. Feinberg of The Feinberg Group, LLP as mediator, and the mediation commenced in January 2002.[3] (A609.) Mr. Feinberg's first task was to oversee a discovery program as part of the mediation process. (A1688.) The information requested by plaintiffs included the databases' payments to the publishers for the latter's content; copies of database/publisher license agreements; numerical summaries of works available on the databases; the percentage of freelance authors' works to the whole of the works on the databases; and financial data with respect to the databases' revenues and expenses. (*Id.*) After lengthy, often heated discussions among the parties and the mediators, the information was provided to plaintiffs. (*Id.*)

While plaintiffs were confident they could ultimately prevail on the merits, they recognized, of course, that there was risk. The vast majority of works at issue

[3] Among other distinctions, Mr. Feinberg was appointed by the United States Department of Justice to serve as the Special Master administering the September 11 Victim Compensation Fund. (A1687.)

were never registered with the U.S. Copyright Office, and thus the authors of those works arguably lacked standing to sue for copyright infringement. *See* 17 U.S.C. § 411(a); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002). As to the registered works, defendants presented plaintiffs with colorable defenses against liability, including the existence of oral and implied-in-fact licenses, and claim bars based on estoppel, acquiescence and laches. (A1469.) Although the decision in *Tasini* removed one defense advanced by the defendants, *i.e.*, that the "revision" provision in Section 201(c) of the Copyright Act, 17 U.S.C.§ 201(c), encompassed the electronic reproduction of freelance articles contained in collective works, it did not remove other defenses.

Nor did *Tasini* address the issue of damages. Plaintiffs here faced substantial difficulty establishing damages. First, infringements of the overwhelming majority of works at issue might have gone completely uncompensated because they were not registered. Second, the risk of establishing damages was heightened by the state of the law. This Court stated in *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001):

> [W]e think the term 'gross revenue' under the statute means gross revenue reasonably related to the infringement . . . . Thus, if a publisher published an anthology of poetry which contained a poem covered by the plaintiff's copyright, we do not think that plaintiff's statutory burden would be discharged by submitting the publisher's gross revenue from its publication of hundreds of titles, including trade books, textbooks, cookbooks, etc. *In our view, the owner's*

> *burden would require evidence of the revenues realized from the sale of the anthology containing the infringing poem.*

Id. at 160 (emphasis added). Thus, in order to prove damages, plaintiffs would need to account for the fact that the defendants copied entire libraries of works, not individual articles. They would also have to account for the fact that not all of the defendants even made a profit. (A1469.)

Third, in the mid-1990s, publishers began to require freelance contributors to grant electronic rights to the publishers, for no additional compensation, thus further heightening plaintiffs' risk of establishing damages. (A1470.)

Against that backdrop, plaintiffs' expert, Dr. Jeffrey J. Leitzinger,[4] provided a calculation of damages based on three methodologies, and concluded that the total measure of damages was in the range of $35-$71 million for all defendants. (A1668.) Defendants sharply criticized Dr. Leitzinger's analysis and argued that damages were much lower. (*Id.*; A1469.)[5]

At various points in the mediation, Mr. Feinberg concluded that the negotiations had broken down and the parties would have to litigate. (A1688.) In supporting the Settlement, he testified that "both plaintiffs and defendants were

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[4] Dr. Leitzinger is a leading economist retained by plaintiffs as an expert to analyze the damages in this case. (A1469; A1671.)

[5] That the Settlement amount is less than Dr. Leitzinger's damages estimate reflects the risks of establishing liability and damages, discussed herein.

resolute and determined in advancing their mutually respective positions on the merits and were reluctant to compromise on material matters essential to the resolution of the dispute."[6] (A610.) Nevertheless, the parties persevered in reviving the negotiations and after numerous long and late-night negotiations were able to reach a comprehensive settlement. (A1688.)

Mr. Feinberg stated, "[T]here is absolutely no question that the comprehensive settlement achieved by the parties was the result of lengthy, intense negotiations between and among very sophisticated parties knowledgeable about the subject matter and fully cognizant of any and all issues pertinent to reaching such a settlement." (A1688.) Moreover, "the mediation proved over a lengthy period of time to be a stunning success; a comprehensive resolution was achieved between and among sophisticated and knowledgeable parties and lawyers with full awareness of the role of the mediators." (A1689.)

Significantly, the Class's interests were protected not only by the Representative Plaintiffs and Class Counsel, but also by the three leading authors rights groups, the Associational Plaintiffs. The Guild, NWU, and ASJA had just one objective, to advance the interests of all freelance authors. They were not paid

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[6] The objectors' unsupported statement that the case was not "vigorous[ly] prosecut[ed]" is false. (Appellants' Brief ("App. Br.") 26.) To the contrary, the case ***was*** vigorously prosecuted in the mediation process. Every issue large and small was litigated before Mr. Feinberg and his partner, Peter Woodin, including with respect to discovery disputes, briefing of legal issues, resolving factual disputes, and much, much more. (A1466-67; A1574-1631; A1687-88.)

a penny for their services on behalf of the Class, yet spent considerable time and resources advising and assisting Class Counsel at every step of the mediation, as well as during the notice and claims process. (A1461-62; A1533-34.)

The participation of the mediators further establishes the Settlement was not collusive. Mr. Feinberg states that "there was absolutely no evidence of collusion during the entire mediation process . . . ." (A610.) Moreover, Mr. Feinberg's description of the mediation process – as "the most difficult, time consuming and protracted" he has ever had, where "all class member interests were thoroughly explored, considered and resolved," and the release negotiated was "carefully crafted, [and] hard fought" – establish that the negotiations were fully adversarial. (*Id.*) Mr. Feinberg's declarations provide direct and compelling evidence that the Settlement was the product of procedural fairness. There is no evidence to the contrary.

IV. THE SETTLEMENT

A. Pertinent Settlement Terms

1. Class Definition

The Class consists of all persons who own a copyright under the United States copyright laws in an English language literary work that, after August 14, 1997, was copied electronically by any Defense Group member without the person's authorization ("Subject Works"). (A335-36.) A person is a Class

Member even if his or her Subject Work was not registered with the U.S. Copyright Office, or was originally published outside the U.S. (so long as the work was published in a country that is a member of a U.S. copyright treaty). (A335.)

