# EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOUGLAS BERNSTEIN, ELAINE INGULLI, TERRY HALBERT, EDWARD ROY, LOUIS PENNER, and ROSS PARKE, as personal representative of The Estate of Alison Clarke-Stewart, on behalf of themselves and others similarly situated,

Plaintiffs,

-v-

CENGAGE LEARNING, INC.,

Defendant.

CIVIL ACTION NO.: 19 Civ. 7541 (ALC) (SLC)

**REPORT & RECOMMENDATION**

**SARAH L. CAVE**, United States Magistrate Judge.

**TO THE HONORABLE ANDREW L. CARTER, JR.**, United States District Judge:

Plaintiffs Douglas Bernstein, Edward Roy, Louis Penner, and Ross Parke, as personal representative of The Estate of Alison Clarke-Stewart, on behalf of themselves and others similarly situated (collectively, "Plaintiffs") have asserted breach of contract claims against Defendant Cengage Learning, Inc. ("Cengage"), alleging that Cengage violated the terms of its publishing agreements (the "Contracts") by failing to pay authors royalties for use of their works in accordance with those Contracts. (See, e.g., ECF Nos. 1 ¶¶ 54–59; 120 ¶¶ 2, 6, 10–12). Before the Court are Plaintiffs' motion for class certification and appointment of class representatives and class counsel (ECF No. 169 (the "Class Motion")).[1]

[1] Cengage has also filed a motion to exclude the testimony of Plaintiffs' expert, Professor Daniel F. Spulber ("Prof. Spulber"), under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). (ECF No. 188 (the "Daubert Motion," with the Class Motion, the "Motions")), as to which the Court is simultaneously issuing an Opinion and Order (the "Daubert O&O").

For the reasons set forth below, I respectfully recommend that the Class Motion be GRANTED, with appropriate revisions to the definitions of the proposed classes.

## I. BACKGROUND

### A. Factual Background

The factual background on which Plaintiffs base their claim for breach of the implied covenant of good faith and fair dealing is set forth in detail in the decisions of the Honorable Andrew L. Carter, Jr., and the undersigned in this action, and is incorporated by reference. See Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2021 WL 4441509 (S.D.N.Y. Sept. 28, 2021) ("Bernstein IV") (granting in part and denying in part motion to amend); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2021 WL 4927033 (S.D.N.Y. Apr. 22, 2021) ("Bernstein III") (recommending granting in part and denying in part motion to amend); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2020 WL 5819862 (S.D.N.Y. Sept. 29, 2020) ("Bernstein II") (granting motion to dismiss in part as to breach of contract claims and denying motion to strike class allegations); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2019 WL 6324276 (S.D.N.Y. Nov. 26, 2019) ("Bernstein I") (granting motion to appoint interim class counsel).[2] This summary will focus on the facts pertinent to the Class Motion.

#### 1. The Parties

Plaintiffs, authors of academic textbooks, were parties to the Contracts with Cengage, a publisher, seller, and distributor of "learning solutions," including textbooks. Bernstein II, 2020 WL 5819862, at *1. (See ECF Nos. 172-1 ¶ 2; 172-2 ¶ 2; 172-3 ¶ 2; 172-4 ¶ 2; 172-10 at 6–7).

[2] Unless otherwise indicated, internal citations and quotation marks are omitted from case citations.

Cengage's current corporate form "is the result of mergers and acquisitions" of several publishing companies, whose contractual rights and responsibilities Cengage has assumed. (ECF No. 186-2 at 11 ¶ 4).

Plaintiffs Douglas Bernstein ("Bernstein"), Louis Penner ("Penner"), and Edward Roy ("Roy"), are co-authors of and receive royalties from two books published by Cengage: Essentials of Psychology and Introduction to Psychology. (ECF Nos. 172-1 ¶ 2; 172-2 ¶ 2; 172-3 ¶ 2). Alison Clarke-Stewart ("Clarke-Stewart") was a fourth co-author of Essentials of Psychology.[3] (ECF No. 172-4 ¶ 2). Since 2017, these two textbooks have been among Cengage's lower-selling psychology textbooks. (ECF No. 186-4 at 128–29). Plaintiffs did not participate in preparing ancillary materials for Essentials of Psychology. (ECF No. 186-1 at 112, 156–57, 164–65). Clarke-Stewart's representative referred to Bernstein as his "fearless leader" in this action. (ECF No. 186-1 at 79, 302). The amount of royalties Bernstein received varied monthly since 2017, to the extent that he had "planned" to request "a reversion" of his intellectual property rights in the two textbooks. (Id. at 313; see id. at 308, 310).

**2. The Contracts**

At issue in this action are royalties to which Plaintiffs claim they and other authors are entitled under the Contracts relating to Cengage's digital products, MindTap and Cengage Unlimited ("CU"). See Bernstein II, 2020 WL 5819862, at *1–2. The Contracts "do not follow any single template" (ECF No. 186-2 at 11 ¶ 5), but each contained a similar material term: that Cengage was obligated to pay the authors royalties by applying a royalty percentage to net

[3] Clarke-Stewart's Estate, through her former husband and personal representative, is a Plaintiff. (ECF Nos. 15 ¶ 15; 172-4 ¶ 2).

receipts or net revenue from the sales of their works. (ECF Nos. 172 ¶¶ 19–42; 172-14 – 172-37; see ECF Nos. 172-8 at 6–8; 172-10 at 12; 172-12 at 5 ¶¶ 3.1–3.2; 172-13 at 3 ¶ 8; 172-39 at 3). Judge Carter has held that the Contracts do not require Cengage "to base royalties on total net receipts for MindTap and [CU,]" but they do obligate Cengage to act in good faith "in exercising its discretion to determine" the revenue attributable to the authors and pay royalties accordingly. Bernstein II, 2020 WL 5819862, at *4–5; see Bernstein IV, 2021 WL 4441509, at *4 (finding FAC sufficiently alleged Cengage's bad faith in implementing allocation methodology as to CU). Of the more than 12,000 Contracts that Cengage produced in discovery, approximately 4,800 have New York choice of law clauses, and 3,780 have Massachusetts choice of law clauses. (ECF No. 172 ¶ 17).

**3. The DRA Framework**

Beginning in 2015, for works with copyright years of 2017 and later, Cengage developed and implemented the Digital Royalty Allocation ("DRA") Framework as a set of guidelines to apply the royalty-bearing percentage—"the share of revenue attributed to the authors[,]" Bernstein II, 2020 WL 5819862, at *2—"consistently across authors." (ECF Nos. 172-6 at 6, 35–38; see ECF Nos. 172-42 at 4 (DRA Framework intended to be "consistent and clear"); 172-43 at 2 (observing that, with DRA Framework, Cengage was "trying to be more consistent")). Cengage uses the DRA to "determine what portion of net revenue generated from the sale of a digital product is attributable to a particular author or content creator involved in creating content for that digital product, for purposes of calculating royalties on that sale." (ECF No. 186-5 at 11 ¶ 6; see ECF No. 186-2 at 14 ¶ 11)).

**a. MindTap**

As Judge Carter has explained, "MindTap is an electronic platform through which a student has access to an electronic version of a student textbook, along with homework, quizzes, tests, and multimedia materials[,]" as well as "feedback and analytics for instructors and students." Bernstein II, 2020 WL 5819862, at *2. (See ECF Nos. 186-2 at 12 ¶ 8 (listing examples); 186-5 at 11 ¶ 7 (same)). To calculate MindTap royalties, "Cengage allocates the revenue it receives from the sale of MindTap to the two components of MindTap: the textbook [('eTextbook')], on which it pays royalties, and the ancillary materials (tests, study guides, exercises), on which it does not typically pay royalties [(the 'Supplemental Materials')]." Bernstein II, 2020 WL 5819862, at *2.[4] The Supplemental Materials contain content related to or derived from the eTextbook, as well as content related to "the course or the discipline." (ECF No. 172-7 at 8). An eTextbook author's involvement in the creation of the Supplemental Materials varies by author and product. (ECF No. 186-2 at 13 ¶ 10; see ECF No. 186-5 at 12 ¶ 9 (Supplemental Materials are created by authors, third-parties, and/or Cengage); see also ECF Nos. 186-5 at 211 ¶ 6 (author describing third parties creating Supplemental Materials); 186-5 at 224 ¶ 5 (author describing creation of Supplemental Materials)). Cengage does not sell the Supplemental Materials separately from their corresponding eTextbook (ECF No. 172-38 at 4), and views the Supplemental Materials as "additional content that supports and surrounds, [and] is supplemental to[,] the overall product." (ECF No. 172-6 at 25). Instructors in most disciplines appear to place greater reliance on MindTap

[4] In this action, Plaintiffs are not seeking as damages any unpaid royalties as to Supplemental Materials, and only "seek royalties attributable to their textbooks." (ECF No. 195 at 11).

products' comprehensiveness, readability, and compatibility than on the availability of the Supplemental Materials. (ECF No. 172-60 at 3).

Under the DRA Framework, Cengage values the eTextbook portion of every MindTap product as 50% of the product's value, and the Supplemental Materials to represent the remaining 50%. (ECF Nos. 172-8 at 10, 12; 172-47 at 3). Cengage set the DRA as follows: (i) authors who contribute only to eTextbooks are paid royalties on 50% of net receipts; (ii) authors who provide additional content beyond the eTextbook are paid royalties on 75% of net receipts; and (iii) authors who create all the content in the MindTap product—both the eTextbook and the Supplemental Materials—are paid royalties on 100% of net receipts. (ECF Nos. 172-6 at 24–28; 172-8 at 13–15; 172-9 at 6–8; 172-42 at 5; 172-46 at 3; 186-2 at 15 ¶ 14; 186-5 at 13 ¶¶ 13–17). Cengage has maintained the DRA Framework from its inception in 2016 "through the present." (ECF No. 172-6 at 41; see id. at 14, 24, 46). Cengage conducts audits to ensure that product managers "comply" with the DRA Framework. (ECF No. 172-7 at 11; see ECF No. 172-10 at 29–31 (referring to "rais[ing] a flag" if royalty percentages changed from DRA Framework)).

