

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**In re LITERARY WORKS IN
ELECTRONIC DATABASES
COPYRIGHT LITIGATION**

**Master Docket No. M-21-90 (GBD)
(MDL # 1379)**

**MEMORANDUM IN SUPPORT OF OBJECTIONS TO PROPOSED CLASS
SETTLEMENT BY CLASS MEMBERS IRVIN MUCHNICK, CHARLES
SCHWARTZ, ABRAHAM ZALEZNIK, JACK SANDS, TODD PITOCK, JUDITH
STACEY AND JUDITH TROTSKY**

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I. INTRODUCTION

Proposed class action settlements are disapproved. Their approval is reversed, or disapproval upheld, by the Supreme Court and the Courts of Appeal. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004); *Smith v. Sprint Comm. Co.*, 387 F.3d 612 (7th Cir. 2004); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003); *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002); *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995), cert. denied sub nom *General Motors v. French*, 133 L. Ed. 2d 45, 116 S. Ct. 88 (1995); *Plummer v. Chemical Bank*, 668 F.2d 654 (2nd Cir. 1982); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9 (2nd Cir. 1981); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), cert. denied, 444 U.S. 870, 100 S. Ct. 146, 62 L. Ed. 2d 95 (1979); *Saylor v. Lindsley*, 456 F.2d 896 (2nd Cir., 1972). District Courts disapprove proposed settlements, even after preliminary approval. *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34 (D. Me. 2005); *Moore v. Halliburton Co.*, 2004 U.S. Dist. LEXIS 18187 (N.D. Tex., 2004); *Reynolds v. Beneficial Nat'l Bank*, 260 F. Supp. 2d 680 (N.D. Ill., 2003); *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108 (S.D.N.Y. 1999); *Martens v. Smith, Barney, Inc.*, 181 F.R.D. 243 (S.D.N.Y. 1998).

This settlement should be denied approval. It presents fundamental defects in critical areas of class action requirements. The first and very fundamental is that a portion of the proposed class, holders of unregistered copyrights, lacked any representation in the negotiation of the settlement. The second, and equally fundamental, defect is that the proposed settlement purports to convey extensive rights under class members' copyrights to

the defendants. This is simply not something that the class representatives can do, or that the Court has the jurisdiction to do by approving this settlement. Even if it were theoretically possible, the Notice to the class so completely fails to alert class members to this aspect of the settlement that it is a denial of due process. The third, and again fundamental, is the abandonment of a portion of the defined class by the stratagem of using the Notice and claim form to deny them the right to any compensation, while the Settlement Agreement and Court orders release their claims. The fourth, and also fundamental, is that the settlement was negotiated by the Associational Plaintiffs, who are not, as a matter of law, adequate representatives for any part of the class when it comes to negotiating damage claims. Adequacy of representation is the touchstone of due process for class actions, which determine the rights of absent persons. Fifth is that all named plaintiffs, and proposed class counsel, proved themselves inadequate representatives for any part of the class by their failure to vigorously prosecute the action.

Further, there are other major defects, any one of which, or various combinations of which, would suffice for denial, and which demonstrate the inadequacy of the named plaintiffs and their counsel. These include the “syndication” structure of the settlement; the scope of the release; the “single infringement” approach; and different definitions for Category A.

In 1999 a unanimous three-judge panel of the Second Circuit declared that the defendants’ were systematically infringing the copyrights of freelance writers. These actions were filed in 2000, on behalf of holders of registered copyrights. Each complaint alleged the need for injunctive relief, and the Associational Plaintiffs alleged that it was particularly their charge to seek that relief. In 2001, by a 7 to 2 vote, the Supreme Court affirmed the Second

Circuit in an eloquent vindication of copyright holders. The plaintiffs in this case never sought to enjoin the continued, systematic, infringement.

Instead, they now come to this Court, purporting to act on behalf of all freelance writers throughout the world, and present a settlement that is so favorable to the publishing and database industries that it readily becomes apparent that the proposed settlement is the result of collusion. Instead of seeking injunctive and monetary damages for the holders of registered copyrights, the plaintiffs agreed to sweep into this settlement the vast number of owners of unregistered copyrights, offering them trifling amounts of compensation, which is subject to forfeiture in favor of the original class of registered copyright owners. They also agreed to convey class members' copyrights to the defendants by an illegal, default procedure which is not described in the class notice. The plaintiffs have done everything possible to shield this settlement from critical scrutiny. They have imposed a burden on potential objections by class members that has only been utilized one time before in the history of Rule 23. They have withheld any justification of the settlement amount from examination by class members before the deadline to opt out or object. However, the time for close scrutiny by the Court, the ultimate protector of absent class members, has arrived. The Court should deny approval for this settlement to defend the salutary purposes of the class action system from abuse.