Excluded from the definition of "Subject Works" are staff works (*i.e.*, works written by the publications' employed authors), "letter[s] to the editor, scientific and research-oriented medical journals, non-English language works, or content other than literary works." (A232; A421; A752.) Only claims pertaining to Subject Works were released. (A338; A755.)

2. Settlement Amount

Under the Settlement, the Defense Group and Supplemental Participating Publishers agreed to pay a minimum of $10 million and up to $18 million for valid claims and court-approved fees and costs. (A340-42.)

3. Plan of Allocation

Settlement payments are based on the following plan of allocation:

- **Category A.** For each Subject Work the class member registered in time to be eligible for statutory damages: $1,500 for each of the first fifteen Subject Works written for any one publisher; $1,200 for each of the second fifteen Subject Works written for that publisher; and $875 for each Subject Work written for that publisher after the first thirty.

- **Category B.** For each Subject Work the class member registered but not in time to be eligible for statutory damages: the greater of $150 or 12.5% of the original sale price of the Subject Work.

- **Category C.** For all other Subject Works: $60 for each Subject Work that originally sold for $3,000 or more; $50 for each Subject Work that

> originally sold for $2,000 to $2,999; $40 for each Subject Work that originally sold for $1,000 to $1,999; $25 for each Subject Work that originally sold for $250 to $999; the greater of $5 or 10% of the original price of the Subject Work for works that originally sold for $249 or less.

(A345.)

Reduced Payments for Older Subject Works. For Subject Works created before January 1, 1995, payments in Categories B and C will be reduced based on the year in which the Subject Work was created, from a 5% reduction for each year beginning in 1994 and up to 50% for works created in or before 1985. (*Id.* at 345-46.)

4. Continued Electronic Use

Settlement payments represent compensation both for past infringement and for the continued non-exclusive right to the electronic use of Subject Works by the Defense Group and Supplemental Participating Publishers. Class members may choose not to grant continued electronic rights, in which case they will receive 65% of the total settlement payment for that work. (A348-50.)

5. Claim Reduction If $18 Million Cap Is Exceeded

The Settlement Agreement provides for an allocation procedure in the event valid claims, fees, and costs exceed $18 million. (A346.) Generally, that procedure reduces Category C claims before Categories A and B claims are reduced. (A346-47.) However, from the outset the parties concluded there was

very little possibility the $18 million cap would be reached, and in fact the $18 million cap was not reached. (A1098.)[7]

B. The Release

The Settlement Agreement provides that the Defense Group and Supplemental Participating Publishers will be released from certain past, present and future claims based on electronic use of the Subject Works. Claims based on works that do not fit the definition of "Subject Works," including scientific studies, are not released. (A338.)

Further, not all future claims are being released. As stated, the Settlement entitles class members to participate in the Settlement and at the same time refuse to release claims relating to the continued use of their Subject Works (the "takedown right"). (A348; A754.)

V. THE DISTRICT COURT'S REVIEW OF THE SETTLEMENT

A. Preliminary Approval

On March 22, 2005, plaintiffs filed a motion for preliminary settlement approval and a memorandum of law detailing the terms of the settlement, proposed notices, a proposed claim form, and supporting declarations. (A200-412.)

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[7] The deadline to submit claims was September 30, 2005. (A755.) The claims administrator has since advised counsel for plaintiffs and defendants that the face value of all *prima facie* valid claims is $10,762,904, which, together with the total payment of $5.2 million for costs and expenses, and $1 million credit to the defendants for notice (A340), equals $16,962,904.

Following a hearing on March 31, 2005, the district court concluded that the settlement "would be fair and reasonable to the class," was "satisfied as to the certifiability of the class," and granted preliminary approval. (A417.)

B. The Notice Program

The Notice of Class Action Settlement ("Notice") was mailed to over 40,000 authors, and the Summary Notice was published in over one hundred magazines and newspapers. (A1403; A1539-40; A1658-60.) In addition, defendants' website home pages displayed an announcement about the Settlement and a hyperlink to the official Settlement website, www.copyrightclassaction.com. (A1662.) The objectors do not challenge the adequacy of the notice dissemination program. (App. Br. 53-54.)

The Notice: (a) describes the Class, the material settlement terms, the history and status of the litigation, and the plan of allocation; (b) advises class members of their rights, including the right to opt out of or object to the Settlement; (c) discloses the requested amounts of the attorneys' fees, expenses, and special awards to the Representative Plaintiffs; and (d) sets forth the date, time, and place of the final fairness hearing. (A751-57.)

The Notice explains the takedown right: "If you do choose not to grant the right to future electronic use, your Subject Works will be removed from the databases, and you will receive 65% of the Settlement Payment." (A754.)

The Notice also provides: "YOUR SUBJECT WORKS ARE EXCLUDED FROM THE SETTLEMENT IF . . . they are . . . scientific and research-oriented medical journals . . . ." (A232 (emphasis in original); A752; A421.)

Additionally, the Notice states: **"IF, AFTER YOU HAVE READ THIS NOTICE, YOU HAVE QUESTIONS OR REQUIRE ASSISTANCE, PLEASE CONTACT THE AUTHORS GUILD AT WWW.AUTHORSGUILD.ORG; OR THE NATIONAL WRITERS UNION AT WWW.NWU.ORG; OR THE AMERICAN SOCIETY OF JOURNALISTS AND AUTHORS AT WWW.ASJA.ORG."** (A751 (emphasis in original).) It further states, "Any questions that you have concerning the matters contained in this Notice may also be directed in writing to any of the following Co-Lead Counsel for plaintiffs and the Class [listing counsel]." (A757.) The Notice provides the claims administrator's contact information, as well as the web address, www.copyrightclassaction.com, for further information or assistance. (A757.)[8]

C. Reaction Of The Class

In response to the comprehensive notice dissemination program, just five objections, on behalf of just 12 class members, were received. In contrast, support for the Settlement has been overwhelming. (A1477-78; A1485-88.) The Guild,

[8] The claim form, which was attached to the Notice and on the website, explains clearly how to exercise one's takedown right. (A748-50.)