Cengage developed the DRA Framework based on "a survey of customer preference and how they derive value from the [MindTap] products" (ECF No. 172-6 at 17; see id. at 30), as well as the type and amount of MindTap content, the "functionality within the MindTap," and "third-party technologies in a given MindTap." (Id. at 30–31). The survey itself did not value the eTextbook component of a MindTap product, and Cengage did not employ any other reports, surveys, or quantitative analyses to develop the percentages in the DRA Framework. (id. at 18, 33–34). Rather, "[i]mplicit factors determine[d]" the DRA Framework without "explicitly

account[ing] for costs or value-add contribution." (ECF No. 172-56 at 9; see ECF No. 172-6 at 48–49). While Cengage has recognized its contractual obligations to pay authors' base royalty rate, it has also acknowledged that the DRA Framework was "[s]emi-[a]rbitrary." (ECF No. 172-57 at 4). As evidence that Cengage, by adopting and implementing the DRA Framework, intended to reduce royalties to authors, Plaintiffs point to statements that Cengage "intentionally didn't put DRA in contracts" (ECF No. 172-74 at 2) and made it "confusing for the authors" to understand the DRA. (ECF No. 172-75 at 2; see ECF No. 172-62 at 4 ("not all authors were notified of what DRA is and/or what their DRA allocation is."). Plaintiffs also point to evidence showing that some "in Cengage's leadership believed" that the lowest percentage in the DRA Framework "should be closer to 75[%.]" (ECF No. 172-11 at 10; see ECF No. 172-54 at 2). Some product managers requested permission to apply DRAs of 60% or 80% but were denied and told "NOT to deviate from the standards" in the DRA Framework. (ECF Nos. 172-44 at 2; 172-58 at 2; see ECF No. 172-59 at 2 (agreeing that, under the DRA Framework, "the options are 50, 75 and 100%."). Cengage's Director of Finance also testified that the DRA was "an initiative to lower the royalty-bearing base for digital products." (ECF No. 172-9 at 18; see ECF No. 172-11 at 7–8 (Cengage sought to "allocate more [revenue from digital products] to Cengage" and "less to authors"). As a result of implementing the DRA Framework, Plaintiffs estimate that, by 2019, Cengage had reduced its royalty payments to authors by [redacted] to [redacted]. (ECF Nos. 172-9 at 24–25; 172-61 at 3).

Cengage's product managers "were responsible for assigning DRAs to particular MindTap works[.]" (ECF No. 172-6 at 20; see ECF No. 186-5 at 13 ¶¶ 11–12). When implementing a DRA, product managers analyzed the product "and assessed the author's contributions to the overall

product[,]" including the Supplemental Materials, "to determine the appropriate DRA level for that work." (ECF No. 186-2 at 15 ¶ 16; see ECF No. 186-5 at 185 ¶ 13 ("Product Managers should use their discretion and best judgment in assigning DRAs to each work[.]")). Product managers also considered the terms of the author's contract, "consulted with legal (as appropriate)," and "made all sorts of judgment calls in implementing DRAs[.]" (ECF No. 186-2 at 15 ¶¶ 16–17). In some cases, product managers considered non-content-based contributions by authors, such as marketing efforts and reputation. (ECF Nos. 186-2 at 16 ¶ 18; 186-5 at 194 ¶¶ 6–7; 186-5 at 200 ¶ 9). Although product managers had "discretion . . . to implement DRAs" (ECF No. 186-2 at 16 ¶ 17), and to grant "exceptions to the rules," (id. at 152), they were required to "stick within" the DRA Framework—50%, 75%, or 100%—and were prohibited from "creat[ing] their own DRA percentage." (ECF No. 172-7 at 12; see ECF No. 172-44 at 2 ("We absolutely are NOT to deviate from the standards AND Product Managers are not to be negotiating DRAs at all."); 172-7 at 29 (Cengage "didn't want anybody deviating from" the DRA Framework); 172-45 at 2 (instructing that "the DRA percentages should not be deviated from."); see also ECF Nos. 186-5 at 114 (explaining that "[t]here are four possible options for establishing a DRA," 0%, 50%, 75%, and 100%); 235-1 at 5 (product managers "did not have any other option but to set rates at 50 percent, 75 percent, and 100 percent"); id. at 6–7 (same)). Cengage has not produced evidence of any author who was assigned a DRA other than 50%, 75%, or 100%.[5]

[5] During oral argument on the Class Motion, Cengage disclosed that a very small number of works—approximately three—were "entered into the system" with a DRA of [redacted], which one of Cengage's witnesses testified was in error and on which Cengage conceded it was not relying. (ECF No. 253 at 47; see id. at 48, 54, 63).

The parties dispute the number of authors as to whom Cengage has assigned DRAs of 50% and 100%. Plaintiffs contend that Cengage assigned a DRA of 50% to the majority of MindTap works (ECF Nos. 172-48; 172-49) and that Cengage "rare[ly]" assigned a 100% DRA to an author "because Cengage incurs a lot of cost to create the MindTap." (ECF No. 172-50 at 2; see ECF No. 172-46 at 3). Cengage, on the other hand, contends that "nearly half of MindTap products have a DRA of 100%." (ECF No. 186 at 14 (citing ECF Nos. 186-1 at 258; 186-5 at 14-15 ¶¶ 19–26 & 1011–66); see ECF No. 245 at 19).

Plaintiffs contend that, by arbitrarily choosing and imposing DRAs of 50% and 75%, Cengage reduced the amount of royalties paid to authors by 50% or 25%, respectively, and allocated to itself that portion of revenue, rather than to the authors. (ECF No. 171 at 14–15, 17–18; see ECF Nos. 172-6 at 11–12 (lower DRA results in lower royalties to author); 172-7 at 16–18) (same). Instead, Plaintiffs contend that Cengage should be allocating 81.6% to the eTextbook portion of MindTap products and 18.4% to the Supplemental Materials, leading to Corrected DRA tiers of 81.6% (up from 50%) and 90.8% (up from 75%). (ECF No. 171 at 17 (citing ECF No. 172-5 at 64–65 ¶¶ 148–54); see ECF No. 247 at 6). Since Cengage launched MindTap and CU, however, some authors have observed their "royalties both increase and stabilize." (ECF No. 186-5 at 215 ¶ 6; see ECF No. 186-5 at 211 ¶ 7, 220 ¶ 6, 225 ¶ 7, 238 ¶ 5).

**b. CU**

CU "is a subscription service for digital higher education materials," which "provides access to most of Cengage's electronic catalog," Bernstein II, 2020 WL 5819862, at *2, for a set periodic fee. (ECF No. 186-5 at 16 ¶ 29). The materials to which the CU subscription provides access include "electronic versions of all textbooks within the Unlimited platform," and

subscribers have the "option of renting a paper textbook at an additional per-book fee." Bernstein II, 2020 WL 5819862, at *2.

As with MindTap, Cengage established a model to allocate revenue and calculate royalties for CU. (ECF No. 186-5 at 17 ¶ 31). The first step in this model involves "determin[ing] how much revenue to recognize in the month." (ECF No. 172-10 at 8; see ECF Nos. 172-8 at 48–49 (CU revenue "is allocated evenly over [the] subscription length."); 172-63 at 3 ("Step 1: Allocate Subscription Revenue by Month"); 186-5 at 17 ¶ 31(a) ("[O]n a monthly basis Cengage accounts for the total net revenue generated from subscription sales of [CU]."). The second step involves allocating the revenue into "three royalty pools": courseware, eTextbooks, and print rentals. (ECF No. 172-10 at 9; see ECF Nos. 172-8 at 53; 172-63 at 4; 186-5 at 17 ¶ 31(b)). Each of the three royalty pools contains both royalty-bearing and non-royalty-bearing products. (ECF No. 186-5 at 16–17 ¶ 30). At the third step, Cengage allocates revenue within each of the three royalty pools to all products—royalty-bearing and non-royalty-bearing—within that pool. (ECF Nos. 172-8 at 55; 172-10 at 10–11; 172-63 at 5; 186-5 at 17–18 ¶ 31(c)). At the fourth and final step, Cengage multiplies the revenue for the specific product by the author's royalty rate to arrive at the royalty payment to the author. (ECF Nos. 172-64 at 3; see ECF Nos. 172-8 at 59; 172-10 at 12; 186-5 at 18 ¶ 31(d)). Where the product within CU is courseware (e.g., MindTap), Cengage applies the DRA to the CU calculation before applying the author's royalty rate. (ECF No. 172-62 at 3; see ECF No. 172-8 at 59–60). The Court refers to these four steps as the "CU Methodology."