II. THE SETTLEMENT PRESENTS COLLUSION ON ITS FACE.

A. The Present Agreement Has Provisions Called Collusion On Its Face.

In May the District Court for Maine disapproved a settlement to which it had twice given preliminary approval. *Sylvester v. Cigna Corp.*, 369 F. Supp. 2d 34 (D. Me. 2005). It did so because, as it came to understand the settlement better, it found the key provisions of

the agreement appeared collusive on its face. *Sylvester*, at 45. The present settlement contains the same provisions that concerned the Chief Judge of the District Court of Maine, as well as great many other provisions that demonstrate collusion on its face.

The court in *Sylvester* was concerned by the presence of a combination of a reverter clause and a “clear sailing” provision regarding attorneys’ fees for the class counsel. The present settlement contains both. A reverter clause is one which, in a claims settlement, provides that unclaimed settlement funds revert to the defendant. The reverter provision of the present settlement works this in the following manner. To the extent that claims, and the cost of notice and settlement administration and the cost of attorneys’ fees, do not exceed \$9 million the defendants do not have to put up any further money.¹ (Settlement Agreement ¶ 3.a.) The \$18 million is not a settlement fund, it is a settlement cap. A “clear sailing” agreement is one in which a defendant agrees not to oppose an attorneys’ fee request that is below an agreed limit. *Sylvester*, at 40. The present agreement has such a clause. (Settlement Agreement ¶ 12.)

As noted in *Sylvester*, these two clauses typically go together. *Sylvester*, at 45 (citing William D. Henderson, Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements, 77 TUL. L. REV. 813, 835 (2003) (“It is important to recognize that it would be relatively rare for a plaintiff’s attorney to agree to a reverter-fund settlement without also having the security of a clear sailing agreement to reduce the uncertainty in his fee award.”). The chief judge in *Sylvester* took special note of Justice Sandra Day O’Connor’s observation that reversionary fund settlements that allow attorneys’ fees to be

¹ Of the \$10 million, one million is provided by the defendant in the form of published notice, so they are really only putting up \$9 million which won’t “revert” to them if claims are low.

based upon the total fund may "potentially undermine the underlying purposes of class actions by providing defendants with a powerful means to enticing class counsel to settle lawsuits in a manner detrimental to the class" *International Precious Metals Corp. v. Waters*, 530 U.S. 1223, 147 L. Ed. 2d 265, 120 S. Ct. 2237 (2000) (Mem.) (Justice O'Connor's Statement respecting denial of writ of certiorari).

The *Sylvester* decision provided a dramatic new piece of information about what happens in claims settlements. There have been examples available for years of settlements where claims turned out to be dramatically lower than expected. However, in *Sylvester* the court received the testimony of the settlement administrator stating that, in his experience, "claim return rates are 10% or less in the vast majority of settlements that require filing a notice of claim." *Sylvester*, at 44. Mr. Tilghman's company has administered **175 class action settlements**. *Id.*

There will be low claims here. There is clearly that possibility, aside from the general experience. Plaintiffs have told the Court that the overwhelming majority of class members and potential claimants are in the C Category, because freelancers don't register their copyrights. (Plaintiffs' Memorandum In Opposition to Non-Party Irvin Muchnick's Motion to Vacate the Preliminary Settlement Approval, p. 14.) They stated they have a study indicating less than 1 in a 1000 have registered copyrights, or 1/10 of 1% of the class will be in Categories A and B. The awards for Category C are very modest, ranging from \$5 to \$60. These amounts are reduced (except for the \$5 award) if the works were created before 1995. Moreover, if a claimant will not authorize future use, they only get 65% of the award. Finally, the Category C claimants have been advised that their awards could be reduced to

zero if the total claims, including their own, exceed a certain limit. The Category C claimants have very little incentive to file claims.

B. This Settlement Is Clearly Collusive On Its Face.

The problems addressed by the Court in *Sylvester* appear modest by comparison to the provisions illustrating a breach of fiduciary duty by the purported class representatives, and their counsel,² here.

1. Abandoning The Authors of Scientific and Academic Works In a Deceptive Manner Is A Breach of Fiduciary Duty.

From the beginning, all these consolidated class actions included owners of copyrights on scientific and medical works. The class is alleged as “all persons who own a copyright in a literary work created and first published on or after January 1, 1978 and electronically reproduced, displayed, sold, and/or distributed by one or more of defendants” (Consolidated Complaint, ¶ 55.) The definition of “literary works” includes scientific and medical articles. 17 U.S.C. § 101 (works expressed in words, numbers or other verbal or numerical symbols). Were that not clear enough, there are other indications in the Consolidated Complaint that these works were intended to be included. The allegation describing defendant West Publishing Company states that it publishes articles from “scientific and business information journals.” (Consolidated Complaint, ¶ 42.) The allegation describing defendant Northern Light Technology Corporation states that it provides access to publications in the subject areas of “medical, financial and academic.”