NWU, and ASJA all supported the settlement. (A1459-65; A1532-36; A1716-17.) In addition, Class Counsel and the Associational Plaintiffs received many favorable reactions from class members, including these few examples:

> *I feel the payment negotiated in this settlement is more than fair because it would never have been available without a class action case such as this one. As an individual, I could never have financed the prosecution of an individual case like this so my settlement would have been money lost and will continue in that vein until the settlement is approved.*
>
> Gary Taylor

> *I am a mother of three daughters with child-rearing costs. This money would help tremendously to pay for their college ... This money is incredibly important to me. I am disgusted and aggravated by this objector to the settlement. It is absurd that someone wants all the parties involved to go back to the drawing board and try again after five years of negotiations that finally yielded a settlement. It took enormous effort and cooperation to reach this point ... I request that the court consider that this group of six objectors is by far outweighed by the hundreds of claimants who have applied for compensation and support the settlement's present terms. We have waited a long time for this. Please don't destroy the hard work that has been done here. We finally have all of the defendants that have agreed to the settlement and arriving at that was a tremendous feat.*
>
> Martha Russis

> *Personally, I am extremely pleased that some people have gone to the time and trouble of bringing this action that I can now be a part of from across the seas. I don't feel so alone and stamped on and also there is no threat of nasty comeback for me as I get my dues. Good for them, I say.*
>
> Susan Wallace

This settlement will be very helpful to my family for several reasons, mainly dealing with my fiscal considerations as we've had a number of hardships over the past few years ... All of this has hurt us financially in many ways, and this settlement will go a long way towards relieving some of the worries that plague us.

Jeff Seidel

I wholeheartedly and fervently support this settlement for a number of reasons ... First and foremost, my wife, Alisa, has been a cancer survivor twice in the past two years. During the time of her treatments and hospitalizations, we racked up large amounts of bills – bills that we could pay with a healthy settlement check ... After all we've been through, a delay at this point would be disastrous, as well as an enormous psychological blow.

Richard Scherr

(A1477-78; A1490-97; A1503.)

Without offering a single improvement to the Settlement, the objectors would deny relief to the thousands of claimants waiting for their claim awards.

D. Final Settlement Approval

On April 26, 2005, Mr. Chalmers filed a Motion to Vacate Preliminary Approval and to Establish New Procedures for Final Approval and Motion to Establish New Procedures for Final Approval and Award of Attorney's Fees. (A427-36.) At a hearing on May 24, 2005, Mr. Chalmers was given a full opportunity to be heard. (A617-633.) The district court denied the motion. (A627.)

On May 10, 2005, Mr. Chalmers filed an Application for Emergency Stay to Postpone Mailing and Publishing of Notice. (A469-71.) The emergency application was denied. (A469-71.)

On July 26, 2005, the court granted plaintiffs' motion for preliminary approval of an amendment to the Settlement, which Mr. Chalmers had opposed. (A12; A1119-25.) On June 20, 2005, Mr. Chalmers filed a Motion for Production of Information by Named Plaintiffs and Class Counsel to Class Members. (A671-675.) This motion was denied (except the court directed plaintiffs to produce the *Posner* complaint, which was missing from the court's file). (A705; A694.) Mr. Chalmers also unsuccessfully sought orders to show cause regarding an alleged violation of the court's order concerning notice, and for continuation of the fairness hearing. (A13.) On September 1, 2005, he filed a Motion for Discovery Related to Settlement Approval, which was denied. (A1234-1241; A17.)

On September 27, 2005, the district court held a final fairness hearing to determine whether to approve the settlement. At that hearing, the district court again heard extensive argument from Mr. Chalmers, who had filed four sets of objections. (A728-43; A1247-1252; A1378; A1721-24.) The district court gave Mr. Chalmers every opportunity to present his objections.

Mr. Chalmers presented a vast array of arguments, many of which raised concerns entirely divorced from the record or were little more than mud-slinging.

(*See, e.g.,* A1803 (Mr. Chalmers referring to a "collusive settlement" and "evidence of [a] complete and total sellout").)

After hearing extensive argument from Mr. Chalmers, who presented no evidence and called no witnesses, the district court overruled the objections and approved the Settlement. The court stated:

> I have thoroughly reviewed the settlement agreement as amended. I find that, despite the objections, it is appropriate, and the correct thing to do is to give final approval at this point to the settlement agreement.

(A1811.)

The district court's rejection of Appellants' assertion of collusion could not have been clearer:

> I find that the settlement on this record, which is a very thorough record which has been prepared, which airs all issues relevant to the settlement, is fair, adequate, and reasonable and not a product of collusion.

(*Id.*) The court also addressed the process leading up to the Settlement and result achieved for the Class:

> I've considered and thoroughly 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 . . . that otherwise have to be further expended in that regard.
>
> I find that this settlement agreement is the product of very aggressive and thorough examination, negotiation, and debate among the parties.

> 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 alternatives considered.

(A1811-12.)

The district court ruled that the objections were meritless:

> The objections that I have considered prior to today submitted to me in writing and the objections that I have considered today do not warrant either a further delay or not granting approval to the terms of this settlement.
>
> * * *
>
> Many of the objections raised or made are hypothetical. Many of them are purely speculative, and many are simply invalid objections, inconsistent with the evidence and record that goes along with this negotiating process and the substance and terms of the settlement agreement. . . .

(A1812-14.)

STANDARD OF REVIEW

A district court's approval of a class action settlement and certification of the settlement class are reviewed for abuse of discretion, except for errors of law, which are reviewed *de novo*. *Denney v. Deutsche Bank AG*, 443 F.3d 253, 273 (2d Cir. 2006); *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 106 n.12 (2d Cir. 2005); *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974).

The fairness and reasonableness of a class settlement "are factual questions for the district court." *Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983). A district court's disposition of a proposed class action settlement is accorded considerable deference. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22-23 (2d Cir. 1987).

Contrary to the objectors' unfounded assertions, the district court's decision is based on an ample record that is more than adequate to merit deference. *See Malchman*, 706 F.2d at 434 (quoting *Weinberger v. Kendrick* 698 F.2d 61, 74 (2d Cir. 1982) ("[T]his 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.'").

SUMMARY OF THE ARGUMENT

The objection concerning defendants' continued right to use Subject Works is unavailing. In exchange for compensation, the Settlement includes a release of known future claims. The release was clearly explained in the Notice. The Class had the ability to exercise a takedown right and still receive compensation for defendants' past infringement. In addition, class members had the ability to opt out of the Settlement, and thereby prevent the continued use of their works as well as bring their own actions for infringement. The requirements of due process and Rule 23 of the Federal Rules of Civil Procedure have been satisfied.

The Representative Plaintiffs more than adequately represented the best interests of all class members, including those eligible only for Category C relief. All class members' interests were further protected by the Associational Plaintiffs, which actively participated on the authors' behalf throughout the mediation proceeding.