As with MindTap, Plaintiffs allege that, in adopting and utilizing the CU Methodology, Cengage is acting in bad faith by "allocating too little revenue from CU sales to authors and too much to itself." (ECF No. 171 at 19). Plaintiffs calculate that, by applying the DRA Framework

within the CU Methodology, Cengage "has not paid royalties on [redacted] in revenue," and has shifted over [redacted] in revenue to non-royalty bearing products. (id. at 19; see ECF No. 172-65 at 3). Plaintiffs contend that "[t]he purpose and effect of Cengage's CU methodology is and has been to minimize the royalties Cengage pays to authors." (ECF No. 171 at 19; see ECF Nos. 172-8 at 63 (shifting more revenue into CU courseware pool expected to result in "a lower royalty expense"); 172-10 at 24 (between 2016 and 2017, certain authors' royalty payments reduced by 2.8%, and between 2017 and 2018, by 18.1%); 172-67 at 3 (after implementing CU Methodology, Cengage saw [redacted] royalty owed reduction")). Other Cengage communications reflect the belief, however, that "[f]rom an overall financial perspective," adopting the CU Methodology was "not a win for" Cengage. (ECF No. 172-66 at 2). As with MindTap, Plaintiffs contend that they can show with common evidence "that Cengage misled authors about how it calculated CU royalties." (ECF No. 171 at 20 (citing ECF Nos. 172-68 & 172-69)). Plaintiffs will also calculate the harm to authors from Cengage's bad faith allocation of too much revenue to non-royalty bearing products by: (1) "determining the percentage of revenue that Cengage has flowed to non[-]royalty bearing works that should instead flow to royalty[-]bearing works" and (2) "calculating the additional royalties that class members should have been paid using Cengage's own formulas." (ECF No. 171 at 20 (citing ECF No. 172-5 ¶¶ 177–93)).

**4. The Proposed Classes**

In the Class Motion, Plaintiffs seek certification of two classes:

- MindTap Class: Authors of works who entered into a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been sold on the MindTap platform and assigned a [DRA] of 50 percent or 75 percent [the "Proposed MindTap Class"].

- CU Class: Authors of royalty-bearing works who entered a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been used on Cengage Unlimited [the "Proposed CU Class"].

(ECF No. 169 at 1 (the Proposed MindTap Class and the Proposed CU Class together, the "Proposed Classes")). Plaintiffs seek appointment as class representatives for the Proposed Classes, and for the appointment of Susman Godfrey L.L.P. ("Susman Godfrey") as class counsel. (ECF No. 169 at 2).[6]

**5. Prof. Spulber's Opinions**

To support certification of the Proposed Classes, Plaintiffs engaged Prof. Spulber, a Professor at the Kellogg School of Management and Pritzker School of Law at Northwestern University and the University of Southern California Law School. (ECF No. 172-5 at 5 ¶ 1). Plaintiffs engaged Prof. Spulber to:

> review and analyze whether there is a class-wide method of proof to determine: (i) whether Cengage's DRA Framework is arbitrary; (ii) whether Cengage's DRA Framework systematically undervalued authors' contributions to MindTap; and (iii) whether damages for the [Proposed Classes] from the underpayment of royalties from MindTap and CU can be calculated on a class-wide basis using a common methodology.

(ECF No. 172-5 at 8 ¶ 12).

Prof. Spulber observes that "Cengage has allocated revenue from the sales of MindTap versions of authors' works between the digital textbook ('eTextbook') and the platform and accompanying supplemental materials using a common-class-wide methodology." (ECF No. 172-5 at 9 ¶ 17). Specifically, Cengage assigned all MindTap Class members "either a

[6] Two additional named Plaintiffs, Elaine Ingulli and Terry Halbert, do not seek appointment as class representatives. (See ECF Nos. 120 ¶ 17; 171 at 11 n.2).

50 percent or 75 percent DRA." (Id. at 8 ¶ 13).[7] From this observation, Prof. Spulber offers several opinions that he contends can be shown using class-wide factors and economic analysis:

- Cengage's DRA Framework "is arbitrary and unsupported by economic principles" insofar as "Cengage's assignment of different DRA levels to different products was not based on an analysis of authors' IP contribution to the MindTap products or the relative market value of the different MindTap components, but instead based on arbitrary heuristics that undervalue the eTextbooks in comparison to the platform and accompanying Supplemental Materials." (Id. at 9–10 ¶ 17).

- Cengage's application of 50% and 75% DRAs "did not accurately allocate revenues to the contributions of authors relative to other components of a MindTap version of the authors' work." (Id. at 10 ¶ 17).

- His analysis, which uses Open Educational Research ("OER") products as a benchmark for determining the revenues attributable to each portion of the Mindtap products, "identif[ies] a corrected DRA" that allocates 81.6% of revenue from MindTap sales to the eTextbook portion of the products (the "Corrected DRA"), and 18.4% to the platform and Supplemental Materials, which "properly accounts for the relative contributions of the authors, on the one hand, and Cengage's contributions, on the other." (Id.)

- He proposes a "Corrected DRA" of 81.6% for authors currently receiving a DRA of 50%, and 90.8% for authors currently receiving a DRA of 75%. (Id. at 65–66 ¶¶ 153, 156).

- Using the Corrected DRA, he has calculated the damages resulting from Cengage's application of an arbitrary DRA to the MindTap works for the period 2016 to 2021 (the "MindTap Damages") as [redacted], which represents "the underpayment of royalties as measured by comparing the royalties Cengage actually paid to those that Cengage would have paid had Cengage used a DRA that more accurately" valued the components of the MindTap works. (Id. at 10 ¶ 17, 68 ¶ 164).

- As an alternative, using an "Admission DRA"—which treats the eTextbook portion of MindTap products as 75% of the value—he calculates the MindTap Damages as [redacted]. (Id. at 68–71 ¶¶ 167–76).

[7] Authors to whom Cengage assigned a 100 percent DRA are not members of the Proposed MindTap Class. (See ECF No. 169 at 1).

- He has calculated the damages resulting from Cengage's CU Methodology (the "CU Damages"), by allocating "a given percentage"—90%—"of the revenue that Cengage allocated to non-royalty bearing works on its CU platform to the royalty bearing works within CU and calculat[ing] the resulting change in royalty payments." (Id. at 11 ¶ 17, 75–78 ¶¶ 185–93).

Plaintiffs intend to rely on Prof. Spulber's opinions as common evidence showing that the DRA Framework and CU Methodology are arbitrary and resulted in underpayment of royalties to authors, and to calculate damages for the Proposed Classes. (See ECF No. 171 at 14–20).[8]

**B. Procedural Background**

**1. The Complaint and the MTD Order**

On August 12, 2019, Plaintiffs filed the Complaint (ECF No. 1), which Cengage moved to dismiss. (ECF Nos. 39–41). On September 29, 2020, Judge Carter granted the motion as to the breach of contract claims as to both MindTap and CU, and the breach of implied covenant of good faith and fair dealing claim as to CU. Bernstein I, 2020 WL 5819862, at *4–6. Judge Carter found that Plaintiffs' breach of contract claim rested on the premise that the royalty clauses in the Contracts "plainly require Cengage to pay royalties based on total net receipts of MindTap and [CU]," but that "Plaintiffs have not adequately pleaded that Cengage is contractually obligated to base royalties on total net receipts for MindTap and [CU]." Id. at *3–4. Judge Carter pointed out that the Contracts "explicitly refer to royalties to be paid on 'the Work', which is defined as the textbook itself." Id. at *4. Judge Carter noted that "[t]he plain text of the clauses do not refer to any product Cengage might sell in addition to 'the Work.'" Id. (emphasis added). Accordingly,

[8] As discussed in the Daubert Opinion and Order, Cengage offers in response to Prof. Spulber a report from Professor Lorin Moultrie Hitt (ECF No. 186-1 at 316–80), but none of Cengage's arguments warrants exclusion of Prof. Spulber's opinions.

because "[t]he royalty clauses in the [Contracts] unambiguously define the 'Work' as the titles themselves," Judge Carter found that they "cannot bear Plaintiffs' reading that they literally commit Cengage to pay royalties on total net receipts of MindTap and [CU]." Id. Having failed to plead that the Contracts prohibited Cengage's "pricing scheme for MindTap and [CU]," Judge Carter dismissed the breach of contract claims. Id. at *5.

As to the breach of implied covenant of good faith and fair dealing claims, Judge Carter found the "decisive question" to be "whether Plaintiffs have pleaded a lack of good faith by Cengage," and concluded that Plaintiffs pled Cengage's lack of good faith as to MindTap, but not as to CU. Bernstein I, 2020 WL 5819862, at *5. Judge Carter relied on Plaintiffs' allegation that Cengage, "in exercising its discretion to determine what among net receipts from the sales of MindTap is attributable to the authors and what is attributable to Cengage-made materials, systematically undervalued authors' contributions to enrich themselves." Id. Because, if true, this allegation suggested that "Cengage has exercised its discretion with the ulterior motive of appropriating what should go to the authors to itself," Judge Carter held that Plaintiffs adequately pled bad faith. Id. In the absence of allegations suggesting that Cengage set the subscription price for CU in bad faith or was "in any way taking more of the pie than it is due," however, Judge Carter dismissed the breach of the implied covenant of good faith and fair dealing claim as to CU. Id. at *5–6.

In addition, Judge Carter denied Cengage's motion to strike Plaintiffs' class allegations, finding that the dismissal of the breach of contract claims and the CU breach of implied covenant of good faith and fair dealing claim resolved Cengage's concern "that common issues will not predominate over individual ones." Id. at *6.

**2. The FAC**

On December 11, 2020, Plaintiffs moved for leave to file a first amended class action complaint (the "FAC") to correct the deficiencies highlighted in Bernstein II and, with respect to CU, assert allegations based on documents that Cengage had recently produced. (ECF Nos. 61; 64 at 5). Cengage opposed the motion to amend (ECF No. 72). I recommended, and Judge Carter agreed, that Plaintiffs be denied leave to amend their breach of contract claims but be permitted to amend their claim for breach of the implied covenant of good faith and fair dealing as to CU. Bernstein III, 2021 WL 4927033, at *9, adopted by, Bernstein IV, 2021 WL 4441509, at *3–4. On October 8, 2021, Plaintiffs filed the FAC, asserting that Cengage breached the implied covenant of good faith and fair dealing in the Contracts by: (i) failing to pay authors for use of the works in accordance with the Contracts, (ii) allocating to itself royalty-bearing revenue from its use of the works, (iii) failing to pay the authors royalties on all royalty-bearing revenue from its use of the works, (iv) selling the works with the MindTap functionalities in a manner that dilutes the revenue base attributable to the authors, and (v) excluding from royalty-bearing revenue millions of dollars of CU subscription fees. (ECF No. 120 ¶¶ 70–73).