² “Realistically, functionally, practically, [the class counsel] is the class representative ...” *Culver v. City of Milwaukee*, 277 F.3d 908, 913 (7th Cir., 2002). “Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is [sic] sheer sophistry.” *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 832 n. 9 (3d Cir. 1973).

(Consolidated Complaint, ¶ 49.) Defendant Reed Elsevier is alleged to be a publisher of “scientific information” and the LEXIS-NEXIS division is alleged to publish “articles from more than one thousand two hundred scientific, legal and business information journals.” (Consolidated Complaint, ¶ 51.) Earlier complaints in individual actions also demonstrate that scientific works were always intended to be included. For instance, plaintiff James Gleick is alleged to write widely on “scientific” subjects. (Corrected First Amended Class Action Complaint, ¶ 9.a.)

The proposed settlement has a class definition which includes all literary works. (Settlement Agreement, ¶ 1.f.) (“English language literary work”) However, the Notice of Class Action Settlement, and the claim form, advise the class that works in “scientific and research-oriented medical journals” are not included in the settlement. (Notice, Sect. I.B.1, p.2.) (Claim Form, settlement website.) The plaintiffs agreed to a form of Notice and claim form which excludes part of the certified class from compensation, while their rights are released.

Placing these exclusions outside the settlement agreement permits the conclusion, from review of the Settlement Agreement, that those subject to these exclusions are within the class and will have released all claims by the settlement. The Manual for Complex Litigation warns district courts to wary of reoccurring potential abuses in class actions when reviewing proposed settlements, including “releasing claims of parties who received no compensation in the settlement.” Manual for Complex Litigation, Fourth (1st ed. 2004), § 21.61, p. 311. Plaintiffs described the settlement class as “all persons who own a copyright under the United States copyright laws in an English language literary work that, at any time after August 14, 1997, that was reproduced ... by any Defense Group member, without the

person's authorization.” (Memorandum of Law In Support of Plaintiffs' Motion For Preliminary Settlement Approval, p. 4.) No mention was made of the exclusion. Further, the order for preliminary approval submitted by the plaintiffs, which was executed by the Court, contains a definition of the class which clearly **includes** these scientific or medical works that the Notice and Claim Form tell class members are excluded. (Order For Preliminary Settlement Approval, ¶ 7, p. 2.) That form of order is an exhibit to the Settlement Agreement. (Settlement Agreement, Ex. C.) Finally, the form of Notice (which includes the form of Claim Form) is, pursuant to the Settlement Agreement, subject to approval by counsel for the defendants. (Settlement Agreement, ¶ 8, p. 22.) The situation strongly suggests that the plaintiffs and defendants colluded to obtain a class definition that would include the scientific and medical works, and thus they would be subject to the settlement releases, but to advise the class that no claims could be made for such works, and to mislead the Court from being aware of this arrangement.

If it was just a mistake, the plaintiffs had the opportunity to correct it. Objector Muchnick raised this issue in his Motion to Vacate Preliminary Approval. That motion was served on April 26, 2005, more than a month before the Notice was mailed to the class. That motion clearly identified this situation. “Such articles are clearly literary works under the Copyright Act, and there is nothing in the settlement agreement to indicate that the Copyright act definition should not govern. Therefore, there needs to be some explanation of why scientific or academic articles, which are nowhere mentioned in the Settlement Agreement, are not Subject Works under the Settlement Agreement.” (Memorandum in Support of Motion to Vacate, etc., p. 6.) The opposition simply ignored the point that the exclusion

appears only in the Notice and not in the Settlement Agreement. No explanation was given. (Plaintiffs' Memorandum in Opposition, etc., p. 13.)

There is virtually no chance under the circumstances that this is a mistake. The plaintiffs presented a Settlement Agreement, and form of preliminary approval order, which would allow it to be asserted that owners of copyrights in scientific and medical works (works published in such "journals") had been covered by the settlement and had released their claims. But they agreed with defendants to a Notice and claim form which excludes those class members from compensation. This is evidence of collusion on the face of the settlement, as well as a breach of fiduciary duty to the owners of those copyrights.

2. Agreeing To Subordinate Compensation of Category C Is A Breach of Fiduciary Duty and Presents Collusion On Its Face.

The proposed settlement contains a provision pursuant to which the awards for Category C Subject Works can be reduced, to zero, while the awards for Category A and B remain undiminished. (§ 4.f., p. 15-16.) (hereafter "Category C Reduction" or just "Reduction") This provision is clearly to the benefit of holders of A and B claims. All the individual named plaintiffs are holders of A and B claims. Some of them hold many, many B claims. (Declaration of Irvin Muchnick In Support of Objections to Settlement, ¶ 35) (hereafter "Decl. Muchnick") These named plaintiffs originally alleged they were suing only as representatives of those with registered copyrights.