The plan of allocation fairly reflects the different levels of risk faced by claims based on registered works and claims based on unregistered works. Moreover, the Representative Plaintiffs were not in conflict with other class members as they actually submitted nearly three times as many Category C claims as Category A claims. The (moot) provision under which Category C claims

would be reduced if total claims exceeded $18 million would have applied to the Representative Plaintiffs as much as the absent class members.

The objection that claims related to scientific studies have been "sold out" is frivolous. Scientific studies were not included in the definition of "Subject Works" and are not being released, and no scientist or academic has been prejudiced in the least.

The requirement that objectors appear at the final fairness hearing is not improper.

The district court exercised careful, independent judgment and review of the proceedings and the voluminous record submitted by the parties. Its judgment was based on an application of the appropriate criteria, is amply supported by the record, and should be affirmed.

ARGUMENT

I. THE RELEASE

The objectors challenge the provision allowing the Defense Group to continue their electronic use of Subject Works. The objectors contend, without citation to any applicable authority, that the provision is a violation of due process. This objection is without merit.

A. The Release of Known Future Claims Is Proper

It is settled that class actions bind absent class members to the terms of a final judgment or settlement, and class members' claims against defendants are extinguished as a matter of course with the use of broad releases. *See Wal-Mart Stores, Inc. v. Visa USA, Inc.*, 396 F.3d 96, 106 (2d Cir. 2005) ("Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country. Practically speaking, class action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability" (internal quotation marks and citations omitted).); *accord Uhl v. Thoroughbred Tech. & Telecomm., Inc.*, 309 F.3d 978, 982, 985 (7th Cir. 2002).

A class action settlement binds absent class members only if they are adequately represented and other standards of due process have been satisfied. *Wal-Mart*, 396 F.3d at 109; *see generally* 7B Charles Alan Wright & Arthur R.

Miller, *Federal Practice and Procedure* § 1789.1 (3d ed. 2005). The question of whether plaintiffs can release known future claims against the Defense Group on behalf of absent class members is, therefore, properly considered in light of due process principles.

Rule 23 of the Federal Rules of Civil Procedure embodies the constitutional principles of due process. *Id.* (Rule 23 "prerequisites seem plainly intended to meet the standard established by the Supreme Court . . . to the effect that persons not parties to an action may be bound by a judgment whenever the procedure adopted 'fairly insures the protection of the interests of absent parties who are to be bound by it.'" (quoting *Hansberry v. Lee*, 311 U.S. 32 (1940))).[9]

Class members here were sufficiently put on notice that if they did nothing they would be releasing claims for the Defense Group's continued electronic use of Subject Works. Class members received an extremely comprehensive publication notice program valued at over $2.6 million, and individual notice was mailed to over 40,000 class members. (A1539; A1664.) The Notice clearly advised class members that they would be releasing all "claims of copyright infringement, past, present, *or **future***," against the Defense Group, Supplemental Participating

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[9] The opt-out right under Rule 23(b)(3) is a significant additional measure of due process protection in the settlement process. *See In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996) (citing *In Re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), *as modified*, 993 F.2d 7 (2d Cir. 1993)); 7B Wright & Miller § 1789.1.

Publishers, ***and licensees***." (A755 (emphasis added).) They were told exactly what they needed to do if they did not want any of their claims released, whether for past infringement or future use: opt out. (A755-56.) They were advised what they needed to do if they wanted to make a claim for past infringement under the Settlement while at the same time retain claims for future use: simply check a box on the claim form. (A750.)

The objectors contend the continued use provision is inappropriate, and that this case "presents a novel issue of law" or issue of "first impression." (App. Br. 1, 45.) To the contrary, the provision is nothing more than a release of known future claims, which is common. As the Notice and Settlement Agreement make clear, there is no transfer of any copyright ownership rights. (A348; A237.) It is consistent with any other release of known future claims in a class action settlement.

The objectors are hung up on the term "license." (App. Br. 17-18, 45.) Although plaintiffs have at times referred to this settlement term as a "non-exclusive license," it is in fact and in law nothing more than a release of a known claim for future use in exchange for the right to receive compensation now. The Settlement Agreement states as follows with respect to this term:

> 5. Continuing Use of Subject Works.
>
> * * *
>
> It is considered by plaintiffs to constitute a non-exclusive license for future database use . . . and it is 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.)

Regardless of what the deal term is called, it is lawful and appropriate. Consistent with the law on non-exclusive licenses, the Settlement Agreement expressly provides that the continued-use term "is not a transfer of ownership to the Subject Works." (*Id.*) *See* Paul Goldstein, *Goldstein on Copyright*, at 4:66 (2d ed., 2005 Supplement). A non-exclusive license is tantamount to a waiver of a right to sue. *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) (copyright owner who grants non-exclusive license to use his copyrighted material waives his right to sue licensee for copyright infringement) (citing *Jacob Maxwell, Inc. v. Veeck*, 110 F.3d 749, 753 (11th Cir. 1997)); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1338-39 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991)); *see also* Bruce P. Keller & Jeffrey P. Cunard, *Copyright Law*, § 3:6.3, at 3-39 (Release No. 3, November 1993) ("[A] non-exclusive license does not involve a property right. Instead it is an authorization to exploit the copyright in a particular way, ***which implicitly includes a covenant*** . . . ***not to sue*** . . . ." (emphasis added)).

Accordingly, the grant of a non-exclusive license is indistinguishable in this context from a release of known future claims, which is undisputedly permitted. *See, e.g.*, *McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1254 (11th Cir. 2001) (discussing broad release of past and future claims in tobacco litigation brought by State of Georgia); *Williams v. Gen. Elec. Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998) ("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."), *cert. denied*, 527 U.S. 1035 (1999); *Ass'n For Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 471 n.10 (S.D. Fla. 2002) ("[F]ederal class action settlements routinely include releases waiving future claims.").

Moreover, contrary to the objectors' assertion (App. Br. 36), the known future claims being released were plainly encompassed in plaintiffs' complaint (A103-24), which sought injunctive as well as monetary relief. The release is thus distinguishable from the release challenged in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), in which the Supreme Court rejected a release of claims for future asbestos injuries that class members did not have any way of knowing they would develop when they were called upon to decide whether to stay in or opt out of the class. *See id.* at 625. Here, the continued use by defendants of the Subject Works was the sole basis for plaintiffs' injunctive relief claims, and the Notice

made perfectly clear that Subject Works would continue to be used unless their authors opted out or exercised their takedown right.