**3. The Motions**

On October 14, 2022, Plaintiffs filed the Class Motion seeking certification of the Proposed Classes. (ECF Nos. 169–75). On December 23, 2022, Cengage filed its opposition to the Motion (ECF Nos. 185–86 (the "Opposition")), and on February 14, 2023, Plaintiffs filed a reply. (ECF Nos. 195–98). With its Opposition, Cengage submitted declarations from eleven individuals—three product managers and seven authors (the "Declarants")—which Plaintiffs moved to strike as untimely disclosed under Federal Rule of Civil Procedure 26(a). (ECF No. 193). Following a

lengthy conference with the parties on March 6, 2023, the Court resolved Plaintiffs' objections to the Declarants through a stipulation that acknowledged Plaintiffs' right to conduct depositions of the Declarants, three of which would be at Cengage's expense, and set a schedule for the parties to submit supplemental letters regarding the Class Motion. (ECF Nos. 214; 220; 230). On April 21, 2023, Plaintiffs submitted their supplemental letter (ECF Nos. 233; 235), and on May 2, 2023, Cengage submitted its supplemental letter. (ECF No. 238). On May 11, 2023, the Court heard oral argument on the Class Motion. (ECF Nos. 220; 243; 251; 253; see ECF min. entry May 11, 2023).

## II. DISCUSSION

### A. Legal Standards

#### 1. Federal Rule of Civil Procedure 23

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348 (2011). "To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate [its] compliance with [Federal Rule of Civil Procedure] 23[,]" Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013), and "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Dukes, 564 U.S. at 350–51; see In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 117 (2d Cir. 2013) (affirming class certification where "district court conducted a rigorous analysis based on the relevant evidence, properly resolved factual disputes, and did not abuse its discretion in concluding that common issues predominate[d]").

A party moving for class certification under Rule 23 "must clear two hurdles." Martínek v. AmTrust Fin. Servs., No. 19 Civ. 8030 (KPF), 2022 WL 326320, at *3 (S.D.N.Y. Feb. 3, 2022). First,

Rule 23(a) requires the party to demonstrate that: "[i] the class is so numerous that joinder of all members is impracticable; [ii] there are questions of law or fact common to the class; [iii] the claims or defenses of the representative parties are typical of the claims or defenses of the class; and [iv] the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). The Rule 23(a) requirements "effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." Dukes, 564 U.S. at 349. In addition to the four Rule 23(a) prerequisites, "the Second Circuit also recognizes an implicit 'ascertainability' requirement, which commands that the proposed class be defined using objective criteria that establish a membership with definite boundaries." Martínek, 2022 WL 326320, at *3. The ascertainability inquiry assesses whether the class is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Brecher v. Republic of Arg., 806 F.3d 22, 24 (2d Cir. 2015). Second, if the proposed class meets the Rule 23(a) prerequisites, the parties seeking certification must then show that "the action can be maintained under Rule 23(b)(1), (2), or (3)." In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 238 (2d Cir. 2012). Plaintiffs seeking certification under Rule 23(b)(3), as is the case here (ECF No. 171 at 25), "must establish that (i) 'questions of law or fact common to class members predominate over any questions affecting only individual members' and (ii) 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" Martínek, 2022 WL 326320, at *4 (quoting Fed. R. Civ. P. 23(b)(3)).

"The party seeking class certification bears the burden of showing, by a preponderance of the evidence, that the requirements of Rule 23 are met." Sykes v. Mel Harris & Assocs. LLC, 285 F.R.D. 279, 286 (S.D.N.Y. 2012) ("Sykes I"), aff'd, 780 F.3d 70 (2d Cir. 2015) ("Sykes II"); see

Martínek, 2022 WL 326320, at *5 (explaining that plaintiff moving for class certification "bears the burden of satisfying Rule 23(a)'s threshold requirements"). A district court granting a class certification motion "must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met," Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 251 (2d Cir. 2011), "notwithstanding the[] overlap with merits issues, [and] must resolve material factual disputes relevant to each Rule 23 requirement . . . ." In re U.S. Foodservice, 729 F.3d at 117.

The Second Circuit has instructed district courts to apply the following standards when adjudicating class certification motions:

> (1) a district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met; (2) such determinations can be made only if the judge resolves factual disputes relevant to each rule 23 requirement and finds that whatever underlying facts are relevant to a particular Rule 23 requirement have been established and is persuaded to rule, based on the relevant facts and the applicable legal standard, that the requirement is met; (3) the obligation to make such determinations is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement; (4) in making such determinations, a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement; and (5) a district judge has ample discretion to circumscribe both the extent of discovery concerning Rule 23 requirements and the extent of a hearing to determine whether such requirements are met in order to assure that a class certification motion does not become a pretext for a partial trial of the merits.

In re IPO Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006). "Ultimately, the district court has broad discretion in deciding how and whether to certify a class, arising from its 'inherent power to manage and control pending litigation.'" In re Aluminum Warehousing Antitrust Litig., 336 F.R.D. 5, 37 (S.D.N.Y. 2020) (quoting Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010)).

**2. Implied Covenant of Good Faith and Fair Dealing**

As noted above, Plaintiffs' sole remaining claims allege that Cengage has breached the implied covenant of good faith and fair dealing with respect to MindTap and CU. See Bernstein IV, 2021 WL 4441509, at *3–4; Bernstein II, 2020 WL 5819862, at *5. The parties' arguments for and against class certification turn significantly on whether common issues of proof of these claims predominate. (See, e.g., ECF Nos. 245 at 3–5; 247 at 31–34; 253 at 19–21). The Court's analysis of the Class Motion thus "involves considerations that are enmeshed in the factual and legal issues comprising the [P]laintiff[s'] cause of action." Dukes, 564 U.S. at 351. The Court will therefore briefly review the elements of this claim under New York and Massachusetts law as context for the Rule 23 analysis. See In re U.S. Foodservice, 729 F.3d at 117 (reviewing elements of plaintiffs' claims before proceeding with Rule 23 analysis).

Under Massachusetts law, a plaintiff asserting an implied covenant claim "'must present evidence of bad faith or an absence of good faith. Lack of good faith carries an implication of a dishonest purpose, conscious doing of wrong, or breach of duty through motive of self-interest or ill will.'" Bernstein II, 2020 WL 5819862, at *5 (quoting Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 238 (1st Cir. 2013)). Although "[a] party may breach the covenant of good faith and fair dealing without breaching any express term of that contract," a plaintiff may not invoke the implied covenant "to create rights and duties not contemplated by the provisions of the contract or the contractual relationship." Id. (quoting Uno Rest., Inc. v. Bos. Kenmore Realty Corp., 441 Mass. 376, 385 (2004)). New York law also implies in every contract a covenant of good faith and fair dealing, "under which 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" Claridge v. N. Am.

Power & Gas, LLC, No. 15 Civ. 1261 (PKC), 2015 WL 5155934, at *6 (S.D.N.Y. Sept. 2, 2015) (quoting 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153 (2002)). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995). As Judge Carter has noted, to succeed on their implied covenant claims, Plaintiffs will need to prove "a lack of good faith by Cengage." Bernstein II, 2020 WL 5819862, at *5; see Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 98 (2d Cir. 2007) ("[S]ince there is a presumption that all parties act in good faith, the burden of proving a breach of the covenant of good faith and fair dealing is on the person asserting the absence of good faith.'") (quoting 23 Willison on Contracts § 63:22 (4th ed. 2006)).

The Second Circuit has explained that, in assessing whether a party has breached the implied covenant, "a court must examine not only the express language of the parties' contract, but also any course of performance or course of dealing that may exist between the parties." Tractebel, 487 F.3d at 98. Whether Cengage "directly violate[d] an obligation that f[ell] within the[] reasonable expectations" under the Contracts, Bank of China v. Chan, 937 F.2d 780, 789 (2d Cir. 1991), is an objective standard. Sharkey v. Zimmer USA, Inc., No. 20 Civ. 8258 (JPC), 2021 WL 3501160, at *5, 8 (S.D.N.Y. Aug. 9, 2021) (noting that the "obligation stemming from an implied covenant must be one 'which a reasonable person in the position of the promisee would be justified in understanding w[as] included'") (quoting Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69 (1978)); see In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 605 (S.D.N.Y. 2018) ("The relevant inquiry called for by the implied covenant is objective, not subjective," considering "'any promises which a reasonable person in the position of the promisee

would be justified in understanding were included.'") (quoting Dalton, 87 N.Y.2d at 389); Boston Sci. Corp. v. Radius Int'l, L.P., No. 06 Civ. 10184 (RGS), 2008 WL 238174, at *2 (D. Mass. Jan. 24, 2008) (noting that "the implied covenant protects only the reasonable expectations of the parties as they were objectively manifested in" their agreement). Accordingly, "whether particular conduct violates or is consistent with the duty of good faith and fair dealing necessarily depends upon the facts of the particular case, and is ordinarily a question of fact to be determined by the jury or other finder of fact." Tractebel, 487 F.3d at 98.

**B. Application**

**1. Rule 23(a) Requirements**

**a. Numerosity**

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable[.]" Fed. R. Civ. P. 23(a)(1). "Courts in this Circuit presume numerosity at 40 putative class members." Stewart v. Hudson Hall LLC, No. 20 Civ. 885 (PGG) (SLC), 2021 WL 6285227, at *7 (S.D.N.Y. Nov. 29, 2021). Courts do not, however, require the moving party to "provide a precise quantification of their class, since a court may make common sense assumptions to support a finding of numerosity." Lea v. Tal Educ. Grp., No. 18 Civ. 5480 (KHP), 2021 WL 5578665, at *5 (S.D.N.Y. Nov. 30, 2021).