Named plaintiffs are fiduciaries for the class members. *Cohen v. Beneficial Loan Corp.* (1949) 337 U.S. 541, 549-50, 69 S. Ct. 1221, 1227, 93 L. Ed. 1528; *Martens v. Thomann*, 273 F.3d 159, 173 n. 10 (2d Cir. 2001) (describing the relationship between a class representative and the class as a fiduciary one). This fiduciary duty applies from the

beginning of the action. *McDowall v. Cogan*, 216 F.R.D. 46, 49 (E.D.N.Y., 2003). This applies equally to class counsel. *Id.*; see also, Manual for Complex Litigation, Fourth (1st ed. 2004)(hereafter “Manual”), § 21.12 (“Rule 23 and the case law make clear that, even before certification or a formal attorney–client relationship, an attorney acting on behalf of a putative class must act in the best interests of the class as a whole.”)

Plaintiffs advised the Court that the Reduction is justified because the “risk (of a reduction) is in fact exceedingly remote.” (Plaintiffs’ Memorandum In Opposition to Non-Party Irvin Muchnick’s Motion to Vacate the Preliminary Settlement Approval, p. 14.) Even if this is a factually justified estimate, the fact remains that the risk falls entirely on the C Category. If the risk is in fact exceedingly remote why did someone (almost surely the named plaintiffs with A and B Category claims) require that Category C bear the risk alone? Moreover, the unfairness of the Category C Reduction is amplified by the fact that its operation would result in C claimants losing all compensation for past infringement, in order to protect from any reduction the compensation to As and Bs for future use of their works.

It is clear why this provision is in the settlement. Defendants wanted to eliminate their liability for damages to all persons who might sue for this type of infringement. That includes the unregistered freelance writers, who could at any time register their copyright and initiate litigation so long as their works remained in the databases. So defendants prevailed upon the named plaintiffs, and class counsel, to expand the class to include unregistered copyright owners. However, the named plaintiffs felt threatened by the looming potential for Category C claims to take up a large portion of the settlement. Plaintiffs stated that only 1 in 1000 class members are likely to have registered their copyrights. So the named plaintiffs demanded the Reduction to protect their A and B

interests. Class counsel went along with it. But they, like the named plaintiffs, became fiduciaries to the unregistered copyright holders the minute they were to be part of the “class” for settlement purposes. They breached that fiduciary duty by agreeing to the Reduction. This is collusion on the face of the settlement but, in an unusual twist, is collusion between class counsel and the named plaintiffs instead of with the defendants.

3. The Arbitrary Cutoff In Defining Categories B and C Is A Breach of Fiduciary Duty and Presents Collusion On Its Face.

The definition of Category B is that the copyright owner must have registered before December 31, 2002. The justification for this date is that it is to prevent “gaming the system” by filing for registration after the settlement was announced. (Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 11.) But the settlement wasn’t announced until early this year, more than two years after the deadline. Irvin Muchnick, who helped start one of these class actions, and who has tirelessly worked for years to correct the rampant infringement of freelancers, didn’t know anything about this settlement until it was announced this year. (Decl. of Muchnick, ¶ 37.) He even emailed to one of plaintiffs’ counsel in January 2005 seeking information and received no reply. *Id.*

The definition greatly reduces compensation for any class member who was registering their works, as the associational plaintiffs have constantly advised, entirely in good faith. It also reduces the monetary size of the claims against the settlement fund, increasing the likelihood of a reversion to the defendants. It also reduces the likelihood of claims, because it shifts B claims to C claims, which receive such small awards that there is less incentive to file a claim. At least two named plaintiffs, Raftery and Laney, registered

hundreds of works, which had been published years before, after these actions were filed. (Decl. of Muchnick, ¶ 35.)

This is evidence of collusion, and breach of a fiduciary duty, because the explanation of the deadline makes no sense, and the effect of the provision is plainly good for defendants and bad for a portion of the class.

4. The “License by Acquiescence” Provision Is Collusion On The Face Of The Settlement.

Even when the defendants convinced the plaintiffs to include holders of unregistered copyrights in the class there was still a problem. They needed to insure their right to use the all the Subject Works in the future. Copyrights last a long time – for the life of the author and 70 years. 17 U.S.C. § 302(a). For the class members who filed a claim the answer was to offer them the right to additional compensation for future use. However, this would not address the large number of class members who did not file claims. With only 10%, or even 20% or 30% of class members filing claims, an enormous number of infringed works would still be eligible for later infringement claims. So the defendants needed a mechanism to acquire rights to use all the Subject Works.