Because both this case and the release involve a finite, identifiable universe of works as of the time of the Notice, every class member was capable of making a fully informed decision with respect to opting out or requesting the takedown of his or her Subject Works. *See Denney v. Deutsche Bank AG,* 443 F.3d 253, 269 (2d Cir. 2006) ("*Amchem* involved potential claimants who were unborn or who did not know of their exposure at the time the class was certified, whereas all members of the . . . class have been identified, have been given notice of the settlement, and have had the opportunity to voice objections or to opt out entirely.").[10]

The objectors baldly assert that class members who do not file claims cannot be imputed to have released future claims or granted a non-exclusive license for electronic use. (App. Br. 17-18.) To the contrary, courts have approved

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[10] The Settlement Agreement limits affected works to those that defendants copied prior to March 22, 2005 (the date of the Settlement Agreement). (A338.) The Notice advised class members to consult the website for a list of over 26,000 publications that licensed works to one or more of the database defendants at any time during the relevant period. (A754.) The claims process did not require class members to prove his or her Subject Work appeared in a database, only that he or she contributed a freelance work to one of the publications on the list. (A750.) Accordingly, the objectors' reliance on *Amchem* – *i.e.*, on the ground that class members cannot now know which defendant (or unidentified licensee) will in the future infringe which Subject Work – is specious. Unlike in *Amchem*, class members here were equipped to make a fully informed decision with respect to their legal rights.

settlements that impose a burden upon the class to transfer a property right where adequate consideration was paid and due process was satisfied.

In *Alvarado v. Memphis-Shelby County Airport Authority*, No. 99-5159, 2000 WL 1182446 (6th Cir. Aug. 15, 2000), owners of land adjacent to an airport brought a class action against the airport authority, seeking relief for noise and other pollution emanating from the airport. A settlement was reached whereby the airport authority allocated $22 million to class members who submitted claims in exchange for an easement permitting the continued use of the airspace as before. The payments represented compensation for both the release of past claims and the easement. *Id.* at *2-3. Although class members who neither opted out nor filed claims received nothing, they were nonetheless deemed to have granted the airport authority an easement for their property. *Id.*

Other cases are in accord. *See Uhl*, 309 F.3d at 982, 985 (7th Cir. 2002) (class action settlement paid to landowners for mandatory easements allowing a telecommunications company to place fiber-optic cable in a pipeline); *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 616 (Iowa 2003) (same). In fact, the settlements in *Alvarado, Barkema*, and *Uhl* were approved even though the easements were mandatory, *i.e.*, the settlements had no "takedown right" equivalent. *Alvarado*, 2000 WL 1182446, at *3; *Barkema*, 666 N.W.2d at 613-14; *Uhl*, 309 F.3d at 982, 984-95.

B. The Class Was Adequately Notified With Respect to the Release.

The objection that the Notice did not adequately disclose the release of claims for future use (App. Br. 17-18) is belied by the Notice itself, which states that released claims include all "claims of copyright infringement, past, present, *or* ***future***," against the Defense Group, Supplemental Participating Publishers, ***and licensees***." (A239 (emphasis added).)

In addition, the Class was amply apprised of the takedown right. The Notice provides as follows:

> **Rights With Respect to the Future Electronic Use of Your Subject Works.**
>
> Valid claims will be awarded a single payment for the past infringement and for the future electronic use of the Subject Works. Plaintiffs consider that 65% of each Settlement Payment is compensation for past infringement, and 35% is compensation for future electronic use by the Database Defendants and original publisher of the Subject Works. You may choose not to grant the rights to future use. If you do choose not to grant the right to future electronic use, your Subject Works will be removed from the databases, and you will receive 65% of the Settlement Payment.

(A754 (emphasis in original).) Further, the claim form clearly explains how a class member can exercise his or her takedown right. (A749.) Page 2 of the Claim Worksheet contains the following: "Check here if you want this Subject Work removed from the electronic databases: **If you check the box you will receive only 65% of the amount otherwise payable under the settlement for the claim**

based on this Subject Work. □" (A750 (emphasis in original).) If that were not enough, the Notice also invites class members to contact any of the three authors rights groups, three law firms, and the claims administrator for assistance. (A757.)[11]

C. The Remaining Attacks on the Release Fail.

The objectors suggest that claims for future infringement are not based on the same factual predicate as past claims, because the infringement has "not yet occurred." (App. Br. 50.) The Federal Circuit rejected this very argument in *Augustine Medical, Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367 (Fed. Cir. 1999). In that case, the court of appeals held that the release barred future claims arising *after* the date of the settlement agreement, so long as the claims were *related to* conduct pre-dating the agreement. *Id.* at 1371; *accord Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 785-86 (8th Cir. 1984) (agreement settling lawsuit for violation of non-compete agreement and misuse of trade secrets properly released patent infringement claims based on patent issued *after* date of

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[11] The objectors raise the illogical scenario that class members who want to exercise their takedown right but ***not*** seek an award for past infringement for the same work were not given instructions on how to exercise their takedown right. (App. Br. 13-14; *see also* App. Br. 35 ("[C]lass members who do not file claims do not have the right to deny the license for future use.").) To the contrary, the Notice makes clear that it is the claim form through which class members communicate their desires to the claims administrator. If a claimant wanted only to take down his or her works, and not receive an award for past infringement, he or she was of course free to do so, and could have easily filled out the claim form to so indicate.

settlement agreement). Likewise, the release here is not limited only to copyright infringement claims accrued as of the time of the agreement, but also includes conduct essentially identical to that pre-dating the Settlement Agreement. (A338.)

The objectors further attack the release on the ground that a "statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." (App. Br. 51.) The objectors rely on two antitrust cases that have no applicability whatever to the copyright claims here. In *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 99 (5th Cir. 1974), and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945), the courts concluded that a settlement would violate public policy if it were to permit future price-fixing with impunity.

The public is not harmed or even potentially harmed, however, by a settlement that pays authors fair compensation for the non-exclusive right to use their works in the future. In fact, the Supreme Court in *Tasini* actually blessed this settlement structure when it stated:

> The parties . . . may enter into an agreement allowing continued electronic reproduction of the [a]uthors' works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.

New York Times Co. v. Tasini, 533 U.S. 483, 505 (2001) (Ginsburg, J.).