Plaintiffs contend that the Proposed Classes "contain hundreds, if not thousands, of authors." (ECF No. 171 at 21 (citing ECF Nos. 172-70 (MindTap data); 172-71 (CU data)). Cengage's off-hand suggestion in a footnote that "the number of contracts does not equate to class members" (ECF No. 186 at 23 n.8) fails to undercut Plaintiffs' showing that the Proposed Classes easily exceed the 40-member threshold for class treatment. See Fin'l Guar. Ins. Co. v. Putnam

Adv. Co., No. 12 Civ. 7372 (AT), 2020 WL 264146, at *2 (S.D.N.Y. Jan. 17, 2020) (noting that "courts routinely decline to consider arguments mentioned only in a footnote on the grounds that those arguments are inadequately raised"). Accordingly, the numerosity element is met for both Proposed Classes.

**b. Commonality**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality does not require absolute uniformity within the class." Casale v. Kelly, 257 F.R.D. 396, 412 (S.D.N.Y. 2009). Rather, "[t]he commonality requirement 'simply requires that there be issues whose resolution will affect all or a significant number of the putative class members.'" Martínek, 2022 WL 326320, at *5 (quoting Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 137 (2d Cir. 2015)). Commonality exists for purposes of Rule 23(a)(2) "if there is a common issue that 'drive[s] the resolution of the litigation' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Sykes II, 780 F.3d at 84 (quoting Dukes, 564 U.S. at 350). The Supreme Court has recognized that, "for purposes of Rule 23(a)(2), even a single common question will do." Dukes, 564 U.S. at 359 (cleaned up). "Because 'the predominance criterion is far more demanding' than the commonality requirement, when plaintiffs move for certification of a class pursuant to Rule 23(b)(3), 'Rule 23(a)(2)'s commonality requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement' of predominance." Dial Corp. v. News Corp., 314 F.R.D. 108, 113 (S.D.N.Y. 2015) (quoting Amchem Prods. v. Windsor, 521 U.S. 591, 609, 624 (1997)).

Plaintiffs contend that issues common to the Proposed Classes and capable of resolution through common proof include whether the DRA Framework and CU Methodology: (1) are

arbitrary; (2) "systematically undervalue authors' contributions to MindTap"; and (3) "were enacted and promulgated with the ulterior motive of appropriating to Cengage what should go to authors." (ECF No. 171 at 23). Cengage responds that Plaintiffs have failed to provide evidence "that these questions are subject to classwide proof." (ECF No. 186 at 16). As to the first and second questions, Cengage argues that its "existing DRA framework overcompensates many authors" and involved product managers' "individualized valuations of each author's overall contributions to a MindTap product," such that determining arbitrariness "would trigger an author-by-author, work-by-work analysis." (Id. at 17–18; see id. at 18 (pointing to product managers' "discretion" to set DRAs based on the work, ancillary content, and authors' contributions)). As to the third question, Cengage argues that assessing whether it acted with malevolence or ill-will requires an individualized analysis of its relationship with each author and the terms of each Contract. (Id. at 18–19).

**i. Proposed MindTap Class**

The Court finds that Plaintiffs have shown that at least three questions common to the Proposed MindTap Class are capable of resolution through common proof. First, Cengage does not dispute that each member of the Proposed MindTap Class received either a 50% or 75% DRA under the DRA Framework. (ECF Nos. 186 at 11–12; 247 at 19; 253 at 50–51, 56). For their part, Plaintiffs do not dispute "where Cengage slotted a particular author within Cengage's mandatory tiered framework," nor do they dispute whether 50% or 75% was the correct DRA for any particular Proposed MindTap Class member. (ECF Nos. 195 at 8; 247 at 9). Given this concession, differences between the Contracts and product managers' discretion in choosing which DRA to apply, which Cengage heavily emphasizes (ECF Nos. 186 at 17–18; 245 at 8–16), are immaterial

to the common questions whether the "hard caps—50% and 75%—[were] arbitrary" and systematically undervalued authors' contributions to MindTap. (ECF No. 195 at 7; see id. at 8). To persuade the jury to answer that question in the affirmative, Plaintiffs intend to introduce statements by Cengage employees as well as Prof. Spulber's opinions, among other evidence. (Id.) Cengage, in turn, will be free to introduce documents and testimony from its witnesses—including authors who did not oppose the DRA Framework (see, e.g., ECF Nos. 186-5 at 211 ¶¶ 6–7; 216 ¶¶ 10–12; 233 ¶ 9)—cross-examine Prof. Spulber about the perceived defects in his opinions, and offer Prof. Hitt's contrasting opinions about how to assess DRAs. (See § I.A.5 n.8, supra). Therefore, whether the DRA Framework was arbitrary and undervalued authors' contributions are questions that can be resolved as to the Proposed MindTap Class by common proof.

Second, the question of Cengage's motive in adopting the DRA Framework can also be resolved by common proof. Under the Contracts, Cengage owed a duty of good faith to all authors in calculating royalties, and in doing so, set the same value for eTextbooks in MindTap products—50%—for all authors in the Proposed MindTap Class. (ECF Nos. 172-8 at 9–10; 172-47 at 2). While product managers had discretion to choose which tier of the DRA Framework to apply—50%, 75%, or 100%—there is no evidence that product managers had discretion to alter the eTextbook value or to choose a different DRA percentage. (ECF No. 171 at 14–16; see § I.A.3.a, supra). Thus, the Proposed MindTap Class shares the common questions of whether the 50% eTextbook value and the 50% and 75% DRAs undervalued authors' contributions, and if so, Cengage's motive for doing so, both of which can be answered by reference to statements by and testimony from Cengage's employees as well as the competing opinions of Prof. Spulber and Prof. Hitt. See In re

Term Commodities Cotton Futures Litig., No. 12 Civ. 5126 (ALC) (KNF), 2022 WL 485005, at *5 (S.D.N.Y. Feb. 17, 2022) (finding that plaintiffs satisfied commonality where defendants' conduct in causing "squeeze" of the entire market affecting all traders was "one manipulative scheme"); In re Digit. Music Antitrust Litig., 321 F.R.D. 64, 86 (S.D.N.Y. 2017) (finding that commonality was satisfied where "Plaintiffs' alleged injuries derive[d] from a uniform course of conduct by the Defendants"); see also Allapattah Serv., Inc. v. Exxon Corp., 333 F.3d 1248, 1261 (11th Cir. 2003) (holding that, where defendant owed duty of good faith "to the dealers as a whole[, w]hether it breached that obligation was a question common to the class and the issue of liability was appropriately determined on a class-wide basis"), aff'd sub nom. Exxon Mobil Corp v. Allapattah Servs., Inc., 545 U.S. 546 (2005); Sykes I, 285 F.R.D. at 290 (finding that common questions of law and fact regarding defendants' "course of conduct" satisfied commonality requirement of Rule 23(a)(2)). Contrary to Cengage's assertion (ECF No. 186 at 18), the Court does not read either New York or Massachusetts law as requiring motive to be proved on an author-by-author basis; rather, both states require the Court to "focus on the subjective, specifically on knowing and purposeful misbehavior" by Cengage, whose purpose in adopting and implementing the DRA Framework was common to all members of the Proposed MindTap Class. Bank of Am., N.A. v. Prestige Imps., 75 Mass. App. Ct. 741, 754–55 (App. Ct. 2009); see Wilder v. World of Boxing LLC, 310 F. Supp. 3d 426, 452 (S.D.N.Y. 2018) (requiring "subjective evidence showing 'malevolent' intent" of the party in breach of the implied covenant of good faith and fair dealing), aff'd, 777 F. App'x 531 (2d Cir. 2019).

Third, Plaintiffs have propounded a class-wide methodology for calculating damages for the Proposed MindTap Class: the difference between what the authors should have been paid

under the Corrected DRA (81.6% for authors with a 50% DRA, and 90.8% for authors with a 75% DRA), and what the authors were paid. (ECF Nos. 171 at 18; 172-5 at 66–71 ¶¶ 155–76). At this stage of the proceedings, the question before the Court is whether Prof. Spulber's methodology can calculate classwide MindTap Class damages, not whether the jury will award such damages—or any damage. See Dial Corp., 314 F.R.D. at 118–19 (finding that dispute between experts about appropriate methodology and benchmarks did not undermine plaintiffs' showing that their "damages model [was] sufficient to show that damages are measurable through use of a common methodology"); see also In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 100 (D. Conn. 2009) ("The real question before this court is whether the plaintiffs have established a workable multiple regression equation, not whether plaintiffs' model actually works, because the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of damages through generalized proof."). For the reasons explained in the Daubert O&O, the Court has found that Prof. Spulber's methodology is capable of that task. Therefore, the question of how to calculate damages on a classwide basis for the Proposed MindTap Class is a third question that can be answered using common proof.

**ii. Proposed CU Class**

As to the Proposed CU Class, Plaintiffs similarly contend that Cengage employed a common, arbitrary approach to calculate royalties—the CU Methodology—to allocate too much revenue away from royalty-bearing titles to the detriment of authors, whom Cengage misled about how it calculated CU royalties. (ECF No. 171 at 18–20). Plaintiffs pose the same three common questions as to the Proposed CU Class—arbitrariness, undervaluation of authors'

contributions, and Cengage's motive—and intend to rely on similar class-wide evidence to persuade the jury to answer each question in their favor. (Id. at 18–20, 23). Cengage does not advance any unique arguments in opposition. (ECF No. 186 at 17–20). The Court therefore finds that Plaintiffs have shown that several questions common to the Proposed CU Class can be answered based on common, class-wide evidence as well.