The Settlement contains a provision which provides, in effect, that if any class member does not act to deny it, the Defense Group Members or the Supplemental Participating Publishers receive a license in perpetuity to all electronic rights in the class member’s subject works. (¶ 13.b., p. 28.) (hereafter “License by Acquiescence”) This provision is simply outside the power of class representatives, even if they were adequate representatives, to agree to on behalf of absent class members. Class actions are about pursuing existing legal claims, not becoming the general agent for class members. See

generally, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832-833, 119 S. Ct. 2295, 144 L.Ed. 2d 715 (1999)(discussing origin of class action practice and modern practice commencing with revision of Rule 23 in 1966). Rule 23 is entirely concerned with bringing actions for damages or equitable relief on behalf of absent class members. There is no known action by an individual, much less for a class, which would allow the plaintiff to cause the defendant to accept a license for a copyright.

Imagine a class action seeking damages and injunctive relief from a local utility for improperly trespassing on class members' property. Is it conceivable that a settlement could provide that, absent a written refusal by individual class members, the utility would thereafter be free to enter every class members' property as it chose? The answer is surely no, because the class representative would not have the power to bind class members to something which could never have resulted from the trial of the action.

But why would the named plaintiffs ever agree to this provision, even if they had the authority? Those who actually make a claim are free to grant the right to future use, and they get paid for it if they do. (Except for Category C claimants who may not get paid for it.) Why would the named plaintiffs agree to grant rights from class members who by definition will not be paid for this grant? Below we describe how the named plaintiffs are not adequate representatives in this matter, thus preventing certification of the class. In this instance, it bears noting that the named class representatives are not similarly situated with the vast number of class members who are affected by this provision. The named plaintiffs are aware of the provision, and will clearly be applying for their compensation. Some of them have reason to expect to receive as much as \$100,000. (Ex. J, Declaration of Irvin

Muchnick In Support of Motion to Vacate Preliminary Approval, etc.) They will also be receiving representative awards of \$2,000 each.

Not only is the provision not legally permitted, but it isn't disclosed. This provision, purporting to grant a copyright license unless class members act to deny it, is not mentioned in the Notice. The provision for actual claimant class members to allow future use is described. (Notice, ¶ 5, p.4.) The settlement creates an elaborate claim form for use in making claims. There is no form for class members who are not making a claim to deny the future use of their Works. The settlement website makes it very easy for class members to use the claim form, by allowing it to be filled out on-line, or downloaded. (Declaration of Charles D. Chalmers In Support of Objections To Settlement, ¶ 2.)(hereafter "Decl. CDC") There is no form for non-claiming class members to deny the future use of their Works. There isn't even a mention of that provision on the website. *Id.* As noted above, experience shows that potentially 90% of the class will not file claims. These are the class members subjected to the forfeiture by this provision. The settlement website lists more than 26,000 publications as encompassed by this settlement. Infringing freelance works by databases started about 1980, or twentyfive years ago. There are likely tens of thousands of copyright owners affected by this provision, but who, due to the lack of notice, have no idea that rights in their property are being conveyed to the defendants.

Consider an example that demonstrates the confiscatory nature of this provision. The writer of a book which was excerpted in a magazine or newspaper, a common practice for many years, would grant the defendants the right to "electronically" publish the entire book (a "Subject Work") in perpetuity. The writer of essays or articles over many years on a particular subject, say the works of a particular composer, or a figure in history,

would grant the defendants the right to electronically publish the collection. The author's children or grandchildren might some day seek to enjoin such a use, only to find that their parent "lost" those rights in the copyright by a provision in this settlement. Many people simply ignore the notices of class action settlements that come in the mail, or appear in publications. Certainly they know that they thereby forego whatever benefit might be available to them. It is inconceivable that the law will uphold the idea that they must carefully read these notices to avoid having something taken away from them.

This provision, combined with the lack of notice, is a breach of fiduciary duty, and evidence of collusion on the face of the settlement. It affects people who by definition are not receiving any benefit from the proposed settlement, but it grants an enormous benefit to the defendants.

III. THE CLASS CAN NOT BE CERTIFIED DUE TO A LACK OF ADEQUATE REPRESENTATION.

Adequate representation of all parts of the class is a requirement of Rule 23. Fed.R.Civ.Pro. 23(a)(3) and (4). It is also a constitutional requirement. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 n 24, 119 S. Ct. 2295, 144 L.Ed.2d 715 (1999). "[A] trial court must conduct a 'rigorous analysis' to ensure that the prerequisites of Rule 23 have been satisfied before certifying a class." *Gen. Tel. Co. of the Southwest v. Falcon* (1982) 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740; accord, *Wal-Mart Stores, Inc. v. Visa USA Inc. (In re Visa Check/MasterMoney Antitrust Litig.)*, 280 F.3d 124, 135 (2d Cir. 2001).

A. The Associational Plaintiffs Are Not Adequate Representatives For The Class Claim For Damages or For Anyone Other Than Their Members.

"Representational standing by an organizational plaintiff is subject to two important limitations. Because it is a standing doctrine, representation by an

organization through representational standing principles is limited to the organization's own members and does not encompass, for example, a class of similarly situated nonmember persons. [ftnt] [citing Sierra] Moreover, most courts have held that representational standing will permit the organization to seek only declaratory and injunctive relief on behalf of its members (collective relief), in contrast to damages relief which is tantamount to individual relief for members, in a class of which the organization is not a part.”