The term objected to is nothing more than a release of a known ascertainable claim that has always been an integral claim in this case. The Class's due process rights have been satisfied by adequate notice of the release, and this objection should be rejected.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT.

A. Plaintiffs Were Adequate Class Representatives.

The objectors contend that the Representative Plaintiffs did not adequately represent the Class, thereby rendering the district court's approval of the Settlement improper. (App. Br. 1, 26.) They argue that plaintiffs hold only registered copyrights, and therefore cannot fairly represent the "Category C claimants." (*Id.* 26, 28.) They cite two settlement provisions as evidence of an intra-class conflict: (1) the plan of allocation; and (2) the reduction of Category C claims before the other categories in the event the $18 million cap is exceeded. (*Id.* 36-37.)

These contentions rest on a false premise. The Representative Plaintiffs authored and alleged copyright infringement with respect to unregistered as well as registered works (A64 (plaintiff Letty Pogrebin has written hundreds of freelance articles in newspapers and magazines, and registered copyright in 21 such articles); A65-67; A26; A71; A26-27; A85 (similar allegations for other Representative Plaintiffs)), and twelve Representative Plaintiffs alleged infringement with respect

to a single registered work. (A127-28; A137; A138; A149; A150; A173-74; A180-83.)[12] The objectors' assertions that "[t]he class representatives hold only registered claims" (App. Br. 28) and that "class representatives hold registered copyrights. . . so far as the record discloses that is all they hold" (*id.* at 26) are flat-out wrong. Similarly, the objectors' statement that the "litigation was initiated for owners of registered copyrights" lacks any support and is patently false. (*Id.* at 20.)

Thus, the argument concerning intra-class conflicts is baseless. The Representative Plaintiffs and absent class members shared a common interest in establishing liability for the unauthorized electronic use of their freelance works, and in maximizing the settlement amount not only as a whole but as to each tier in the plan of allocation.[13]

With respect to the plan of allocation, less favorable treatment for Category C claims is appropriate. Unregistered works arguably would not even

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[12] Moreover, now that the claim period is concluded, the claims experience – not in the record, but reported to the parties by the claims administrator – shows that the Representative Plaintiffs filed nearly three times as many Category C claims (3,698) as Category A claims (1,355), and just 115 Category B claims, and at least six named plaintiffs submitted ***only*** Category C claims.

[13] The objectors take a statement from defendants' joint mediation memorandum out of context – "named plaintiffs are . . . unrepresentative of the thousands of freelance authors who never register their works at all" (App. Br. 29 (quoting A1598). The remainder of the sentence then states that without registration, the authors may be "ineligible to maintain an infringement action against defendants." (A1598.) This is a key point that the objectors gloss over.

confer standing to bring a lawsuit at all, let alone give rise to statutory damages. Thus, if this action had been pursued to a favorable verdict and affirmed on appeal, Category C claimants could well have ended up with nothing, as opposed to the cash payments they can now claim under the Settlement. *See* 17 U.S.C. § 411(a) (copyright infringement action may not be brought unless pre-registration or registration of copyright has been made); *Morris v. Bus. Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002) (registration of copyright in a collective work does not constitute registration of copyright in a freelance article contained in the collective work).

It is appropriate to tailor plans of allocation to reflect the relative strengths and weaknesses of subsets of classes. "[W]hen real and cognizable differences exist between the likelihood of ultimate success for different plaintiffs, it is appropriate to weigh distribution of the settlement . . . in favor of plaintiffs whose claims comprise the set that was more likely to succeed." *In re PaineWebber Limited Partnerships Litigation*, 171 F.R.D. 104, 133 (S.D.N.Y. 1997) (internal quotation marks and citations omitted), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *accord In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (per curiam) ("Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims."); *In re Lucent Techs. Inc. Sec. Litig.*,

307 F. Supp.2d 633, 649 (D. N.J. 2004) ("Courts have routinely approved plans of allocation that provide different payments to class members."). [14]

The Settlement fairly reflects the value of those claims eligible for statutory damages, which was greater than for those works registered later, and much greater than for those that were never registered. Providing for the reduction of Category C claims before reducing Categories A and B claims is neither arbitrary nor prejudicial. (App. Br. 16.) Rather, ***not*** treating the claims differently would have been (if reduction had become necessary) unfair to those authors, however few, who did register their works and who arguably alone would have standing to sue and in some cases seek statutory damages. [15]

The plan of allocation was the subject of the most vigorous and drawn-out bargaining in the mediation. Both sides fought mightily for each level to be as high/low as possible. The participants in the negotiation were top representatives

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[14] Registration costs $30 per work, or $30 per group of works registered together in any one year. (A1597.) Thus, the expense borne by authors of registered works is another reason in support of a plan of allocation that favors registered works.

[15] Besides, as stated, the issue is moot. There will be no reduction of claims, because the $18 million cap was not reached. This was not a function of kismet. Both the Associational Plaintiffs and defendants had advised Class Counsel in the mediation that only a tiny percentage of freelancers register their works. (A1534; A1464-65.) The Settlement was conceived with the make-up of the Class in mind, and plaintiffs reasonably believed that the $18 million settlement fund would not be exceeded.

of the publishing and database industries and the leading advocates of authors' rights. The plan of allocation is fair, adequate, and reasonable. (A1811.)

B. Claims Based on Scientific and Research-Based Medical Works Were Not Released.

The objectors' cries of the plaintiffs "abandoning" or "selling down the river" authors of scientific studies is false and outlandish. (App. Br. 40.) Scientific and research-oriented works[16] are distinct from the literary works that are the subject of this litigation. These works were never included in the Settlement, were expressly excluded prior to class certification (A232), and the objectors never argued that these claims had been released and "abandoned" before the district court.

The Notice provided: "YOUR SUBJECT WORKS ARE EXCLUDED FROM THE SETTLEMENT IF . . . they are . . . scientific and research-oriented medical journals . . . ." (A232 (emphasis in original); A752.) The Final Judgment expressly excluded these works from the release. (A1382.)