**c. Typicality**

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Courts in this District recognize that "[t]he typicality requirement is not demanding." Villella v. Chem & Mining Co. of Chile, 333 F.R.D. 39, 55 (S.D.N.Y. 2019) (quoting In re MF Glob. Holdings Ltd. Inv. Litig., 310 F.R.D. 230, 236 (S.D.N.Y. 2015)). "Typicality 'does not require factual identity between the named plaintiffs and the class members, only that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.'" Martínek, 2022 WL 326320, at *6 (quoting MF Glob. Holdings, 310 F.R.D. at 236). Rather, "[t]he typicality requirement is satisfied where 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" Digital Music, 321 F.R.D. at 87 (quoting In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir. 2009)); accord In re NYSE Specialists Sec. Litig., 260 F.R.D. 55, 70 (S.D.N.Y. 2009). Courts have "liberally construed" the typicality requirement under Rule 23(a)(3). Digital Music, 321 F.R.D. at 87.

Plaintiffs assert that they are typical because "[t]hey challenge the same conduct as every other class member: Cengage's common methodologies for calculating royalties from MindTap

and CU." (ECF No. 171 at 24). Cengage argues that Bernstein is not typical because "his primary goal is to obtain a reversion of his copyrights from Cengage," pointing out that he "complained when his royalties increased in 2018." (ECF No. 186 at 21). Cengage also argues that Plaintiffs, who did not contribute to Supplemental Materials, cannot adequately represent authors who contributed to Supplemental Materials and received a 75% DRA, and that their Corrected DRA of 90.8% attributes less (9.2%) to this author group than Cengage's valuation (25%). (Id. at 20–21).

The Court finds that because Plaintiffs' claims all turn on the question whether Cengage should have allocated more revenue to authors within the DRA Framework, their claims are typical of the Proposed MindTap Class. The FAC alleges that Cengage systematically and intentionally applied a lower value to authors' contributions to the eTextbook portion of the MindTap products, resulting in lower royalties to the authors and more revenue to Cengage, and Plaintiffs are not disputing Cengage's decisions about in which tier authors were placed. (ECF Nos. 120 ¶ 2; 247 at 9).

Similarly, as to the Proposed CU Class, Plaintiffs allege that their "works are offered on [CU]," and that Cengage's improper allocation of royalty-bearing revenue and resulting application of the DRA Framework has minimized their royalties. (ECF No. 120 ¶ 7). Plaintiffs' claims are therefore typical of the Proposed Classes because their claims "arise[] from the same course of events," and they will be making the same arguments as other authors would make to prove Cengage's liability. Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 245 (2d Cir. 2007); see Vida Longevity Fund, LP v. Lincoln Life & Annuity Co. of N.Y., No. 19 Civ. 6004 (ALC), 2022 WL 986071, at *4 (S.D.N.Y. Mar. 31, 2022) (finding that plaintiff was typical of other class members, whose claims all arose from defendant's

course of conduct). Cengage's contention that Bernstein may have credibility issues resulting from his statements about seeking a reversion of his intellectual property rights (ECF No. 186 at 21), is the type of "unique defense [that] does not render a named plaintiff atypical of a putative class member." In re Term Commodities, 2022 WL 485005, at *6; see In re Nat. Gas. Commodities Litig., 231 F.R.D. 171, 183-84 (S.D.N.Y. 2005) (rejecting arguments that lack of credibility rendered named plaintiffs atypical). Therefore, both Proposed Classes satisfy the typicality requirement.

**d. Adequacy**

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Adequacy has two components: '[f]irst, class counsel must be qualified, experienced and generally able to conduct the litigation,' and '[s]econd, the class members must not have interests that are antagonistic to one another.'" Haw. Structural Ironworkers Pension Tr. Fund, Inc. v. AMC Ent. Holdings, Inc., 338 F.R.D. 205, 212 (S.D.N.Y. 2021) (quoting In re Drexel Burnham Lambert Grp., Inc., 960 F.2d 285, 291 (2d Cir. 1992)); see Denney v. Deutsche Bank AG, 443 F.3d 253, 268 (2d Cir. 2006) ("Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members."). "Class certification may properly be denied where the class representatives have so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1077–78 (2d Cir. 1995) (cleaned up). The Court may also consider "the honesty and trustworthiness of the named plaintiff." Savino v. Comput. Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998).

Cengage contests Plaintiffs' adequacy because (i) they did not contribute to Supplemental Materials but purport to represent authors who did and who received a 75% DRA, and (ii) Penner, Roy, and Parke failed to exhibit sufficient knowledge of the litigation during their deposition testimony. (ECF No. 186 at 21–22). Neither argument undermines Plaintiffs' adequacy.

First, whether Cengage assigned a DRA of 50% or 75%, it still applied a 50% valuation to the eTextbook portion of the royalty calculation, which Plaintiffs challenge as arbitrary and undervaluing their contributions. (ECF Nos. 172-8 at 10, 12; 172-47 at 3). Thus, there is no conflict between Plaintiffs and authors who contributed to Supplemental Materials and received a 75% DRA.

Second, Cengage cherry-picks excerpts from Plaintiffs' depositions (ECF No. 186 at 22) but omits their other testimony in which they exhibited a firm understanding of the nature of the claims of the Proposed Classes. For example, Penner testified that "Cengage arbitrarily changed the basis on which they pay royalties for the digital versions of the [eTextbook] presented in MindTap and [CU]." (ECF No. 196-6 at 5). Roy similarly believes that the DRA Framework "degrades the amount, the value of the contribution of the actual text by the authors, and, therefore, the authors get less royalty on the net sales." (ECF No. 196-7 at 3). The testimony of Clarke-Stewart's representative was similar. (ECF No. 196-8 at 4 (representative believed that Clarke-Stewart "was underpaid for both textbooks")).

Third, each of the four Plaintiffs has undertaken, and testified about, their efforts to prosecute this litigation, including reviewing the pleadings, "collecting and producing documents, responding to interrogatories," testifying at depositions, and working with Susman Godfrey. (ECF No. 172-4 at 2–3 ¶ 3; see ECF Nos. 172-1 at 2 ¶ 3; 172-2 at 2 ¶¶ 3–4; 172-3 at 2 ¶ 3; 196-7 at 12;

see generally ECF No. 196-3). See Martínek, 2022 WL 326320, at *7 (finding plaintiff's "demonstrated [] willingness to prosecute this action on behalf of the proposed class" rendered him adequate). Thus, these Plaintiffs are distinguishable from those in which the proposed class representatives were deemed inadequate due to lack of knowledge and diligence. See, e.g., In re Term Commodities, 2022 WL 485005, at *7 (finding one proposed representative to be inadequate because of his "alarming unfamiliarity with the issues in th[e] action" and "all but abdicat[ion of] his responsibilities in th[e] action").

Plaintiffs have therefore satisfied the adequacy requirement as to the Proposed Classes.

**e. Ascertainability**

The Second Circuit's ascertainability requirement mandates that "a class must be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member,' and must be 'defined by objective criteria that are administratively feasible,' such that 'identifying its members would not require a mini-hearing on the merits of each case.'" de Lacour v. Colgate-Palmolive Co., 338 F.R.D. 324, 334 (S.D.N.Y. 2021), lv. to appeal denied, 2021 WL 5443265 (2d Cir. Sept. 16, 2021) (quoting In re Petrobras Sec., 862 F.3d 250, 260 (2d Cir. 2017)).

Plaintiffs assert that the Proposed Classes satisfy the ascertainability requirement by using the following objective criteria to define membership: "1) the author's work must have been sold on MindTap or used on CU, 2) the work must have a DRA of 50 or 75 (for MindTap) . . . , and 3) the author's publishing agreement must have a New York or Massachusetts choice-of-law clause." (ECF No. 171 at 22). Again, although Cengage does not concede ascertainability, its two-sentence, citation-free argument in a footnote fails to persuade the Court that Proposed Classes are not

ascertainable. (ECF No. 186 at 23 n.8). Because Cengage tracks authors with works sold on MindTap and CU, and records DRAs (ECF Nos. 172-70; 172-71), and the Contracts indicate whether they are governed by New York or Massachusetts law (ECF No. 172 ¶ 17), membership in the Proposed Classes can be determined using Cengage's "own records." Allegra v. Luxottica Retail N. Am., 341 F.R.D. 373, 404 (E.D.N.Y. 2022). Thus, the "modest threshold requirement" of ascertainability is met for the Proposed MindTap Class. In re Petrobras , 862 F.3d at 269.

* * *

In conclusion, Plaintiffs have satisfied all four Rule 23(a) factors as to both Proposed Classes.

**2. Rule 23(b)(3) Requirements**

The Court now turns to whether Plaintiffs have satisfied the predominance and superiority requirements of Rule 23(b)(3).

**a. Predominance of Common Issues**

Rule 23(b)(3)'s predominance element requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members[.]" Fed. R. Civ. P. 23(b)(3). This standard is "more demanding than Rule 23(a)." Comcast, 569 U.S. at 33; accord Amchem Prods., 521 U.S. at 623–24. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Id. at 623. "A court examining predominance must assess [i] 'the elements of the claims and defenses to be litigated,' [ii] 'whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief,' and [iii] 'whether the common issues can profitably be tried

on a class[-]wide basis, or whether they will be overwhelmed by individual issues.'" Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 512 (2d Cir. 2020) (quoting Johnson, 780 F.3d at 138). "Ultimately, the court must decide whether classwide resolution would substantially advance the case[,] . . . reduce the range of issues in dispute and promote judicial economy. Johnson, 780 F.3d at 138.

