

05-5943-cv(L)

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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

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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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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the district court properly approved a class action settlement that releases known future claims in exchange for compensation, where the Class is amply notified of the release.
- 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

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

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

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.