There is no conceivable purpose for the parties to collude in an attempt to harm the interests of authors of scientific studies. These works are not being released, as the release pertains only to "Subject Works." (A232; A752.) Nor were these claims "voluntar[ily] dismiss[ed]." (App. Br. 44.) The objectors state

[16] The objectors try to make something of the fact that the terms "research-oriented" and "research-based" have both been used (App. Br. 41 n.6), but this is a distinction without a difference.

incorrectly that the Settlement "provide[s] no compensation to the scientific/medical works while dismissing all such claims" (*id.* at 41), and they mischaracterize the record evidence they cite (*id.* (citing A1382), which says nothing about dismissal. Even if these works were dismissed, which they were not, the statute of limitations would have been tolled under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and no author of this type of work has been prejudiced in the least.[17]

The objectors argue the authors of these works were denied due process. (App. Br. at 40 (citing *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 110 (2d Cir. 2005); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 19 (2d Cir. 1981), *aff'd on other grounds, sub nom, Merrill Lynch, Pierce Fenner & Smith v. Curran*, 456 U.S. 353 (1982); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 782-83 (7th Cir. 2004); *Molski v. Gleich*, 318 F.3d 937, 953-54 (9th Cir. 2003).) However, the cases the objectors rely on all involve class settlements where claims are released without compensation. Here, the claims at issue were not released at all.

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[17] The objectors take a statement from plaintiffs' expert, Professor Issacharoff, out of context, stating that the parties "were unable to reach closure on the value of [claims for works in scientific and research-oriented medical journals]." (App. Br. 44 (quoting A1698-99).) Professor Issacharoff concludes the paragraph selectively quoted by explaining that the scientific works were "simply excluded from the settlement and preserved to be prosecuted or not, as the claimholders see fit." (*Id.*) Thus, the full statement demonstrates that the scientific works were not dismissed or released.

III. THE OTHER OBJECTIONS ARE UNFOUNDED.

A. The Court's Approval of the Settlement Is Well-Supported and Based on a Thorough Record and Independent Judgment, and the Record Is More Than Sufficient to Enable Appellate Review.

The objectors argue that the record is insufficient to affirm the district court's exercise of discretion because "there are no findings" or "analysis" by the district court. (App. Br. 24-26.) To the contrary, the record demonstrates that the district court had before it extensive evidence sufficient to evaluate class certification and the Settlement, and that the district court independently analyzed the evidence, as reflected by its findings at the conclusion of the fairness hearing and other, earlier hearings. (A1811-15; A193-99; A414-25; A617-33; A1072-76; A1131-84.)

Throughout the approval process – both preliminary and final – the parties proferred a detailed record, complete with more than thirty declarations, including two declarations from Mr. Feinberg, as well as plaintiffs' experts, the parties, and counsel. (A200-331; A1379-1720.) *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] court-appointed mediator's involvement in pre-certification settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure."). With all of these papers on file, the district court was able to and did thoroughly review the terms of the proposed settlement

and the arguments of the objectors. (A1811.) The court also "considered thoroughly and examined" the process leading to the Settlement. (*Id.*)

During the approval process, the court held three hearings where it demonstrated familiarity with the facts of the case and arguments of counsel, and it heard extensively from counsel for the objectors. (A618-624; A1141-56; A1746-1755; A1791-1804.) The objectors' statements that there have been "no findings" and "no record of analysis" (App. Br. 24) ignore the proceedings in the district court. As to final approval, the court issued findings of fact and conclusions of law on the record at the close of the final fairness hearing (A1792-1801), even though they are not required. *See Heerwagen v. Clear Channel Communications*, 435 F.3d 219 (2d Cir. 2006); *Weinberger*, 698 F.2d at 74.

The information necessary to evaluate a proposed settlement varies depending on the case, and formal discovery is not required. "[I]t is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to intelligently make … an appraisal of the Settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp.2d 164, 176 (S.D.N.Y. 2000). Here, at the preliminary approval stage, the district court had available Class Counsel's brief (A200-226) describing the risks that the Class faced in proving liability and damages (A218-19) as well as the knowledge that the Settlement had been negotiated before Mr. Feinberg and the circumstances surrounding those

negotiations (A215-16); the court recognized the difficulty of negotiations as well as the prodigious efforts that went into the mediation. (A417.)

Mr. Feinberg's declaration in opposition to the motion to vacate preliminary approval of the settlement detailed the information exchanged by the parties as well as his views on the risks and merits of continued litigation. (A608-612.) That declaration provided additional information to the court on the reasonable range of outcomes, which was addressed at length. Thus, the information available to the court at the preliminary approval stage of proceedings was more than sufficient to satisfy the court that the settlement was within the range of reasonable outcomes. And at the preliminary approval hearing on the amended settlement agreement, the court was provided with additional information to evaluate the range of reasonableness for the amended Settlement. (A1132-34.)

In sharp contrast, in *Sutton v. Bernard,* No. 00 C 6676, 2002 WL 1794048 (N.D. Ill Aug. 5, 2002), cited by the objectors, the court concluded that it did not have enough information to evaluate the proposed settlement. *Id.* at *1. The *Sutton* court did not have the benefit of knowing that the settlement had been negotiated before an experienced mediator with a national reputation, as the district court did in the present case. Moreover, in *Sutton,* it appears that the defendants' insurance carrier negotiated the settlement without the consent of its insured. *Id.* at *2. Under the unique circumstances in *Sutton,* there were reasons for the court to

deny preliminary approval of that settlement. Those circumstances do not exist here.

Nor do the other cases cited by the objectors support their position. In *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982), the Court first noted that "[a]dequacy of representation and fairness of compromise are questions of fact for the district court," and that district courts are not expected to "convert settlement hearings into trials on the merits." *Id.* at 658-59. The Court required that district courts "explore the facts sufficiently to make intelligent determinations" and that there "be some evidentiary foundation in support of the proposed settlement." *Id.* at 659 (internal quotation marks and citations omitted). In the present case, the district court was presented with hundreds of pages of briefing, declarations, and other evidence, and the court held multiple hearings at which the facts were thoroughly explored. (A193-99; A414-25; A617-33; A1072-76; A1131-84; A1739-1820.)

In *Malchman v. Davis*, 706 F.2d 426 (2d Cir. 1983), the Court stated that "[t]he court's discussion need not be prolix to be thorough, and 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." *Id.* (internal quotations and citations omitted). In *Malchman*, unlike here, the district court had conducted only a perfunctory fairness hearing and appeared to rely

exclusively on the report of a referee (who did not even consider all of the settlement evaluation factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)). *Id.* at 431, 433-34. Here, the parties briefed and the court reviewed all of the *Grinnell* factors (A1394-1435; A1545-1649; A1666-70; A1811-14), including the two factors the objectors claim were inadequately reflected in the record – the "best possible recovery" and "recovery in light of all the attendant risks" factors. (A1666-70; A1574-1649.)