"Predominance is not simply an exercise in tallying up issues; it is a qualitative inquiry that entails careful scrutiny of the nature and significance of a case's common and individual issues." Haley v. Teachers Ins. & Annuity Ass'n of Am., 54 F.4th 115, 121 (2d Cir. 2022); accord Petrobras, 862 F.3d at 271. In assessing predominance, the court must "consider all factual or legal issues"—including affirmative defenses—"and classify them as subject either to common or individual proof." Haley, 54 F.4th at 121. "Plaintiffs need not prove, however, that the legal or factual issues that predominate will be answered in their favor." Kurtz v. Costco Wholesale Corp., 818 F. App'x 57, 61 (2d Cir. 2020) (summary order) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 468 (2013)). That damages may require individualize proof does not preclude certification of common issues such as liability, see Johnson, 780 F.3d at 138, but the damages methodology "must actually measure damages that result from the class's asserted theory of injury." Roach v. T.L. Cannon Corp., 778 F.3d 401, 407 (2d Cir. 2015). "In short, the question for certifying a Rule 23(b)(3) class is whether resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof and whether these particular issues are more substantial that the issues subject only to individualized proof." Johnson, 780 F.3d at 138.

From the premise that their implied covenant claims "rise or fall on the legality of" Cengage's "uniform conduct," Plaintiffs argue that the common questions of arbitrariness, undervaluation, and motive "will drive the resolution of this dispute." (ECF No. 171 at 26–27). They contend that common evidence at trial will show that:

> 1) Cengage failed to base its DRA Framework on any meaningful attempt to value authors' contributions to the MindTap products[;] 2) Cengage executives and employees admitted that the class-wide DRA Framework assigned DRAs that were too low, "semi-arbitrary," and made up[;] 3) Cengage rebuffed efforts to examine its arbitrarily low levels[;] 4) Cengage-created or generic ancillary materials packaged with e[Textb]ooks in MindTap, which Cengage uses to slash up 50% of royalty-bearing revenue, rely on authored content and are not sold separately and thus have no proven value in the open market[;] 5) [i]nstructors adopt products primarily considering the quality of the e[Textb]ook content and affordability, not the accompanying materials included[;] 6) [a]nd the 50% and 75% DRAs each substantially and systematically undervalue authors' contributions to MindTap products, as shown by Prof. Spulber's analysis of common, market evidence.

(ECF No. 171 at 27–28). Plaintiffs summarize the key question for the jury as whether "Cengage arbitrarily and systematically undervalued authors' contributions class wide in breach of the implied covenant of good faith and fair dealing." (Id. at 28).

Cengage advances seven individualized issues that it asserts "are central to resolving Plaintiffs' implied covenant claim" and would predominate over any common issues. (ECF No. 186 at 24–29). None of these issues predominates over the common issues Plaintiffs have described for the Proposed Classes.

First, Cengage reiterates its argument that contract variation defeats predominance. (ECF No. 186 at 24). As discussed above, however, the differences that Cengage highlights are not material to the common issues, and it is undisputed that the Contracts all contain the same or substantially similar royalty provision: Cengage's promise to pay authors royalties based on the

net receipts from sales of their works. (ECF Nos. 172 ¶¶ 3–42; 196-2). As Judge Carter has explained, this provision obligates Cengage, "in exercising its discretion to determine what among net receipts from the sales of MindTap is attributable to the authors," not to do so with an "ulterior motive" or otherwise in bad faith. Bernstein II, 2020 WL 5819862, at *5. Cengage has the same obligation as to CU. See Bernstein IV, 2021 WL 4441509, at *4. Differences in the royalty rate between Contracts, then, are not material to Plaintiffs' challenge to the way Cengage has calculated the royalty base using the DRA Framework. (ECF No. 195 at 10 ("But the applicable royalty rate says nothing about how much revenue . . . should be allocated to the royalty base and authors, which is the issue here.")). Because Plaintiffs' implied covenant claims turn on Cengage's conduct in exercising its discretion as to a term that is substantially similar across all authors, immaterial differences between the Contracts do not defeat predominance. See In re U.S. Foodservice, 729 F.3d at 125 (finding predominance satisfied where relevant contracts were "substantially similar in all material respects"); Hanks v. Lincoln Life & Annuity Co., 330 F.R.D. 374, 382–83 (S.D.N.Y. 2019) (finding predominance satisfied where key contract term was "not materially different across [multiple] policies"); see also Allapattah, 333 F.3d at 1261 ("Because all of the dealer agreements were materially similar and Exxon purported to reduce the price of wholesale gas for all dealers, the duty of good faith was an obligation that it owed to the dealers as a whole.").

Second, while Cengage is correct that the Second Circuit has instructed district courts to consider the course of dealing between the parties to determine contract expectations (ECF No. 245 at 3), here, all authors reasonably shared the same expectation under the law of New York and Massachusetts: that Cengage would not act arbitrarily, irrationally, or malevolently in

determining the amount of net receipts on which the royalties would be paid. (See § II.B.1.b.i, supra). The common issues that will predominate over all individual issues pertaining to the implied covenant claims are whether Cengage breached its duty under the Contracts to act in good faith in setting the DRA percentages, and in allocating CU royalty-bearing income. The Court disagrees with Cengage's assertion that resolving these questions will require examination of each author's subjective expectations (ECF No. 186 at 24–25); "[t]o the contrary, breach of the duty [of] good faith and fair dealing may be shown by class-wide evidence of a defendant's subjective bad faith or objectively unreasonable conduct." In re Checking Acct. Overdraft Litig., 275 F.R.D. 666, 680 (S.D. Fla. 2011); see Ge Dandong v. Pinnacle Performance Ltd., No. 10 Civ. 8086 (JMF), 2013 WL 5658790, at *12 (S.D.N.Y. Oct. 17, 2013) (finding that common issues predominated as to implied covenant claim, liability for which "does not require reliance on any sort of misrepresentation"); In re TD Bank, N.A. Debit Card Overdraft Fee Litig., 325 F.R.D. 136, 156 (D.S.C. 2018) (rejecting argument that "resolution of the implied covenant claim will require examination of each class member['s] subjective expectations"). To the extent that some authors "welcomed the shift to MindTap and accepted the tradeoff of DRA" (ECF No. 186 at 24; see ECF No. 186-5 at 211 ¶ 7, 220 ¶ 6, 225 ¶ 7, 238 ¶ 5, 215 ¶ 6), those authors who believe that Cengage has not breached the implied covenant or otherwise do not wish to be part of the action have the right to opt-out of the Proposed Classes. See Fed. R. Civ. P. 23(c)(2)(B)(v); see also Neversink Gen Store v. Mowi USA, LLC, No. 20 Civ. 9293 (PAE), 2021 WL 1930320, at *4 (S.D.N.Y. May 13, 2021) (noting that procedural safeguards in Rule 23 include the right of absent class members to opt out of class action). Thus, any difference in individual author's expectations are not material

to and will not predominate over the common question of the objective reasonableness of Cengage's conduct.

Third, Cengage's reiterated emphasis on product managers' "discretion" to set DRAs (ECF No. 186 at 25) continues to ignore the undisputed evidence that there were only four DRAs from which to choose—0%, 50%, 75%, and 100% (see § I.A.3.a, supra)—and that Plaintiffs claim that Cengage's choice of these percentages and imposition of the DRA Framework on all authors breached the implied covenant. (ECF No. 247 at 11, 13–16). Because Plaintiffs are not challenging the DRAs in which they were placed, but rather the DRA Framework itself—specifically the 50% and 75% DRAs—product managers' individualized decisions about the percentage to assign each author will not predominate over the common questions about the propriety of those percentages. (Id. at 9).

Fourth, with respect to motive, Cengage again misdirects the inquiry to individual product managers' decisions about which percentages within the DRA Framework to apply to particular works. (ECF No. 186 at 26). As discussed above, it is Cengage's motive behind adopting and implementing the DRA Framework that is at issue and is answerable by common proof. (See § II.B.1.b.i, supra).

Fifth, Cengage points to three authors whose Contracts contemplated a 50% royalty rate for internet-published works to suggest that the Proposed Classes included uninjured, or "overpaid," members. (ECF No. 186 at 26–27, 27 n.9; see ECF Nos. 186-1 at 298–99; 186-3 at 155). To the extent that Cengage's complaint is that there are some members of the Proposed Classes who suffered no damages, "district courts in this Circuit have certified classes that likely or certainly contained uninjured class members." In re Restasis (Cyclosporine Opthalmic

Emulsion) Antitrust Litig., 335 F.R.D. 1, 16 (E.D.N.Y. 2020) (observing that "[t]he Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification"). Indeed, "a class may be certified so long as a 'de minimis' number of class members were uninjured or, conversely, 'virtually all' class members were injured." Id. at 17 (quoting In re Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 134, 134–35 (D.D.C. 2017), aff'd, 934 F.3d 619 (D.C. Cir. 2019)); see In re AXA Equitable Life Ins. Co. Litig., No. 16 Civ. 740 (JMF), 2023 WL 199284, at *1–2 (S.D.N.Y. Jan. 17, 2023) (explaining that Supreme Court's holding in TransUnion v. Ramirez, 141 S. Ct. 2190 (2021), "did not alter the well-established law in this Circuit . . . that standing in a class action 'is satisfied so long as at least one named plaintiff can demonstrate the requisite injury'") (quoting Hyland v. Navient Corp., 48 F.4th 110, 117 (2d Cir. 2022)). Nor were Plaintiffs required to adduce, for Rule 23 purposes, "evidence of personal standing" for "each member" of the Proposed Classes. Id. (quoting Denney 443 F.3d at 263); accord Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950 (AT), 2022 WL 814074, at *19-20 (S.D.N.Y. Mar. 17, 2022) (rejecting argument that "each class member must demonstrate standing to maintain certification for a Rule 23(b)(3) damages class action"), am. in part on reconsid., 2022 WL 3586460 (S.D.N.Y. Aug. 22, 2022). In any event, Cengage has not shown that the potentially uninjured or overpaid authors are any more than de minimis, which is "not sufficient to defeat class certification." Roach, 778 F.3d at 405. As discussed in the Daubert O&O, Prof. Spulber's methodology to calculate MindTap Damages and CU Damages can mechanically implement any necessary set-offs.