1 A. Conte & H. Newberg, *Class Actions* § 3.34 (4th ed. 2002)

The Associational Plaintiffs had a limited role to play in this litigation. They could sue for injunctive relief on behalf of their members. That is exactly what they alleged their role to be in this action. (Consolidated Complaint, ¶ 38.) They never sought such relief. Instead, they inserted themselves deeply into the negotiations for a damages settlement on behalf of the entire class. They have undertaken to do exactly what the National Writers Union stated: “[O]ur first choice is not to engage in a legal war that ties everyone up in court and creates an all-out war over rights. Such draconian actions serve only to create conflict and instability in the industry.” (Paula J. Hane, “Freelance Authors Turn Up the Heat,” *Information Today NewsBreaks*, August 21, 2000.)

The certification sought under this settlement is conditional; it is solely for the purpose of presenting this settlement to the Court. (Settlement Agreement, ¶¶ 1.f., p.4 and 7.b., p.21; see also Order For Preliminary Settlement Approval, ¶ 7, p.2 (“provisionally certified for settlement purposes only”). This settlement has nothing to do with injunctive relief. The Associational Plaintiffs are not adequate plaintiffs for this settlement, although, as discussed below, *infra* at 19, they were the dominating force in negotiating it.

B. All Named Plaintiffs Are Inadequate Representatives Due To The Failure To Vigorously Pursue This Action.

It is widely held that satisfying Rule 23(a)(4)'s requirement of a class representative who "will fairly and adequately protect the interests of the class" requires a finding of an assurance of "vigorous prosecution" by the class representative and class counsel. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 170-171 (2d Cir., 2001); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 482-483 (5th Cir., 2001); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir., 1998). There is conclusive evidence that these plaintiffs do not satisfy this requirement. They have done nothing to prosecute the action. Talking settlement is not prosecution of a lawsuit. They didn't even require the defendants to answer the complaint. They never moved for any injunctive relief, although it was established as a matter of law by the United States Supreme Court that the defendants were infringing the class' copyrights. So far as appears at this point, they conducted no discovery. Both the class and the Court are "disarmed" when a settlement is proffered for approval as the result of negotiations when there was no "threat of litigation." *Amchem Prods. Inc. v. Windsor* (1997) 521 U.S. 591, 621, 117 S. Ct. 2231; 138 L. Ed. 2d 689.

The only other freelancer class action, *Ryan v. CARL*, produced a settlement of \$7.25 million, for past infringement alone, in an action against a single infringer. This case presents a settlement of up to \$18 million from the entire publishing and database industries for past infringement and future use. The *Ryan* case was actively litigated. (Decl. Muchnick, ¶ 12.) The class was certified. *Id.* There was no reversion of the settlement fund to the defendant. *Id.* Class members entitled to statutory damages received up to \$30,000 per work. *Id.* An unregistered article received an award of \$750. *Id.*

C. All Named Plaintiffs Are Inadequate Representatives Of Category C Claimants.

The named plaintiffs have demonstrated that they are not adequate representatives of the owners of unregistered copyright owners, whose rights under the settlement are covered by Category C. As described elsewhere, the settlement severely prejudices the Category C claimants in favor of the A and B Category claimants. The named plaintiffs all alleged, when these actions were filed, that they were representing the holders of **registered** copyrights. They all hold either very valuable Category A registrations, or multiple Category B registrations, or both.

But settlement is not a cure-all: "[The] other specifications of [Rule 23] -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context." *Id.* [citing *Amchem*, at 620] These include the requirement that the class representatives' claims be typical of those of the class and that the representatives will adequately protect the class's interests. FED. R. CIV. P. 23(a)(3), (4). And not just the class as a whole: where there are significant differences among subgroups within the class, "the members of each sub group cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem*, 521 U.S. at 627 (quoting *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 743 (2nd Cir. 1992)).

Smith v. Sprint Communications Co., 387 F.3d 612, 614 (7th Cir. 2004). "At all events, the right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts among the class." *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation* (3rd Cir. 1995) 55 F.3d 768, 809, cert. denied sub nom *General Motors v. French*, 133 L. Ed. 2d 45, 116 S. Ct. 88 (1995).

IV. THE NEGOTIATIONS WERE FLAWED FROM THE PARTICIPATION OF IMPROPER CLASS REPRESENTATIVES, LACK OF DISCOVERY AND A BIASED MEDIATION PROCESS.

It is the well-established law of this Circuit, as in all others, that the negotiation process is to be considered in connection with approval of a settlement. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir., 2001) (“court reviewing a proposed settlement must pay close attention to the negotiating process”); *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2nd Cir., 1982). Heighten scrutiny is required when the settlement was negotiated before class certification, which is the case here. *D'Amato* at 85.