Finally, the objectors' reliance on *In re Community Bank of Northern Virginia & Guaranty National Bank of Tallahassee Second Mortgage Loan Litigation,* 418 F.3d 277 (3d Cir. 2005), is misplaced. There, the court did not analyze class certification at all, neither at the preliminary approval nor final approval stage. *Id.* at 298, 300-01. The Third Circuit did not forbid courts from adopting proposed findings drafted by the parties, but rather objected because it did not appear that "the District Court exercised 'independent judgment' in adopting the proposed findings of the settling parties." *Id.* at 301 (quoting *Bright v. Westmoreland County*, 380 F.3d 729, 731-32 (3d Cir. 2004)). Here, however, the district court was deeply engaged in the approval process and in analyzing the facts and legal issues, as is clear from the hearing transcripts regarding the Settlement.

The court issued its own findings of fact and conclusions of law, and the parties did not submit any proposed findings to the court. (A193-99; A414-25; A617-33; A1072-76; A1131-84; A1739-1820.)

B. The Requirement that Objectors Appear in Person Does Not Violate Due Process.

The objectors contend that it is a violation of due process to require the personal appearance at the final fairness hearing of an objector or his or her counsel. No authority supports the objectors' argument, and the federal appellate decision they do cite is squarely on point, and squarely against their position. (App. Br. 54 (citing *Sparks v. MBNA*, 48 Fed. Appx. 385, 391 (3d Cir. 2002)).)

The objectors have failed to cite a single case where a court found that a requirement of appearance in person by an objector or through counsel was a denial of due process. There is no categorical prohibition against such a requirement. In fact, a well-known class action treatise actually contemplates such a requirement. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, Appendix F, Items 9, 14, 18 & 20 (3d ed. 1997) (exemplar notices containing personal appearance requirement).

Finally, the objectors did in fact appear before the district court either personally or through their counsel, and not one other class member ever notified the parties that he or she wanted to object but could not appear at the final fairness hearing.

CONCLUSION

For the foregoing reasons, plaintiffs-appellees request that this Court affirm the judgment of the district court.

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Respectfully submitted,

/s/Michael J. Boni
Michael J. Boni
Joshua D. Snyder
Kohn, Swift & Graf, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107

Diane S. Rice
Hosie McArthur LLP
One Market Street
Spear Street Tower, 22nd Floor
San Francisco, CA 94105

A. J. De Bartolomeo
Girard Gibbs & De Bartolomeo LLP
601 California St., Suite 1400
San Francisco, CA 94108

Gary Fergus
Fergus, A Law Firm
595 Market Street, Suite 2430
San Francisco, California 94105

Attorneys for Plaintiffs-Appellees

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I hereby certify that:

1. This brief contains 10,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 with 14-point Times New Roman.

/s/Michael J. Boni
Michael J. Boni

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused that true and correct copies of the Brief of Plaintiffs-Appellees and Local Rule 32 Virus Protection Certificate of Compliance to be served by First Class U.S. Mail and by electronic mail in PDF format on the following:

Charles D. Chalmers, Esq.
769 Central Boulevard
Suite 148
Fairfax, CA 94930
cchalmers@allegiancelit.com

Counsel for Plaintiffs-Appellants Irvin Muchnik, et al.

Charles S. Sims, Esq.
Proskauer Rose, LLP
1585 Broadway
New York, NY 10036
CSims@proskauer.com

Attorneys for Defendant-Appellee Reed Elsevier Inc.

Henry B. Gutman, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, N.Y. 10017
h_gutman@stblaw.com

Attorneys for Defendant-Appellee Dow Jones Reuters, Business Interactive LLC, d/b/a/ Factiva

James F. Rittinger, Esq.
Satterlee Stephens Burke & Burke
230 Park Avenue
New York, N.Y. 10169
jrittinger@ssbb.com

Attorneys for Defendants-Appellees The Dialog Corporation, Thomson Corporation, Gale Group, Inc., and West Publishing Co.

Jack Weiss, Esq.
Gibson Dunn & Crutcher, LLP
200 Park Avenue, 47th Floor
New York, NY 10166
jmweiss@gibsondunn.com

Attorneys for Defendant-Appellee Dow Jones & Co., Inc.

Ian Ballon, Esq.
Greenberg Traurig, LLP
2450 Colorado Avenue, Suite 400E
Santa Monica, California 90404
balloni@gtlaw.com

Attorneys for Defendants-Appellees Knight- Ridder, Inc. and Mediastream, Inc.

Michael Denniston, Esq.
Bradley Arant Rose & White, LLP
1819 Fifth Avenue North
Birmingham, Alabama 35203
mdenniston@bradleyarant.com

Attorneys for Defendant-Appellee EBSCO Industries, Inc.

Christopher M. Graham, Esq.
Levett Rockwood, P.C.
33 Riverside Avenue
Westport, CT 06880
cgraham@levettrockwood.com

Attorneys for Defendant-Appellee NewsBank, Inc.

Juli Wilson Marshall, Esq.
Latham & Watkins
Sears Tower, Suite 5800
Chicago, IL 60606
juli.marshall@lw.com

Attorneys for Defendant-Appellee ProQuest Co.

Kenneth Richieri, Esq.
George Freeman, Esq.
The New York Times Company
229 West 43rd Street
New York, N.Y. 10018
freemang@nytimes.com

Attorneys for Defendant-Appellee The New York Times Company

Raymond R. Castello, Esq.
Fish & Richardson P.C.
Citicorp Center
153 East 53rd
New York, NY 10022
castello@fr.com

Attorneys for Defendant-Appellee Copley Press, Inc.

Dated: May 25, 2006

/s/Michael J. Boni
Michael J. Boni
Attorney for Plaintiffs-Appellees

Local Rule 32 Virus Protection Certificate of Compliance

Case Name: ***Muchnick, et al. v. Michael Castelman Inc., et al.***
Docket Number: 05-5943-cv(L)

I hereby certify:

1. The digital version of the Brief of Plaintiffs'Appellees submitted by e-mail in Portable Document Format (PDF) as an e-mail attachment to briefs@ca2uscourts.gov in the above referenced case, has been scanned for viruses; and

2. No viruses were detected during the scan.

Dated: May 25, 2006

/s/Michael J. Boni
Michael J. Boni