Sixth, while Cengage is correct that arbitration or forum-selection clauses in the Contracts may prevent those authors' claims from being litigated as part of this action (ECF No. 186 at 27),

the presence of such clauses does not defeat predominance. As one court in this District has observed, "it does not require a great deal of legal acumen to spot a forum selection or arbitration clause in a form contract, and . . . the best method for managing this issue is to exclude [authors] whose [Contracts] contain forum selection clauses or provisions requiring the arbitration of [implied covenant] claims from the class definition." Wu v. Pearson Educ., Inc., 277 F.R.D. 255, 266 (S.D.N.Y. 2011);[9] see In re Titanium Dioxide Antitrust Litig., 962 F. Supp. 2d 840, 863 (D. Md. 2013) (carving out of class definition persons and entities whose contracts contained arbitration or forum selection clauses).[10] To address this issue, the Court has revised the definitions of the Proposed Classes to exclude authors whose Agreements contained (i) an arbitration clause, and/or (ii) a clause restricting the litigation of disputes to courts other than the U.S. District Court for the Southern District of New York. (P. 46, infra).

Seventh, in opposing the Class Motion, Cengage reiterates its arguments in opposition to Prof. Spulber's damages methodologies. (ECF No. 186 at 27–29). As set forth in the Daubert O&O, however, by offering Prof. Spulber's opinions, Plaintiffs have shown "that damages are capable of measurement on a classwide basis." Comcast, 569 U.S. at 34. Both the MindTap Damages and CU Damages are "consistent with the classwide theory of liability and capable of measurement on a classwide basis." In re U.S. Foodservice, 729 F.3d at 123 n.8. Plaintiffs have therefore surmounted Comcast's "low bar." In re Vale S.A. Sec. Litig., No. 19 Civ. 526 (RJD) (SJB), 2022 WL

[9] After further developments, the class in Wu was decertified on other grounds. See Wu v. Pearson Educ., Inc., 2012 WL 6681701 (S.D.N.Y. Dec. 21, 2012).

[10] The Court disagrees with Plaintiffs' belated suggestion at oral argument that this question was not ripe for adjudication on the Class Motion (ECF No. 253 at 22–23), particularly given Plaintiffs' acknowledgement in their reply that a carve-out could be a suitable approach. (ECF No. 195 at 14).

122593, at *18 (E.D.N.Y. Jan. 11, 2022); see Strougo v. Barclays PLC, 312 F.R.D. 307, 313 (S.D.N.Y. 2016) (noting that, in Roach, 778 F.3d at 407-408, "[t]he Second Circuit [] rejected a broad reading of Comcast"), aff'd sub nom. Waggoner v. Barclays PLC, 875 F.3d 79 (2d Cir. 2017). Furthermore, the well-settled precedent "in this Circuit [holds] that factual differences in the amount of damages, date, size, or manner of purchase, the type of purchaser, the presence of both purchasers and sellers, and other such concerns will not defeat class action certification when plaintiffs allege that the same unlawful course of conduct affected all members of the proposed class." In re Sumitomo Copper Litig., 182 F.R.D. 85, 92 (S.D.N.Y. 1998) (citing Green v. Wolf, 406 F.2d 291, 299–301 (2d Cir. 1968)). Because Plaintiffs have shown that the members of the Proposed Classes "are unified in their task to prove" Cengage's breach of the implied covenant and have reliable, formulaic damages models, Sumitomo, 182 F.R.D. at 93, Plaintiffs "have established that common issues in this litigation will predominate over any individual ones." In re Elec. Books Antitrust Litig., No. 11 MD 2293 (DLC), 2014 WL 1282293, at *23 (S.D.N.Y. Mar. 28, 2014). Even if Cengage were to show that Prof. Spulber's models are inaccurate, that, too, "is itself [a question] common to the claims made by all class members," Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 457 (2016), and reinforces that common issues will predominate.

**b. Superiority**

Rule 23(b)(3) also requires the moving party to demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3)). The "nonexhaustive" list of factors relevant to analyzing whether class treatment is superior, are: (i) the class members' interest in individually controlling the prosecution or defense of separate actions; (ii) the extent and nature of any litigation concerning the controversy already

begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (iv) the likely difficulties in managing a class action. Id.; see Amchem, 521 U.S. at 615 (listing these criteria).

Plaintiffs argue that a class action is superior to any alternative adjudication method because individual authors' damages are not "large enough to incentivize individual suits," and litigating as a class action will be more efficient. (ECF No. 195 at 15; see ECF No. 171 at 31). Cengage disagrees, asserting that authors have "sufficient monetary incentive to pursue their own claims," and noting that at least three authors have brought individual suits against Cengage. (ECF No. 186 at 29–30 (quoting Nguyen v. BDO Seidman, LLP, No. 07 SACV 1352 (JVS), 2009 WL 7742532, at *8 (C.D. Cal. July 6, 2009)); see ECF No. 186-1 at 30 (citing two suits by three authors in this District and the District of Massachusetts)).

Each of the four factors under Rule 23(b)(3) weigh in favor of a finding of superiority here. Most importantly, individual actions for a putative class of hundreds, perhaps thousands, of authors under any circumstance, but especially after over four years of litigation, "would be far less efficient, and far more costly and repetitious than continuing to proceed as a class action." In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 57 (E.D.N.Y. 2019); see In re U.S. Foodservice, 729 F.3d at 130 (explaining that "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual issues susceptible to generalized proof will achieve significant economies of time, effort and expense and promote uniformity of decision"). The presence of just two individual actions—one of which

is no longer pending[11]—is consistent with the inference that "there is little interest in class members bringing their own actions." Dial Corp., 314 F.R.D. at 121. Nor does the presence of those actions undermine the conclusion that Plaintiffs have vigorously and effectively litigated on behalf of the Proposed Classes, and will continue to do so. See Restasis, 335 F.R.D. at 39. In addition, given the predominance of common issues (see § II.B.2.a, supra), "class-wide litigation of [these] common issues will reduce litigation costs and promote judicial efficiency," Dial Corp., 314 F.R.D. at 121, and any individual issues will not make a class action unmanageable. Finally, Cengage does not dispute that this District is a desirable forum for a complex class action litigation. Therefore, Plaintiffs have shown that litigating this action as a class action is superior to other methods of adjudication.

**C. Appointment of Class Counsel**

The Court must address Plaintiffs' application for Susman Godfrey to be appointed as lead counsel, and, implicit in the Class Motion, Plaintiffs' application to be appointed Lead Plaintiffs for the Proposed Class. See Martínek, 2022 WL 326320, at *20 (after analyzing Rule 23(a) and Rule 23(b)(3) elements, considering appointment of lead plaintiffs and lead counsel). "Rule 23 also provides guidance to courts concerning the appointment of class counsel." Martínek, 2022 WL 326320, at *4. Rule 23(g)(1) requires courts to consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the type of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing

[11] See Knox v. Cengage Learning Holdings II, Ltd., No. 18 Civ. 4292 (GBD) (S.D.N.Y.) (ECF No. 16 (Stipulation of Dismissal with Prejudice)).

the class." Fed. R. Civ. P. 23(g)(1)(A). For substantially the same reasons the Court discussed in analyzing typicality and adequacy, (see §§ II.B.1.c–d, supra), the Court finds that Plaintiffs are suitable representatives of the Proposed Class, and Susman Godfrey is qualified to represent the Proposed Class. Accordingly, I respectfully recommend the appointment of Plaintiffs as Lead Plaintiffs and Susman Godfrey as Lead Counsel.

## III. CONCLUSION

For the reasons set forth above, I respectfully recommend that the Class Motion be GRANTED as follows:

(1) The definitions of the Proposed Classes modified as:

- The "MindTap Class": Authors of works who entered into a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been sold on the MindTap platform and assigned a Digital Royalty Allocation ["DRA"] of 50 percent or 75 percent, except those authors whose publishing agreement contained (i) an arbitration clause or (ii) a clause restricting the litigation of disputes to courts other than the U.S. District Court for the Southern District of New York.[12]
- The "CU Class": Authors of royalty-bearing works who entered into a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been used on Cengage Unlimited, except those authors whose publishing agreement contained (i) an arbitration clause or (ii) a clause restricting the litigation of disputes to courts other than the U.S. District Court for the Southern District of New York.

(2) Plaintiffs Douglas Bernstein, Edward Roy, Louis Penner, and Ross Parke, as personal representative of the Estate of Alison Clarke-Stewart, be appointed as class representatives for the MindTap Class and the CU Class.

(3) Susman Godfrey L.L.P. be appointed as Class Counsel for the MindTap Class and the CU Class.

[12] The Court's modifications are indicated with underline.

The Clerk of Court is respectfully directed to make this Report and Recommendation available only to the case participants and the Court. By **June 23, 2023**, the parties shall confer and file a proposed redacted version of this Report and Recommendation for the Court's review and public filing.

Dated: New York, New York
June 9, 2023

**SARAH L. CAVE**
**United States Magistrate Judge**

* * *

**NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION**

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. See also Fed. R. Civ. P. 6(a), (d) (adding three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen (14) days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Carter.

**FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW.** See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), (d), 72(b); Thomas v. Arn, 474 U.S. 140 (1985).