A. The Negotiations Were Conducted By and Dominated By The Associational Plaintiffs.

The negotiation of the proposed settlement was conducted predominately by, and dominated by, employees or officers of the Associational Plaintiffs. The mediator describes the persons who participated actively in the mediation. All of these people are representatives of the Associational Plaintiffs, with the exception of plaintiff James Gleick. (Declaration of Kenneth R. Feinberg In Opposition to Motion to Vacate Preliminary Approval etc., ¶ 9.) James Gleick was an officer of one of the Associational Plaintiffs during at least a portion of the period these actions have been pending. (Consolidated Amended Class Action Complaint, ¶ 16.)

As discussed above, they are unqualified to serve as class representatives for damage claims or related negotiations, due to lack of typicality. Fed.R.Civ.Pro. 23(a)(3). Therefore, in the negotiation of the proposed settlement all class members lacked adequate representation.

B. There Appears To Have Been No Discovery Prior To The Settlement Negotiations.

So far the plaintiffs have provided no information about discovery taken in this case. Plaintiffs state that agreement on the principal terms of the settlement was reached in April 2003. (Application of Class Counsel For Award of Fees, Reimbursement of Costs and Service Awards to the Class Representatives, p. 1.). Assuming that the amount of the settlement fund is a “principal term” it would appear that the plaintiffs had no discovery on which to base negotiations. They did nothing else that is normally part of a litigation, not even requiring the defendants to answer the complaint.

This issue can not be fully addressed until plaintiffs make some presentation on the discovery they have done, which will occur after this memorandum must be filed. Discovery must be sufficient for two purposes. One is to provide the Court with the information necessary for it to perform its role of protecting the class. *Martens, supra* at 263 (settlement denied approval due to lack of information). Discovery must also show that the representatives (and counsel) were sufficiently informed to provide effective representation of the class interests. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir., 1974).

The discovery must not be simply an effort to justify the settlement, but an aggressive effort to obtain facts for prosecution of the action. *Saylor v. Lindsley*, 456 F.2d 896, 899 (2d Cir. 1972) (rejecting settlement where the limited discovery was largely contemporaneous with settlement and did not seek much "inculpatory" evidence, *id.* at 901). So-called “confirmatory discovery,” conducted to confirm a tentatively agreed settlement, is suspect for not being sufficiently adversarial. *Moore v. Halliburton Co.*, *supra*, at *30-*31.

C. The Mediation Process Was Flawed By The Mediator’s Fee Structure.

The Settlement Agreement indicates he will receive, a “mediator’s success fee.” Settlement Agreement, ¶ 1.b.(3). There is an indication in the Settlement Agreement that the mediator has not been paid, by plaintiffs, for work performed in February and March 2002. (¶ 1.b., p. 4.) The Model Standards for Conduct For Mediators discourages contingent fees. Scott R. Peppet, Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation, 82 Tex. L. Rev. 227, 242-243 (2003). The Comments to the Standards specifically state that “[a] mediator should not enter into a fees agreement which is contingent upon the result of the mediation or amount of the settlement.” *Id.* This is due to the potential for abuse to diminish confidence in the process. *Id.* The Ethical Guidelines for Mediators promulgated by the Association of Attorney-Mediators bar contingent fees even more explicitly than do the Model Standards of Conduct for Mediators. *Id.* at 244. The rules of many courts prohibit contingent fee agreements for mediation. *Id.* at 247, notes 91 and 92.

Professor Peppet identifies three acknowledged reasons for criticism of contingent fee mediation. The first is that it can distort the mediation process. “The mediator might push for settlement even when settlement is not in the parties’ best interests.” *Id.* at 259. The second is that it undercuts the parties’ self-determination. “If a mediator takes a stake in a dispute through a . . . a success fee, the mediator may be so motivated to push the parties in a particular direction that the mediated outcome can no longer be considered party-driven or self-determined.” *Id.* at 260. Third, the use of a contingent fee mediation may create the appearance of impropriety, even if none occurs. This is the reason many ethics codes for mediators prohibit the practice, particularly with court-connected mediations, where the

mediator serves as an officer of the court. *Id.* at 260-261. Contingent fee mediation may ‘cast a shadow on the mediation process ...’ *Id.*

Mr. Feinberg knows that using this fee structure is considered “very controversial.” Kenneth R. Feinberg, SYMPOSIUM ON MASS TORTS: REPORTING FROM THE FRONT LINE - ONE MEDIATOR'S EXPERIENCE WITH MASS TORTS, 31 *Loy. L.A. L. Rev.* 359, 365 (1998). Many professionals in the dispute resolution field believe that contingent fees should never be used. Carrie Menkel-Meadow, THE LAWYER AS CONSENSUS BUILDER: ETHICS FOR A NEW PRACTICE, 70 *Tenn. L. Rev.* 63, 96 (Fall 2002). It is frankly amazing that Mr. Feinberg, serving as the mediator in court-ordered mediation, would employ a compensation scheme which he knows to be controversial, and which could call into question the propriety of the mediation. In this case several years have gone by without any litigation activity due to this mediation.

V. CLASS MEMBERS CAN NOT EFFECTIVELY OBJECT TO THE ADEQUACY OF THE SETTLEMENT.

To determine if the settlement amount is adequate, the Court must consider two of the *Grinnell* factors: (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 117 (2d Cir. 2005). This information is not available.

These objectors believe there is a likelihood that the total fund, as well as the Category awards, are inadequate. This is strongly suggested by the settlement in *Ryan v. CARL*. (Decl. Muchnick, ¶ 12.) That settlement was from a single infringer. It was for \$7.25 million dollars. Holders of registered copyrights corresponding to Category A in this

settlement received \$30,000. *Id.* Plaintiffs obtained class certification for the issues of liability and injunctive relief in that matter. *Ryan v. Carl Corp.*, 1999 U.S. Dist. LEXIS 366 (N.D. Cal., 1999)

The *Ryan* class only covered infringements, by the one infringer, during a four year period. (1994 – 1998) It was estimated that, considering only owners of registered copyrights, there were 2,744 class members. *Id.* at *16-*17 (there is a decimal point error in the opinion.) This estimate was based on the defendant having infringed with 560,000 articles. *Id.* The present settlement covers registered and unregistered copyright holders. It covers eight years of infringement, from 1997 to 2005. It covers articles published in at least 26,000 publications. Decl. Muchnick, Ex. B. The allegations of the Consolidated Complaint concerning the scope of works potentially infringed by the named defendants, not to mention other parties being released by this settlement, is in the hundreds of millions, if not the billions. (Consolidated Complaint, ¶¶ 40-51.) The Manual for Complex Litigation advises that comparing a proposed settlement to other results for similar claims is appropriate. Manual, § 21.62, p. 316. The plaintiffs in *Ryan* also sought and obtained partial summary judgment on issues in that case. *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146, 1150 (N.D. Cal., 1998). The enormous divergence in the settlements of these similar cases may well result from the difference in how vigorously *Ryan*, but not *In re Literary Works*, was prosecuted.

During the pendency of this litigation there have been two reports of statements by an Associational Plaintiff estimating class-wide damages enormously greater than this settlement. (See, Decl. Muchnick, Ex. MM, and Ex. A to Decl. of Charles D. Chalmers In Support of Motion to Vacate Preliminary Approval, attached hereto for convenience.) This is a case with no question about liability, the likelihood that at least some infringement is

willful, and a reasonable likelihood of class certification. The vast disparity between the estimates and results needs to be explained.

VI. THESE CLASS MEMBERS REITERATE THE DUE PROCESS OBJECTIONS FIRST MADE BY THE MOTION TO VACATE PRELIMINARY APPROVAL.

The requirement that class members must actually appear at the Fairness Hearing in order to object is a denial of due process. The lack of any presentation of the adequacy of the settlement amounts, in total, or for the Categories, before class members must opt out or file objections is a denial of due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). *Fuentes v. Shevin*, 407 U.S. 67, 80, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). The License by Acquiescence, and the failure to describe it in the Notice, also deny the class members due process.

VII. THE COURT NEEDS FURTHER INFORMATION.

Several of these objectors sought the production of information from plaintiffs. Plaintiffs opposed the request on the grounds that the requesting parties were not yet objectors and had no right to ask for “discovery.” The Court apparently accepted this argument, denying the motion except for production of a filed pleading.

After their counsel has received and had time to study the plaintiffs’ final presentation, and any submission by the defendants or other beneficiaries of this settlement, they will present a renewed request for information or discovery. They do not believe that it should be necessary because, as outlined above, there are already irrefutable grounds that mandate denial of approval.

There is one piece of unknown information that bears noting. The fee petition of plaintiffs’ counsel identifies two “settlements” or agreements they made for the class’ benefit

with certain defendants. These are referred to cryptically as the “Contentville” settlement and the Proquest “stand-still” agreement. Neither plaintiffs nor their counsel could enter into any agreement (settlement or compromise) binding on the class without the Court’s approval. Fed.R.Civ.P. 23(e). These agreements need to be thoroughly explained.

VIII. CONCLUSION.

This memorandum does not address every objection that is made. However, further elaboration does not seem necessary. Other objections are mostly self-explanatory, or they are legally supported by the same principles and authorities discussed in this memorandum. We are on the edge of, if not well in to, the age of digital publication. Google has undertaken a project to digitize English literature. “E-books” are already available. This case involves a portion of our country’s literary property, and it involves the defendants’ misuse, confirmed by the United States Supreme Court, of the freelancers copyrights, which are guaranteed to them by the U.S. Constitution.

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S/
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