IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELISSA FERRICK, et al., Plaintiff, vs. SPOTIFY USA INC., et al., Defendants.	No. 1:16-cv-08412 (AJN)

CORRECTED
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

After hard-fought litigation and nearly one full year of arm's-length negotiations conducted with the assistance of a highly experienced mediator, Plaintiffs agreed to resolve this complex class action through a settlement that provides an outstanding result for the Class (the "Settlement"). Under the Settlement, Class Members would receive more than $112.55 million in total financial value.[1] This amount includes a $43.45 million in immediate cash payments by Spotify for the Class and an estimated $1 million in notice and administration costs paid by Spotify. The Settlement also provides for a future royalty program that will result in an additional payment of over $63.1 million in royalties to Class Members, dos Santos Decl., Ex. B, ¶ 1, and an agreement by Spotify to pay up to $5 million in attorneys' fees in addition to the Settlement Fund. No funds will revert to Spotify.

In addition to its significant financial provisions, the Settlement also contemplates specific reform efforts to enhance the process of compensating artists for their compositions, including creating a Mechanical Licensing Committee to improve matching of Spotify tracks to copyright owners and a Copyright Data Sharing Committee among major industry players to facilitate licensing of content on streaming services.

This Settlement reflected a major undertaking to achieve the best result for the Class. The process leading up to settlement involved the exchange of tens of millions of items of Spotify's data; substantial work with experts to evaluate the potential settlement value of the case; case investigation and discovery; and significant briefing. The arm's-length settlement negotiations were also extensive and overseen by the Hon. Layn R. Phillips, a highly experienced and very well-regarded mediator. *See* Phillips Decl., Dkt. 169. The parties' mediator-overseen negotiations including two in-person mediation sessions; numerous joint phone calls; data

[1] This is a conservative estimate, as detailed in the expert report of Joao dos Santos, who values the future monetary relief at $63.1 million. Dos Santos Decl., Ex. B, ¶¶ 1, 28, 35; n. 2, 10, 14.

exchange sessions; work with experts to analyze and evaluate Spotify's data; and briefing of key disputed settlement issues with Judge Phillips and his team.

The Settlement has received positive reaction from the Class since preliminary approval of the Settlement was granted on June 29, 2017, and Notice to the Class was mailed on August 3, 2017. The claims administrator received a total of 13 timely objections out of the total 535,401 individuals receiving notice.[2] The primary concerns raised by objectors are that the settlement is not large enough, the notice is not clear enough, and the attorneys' fees requested are excessive. Each of these concerns is addressed below and in Class Counsel's Response to the Objections to the Class Action Settlement.

For all of the foregoing reasons and additional reasons provided for below, Plaintiffs respectfully request the Court grant final approval to the Settlement.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Class Action Litigation

Class Plaintiffs filed their Complaint on January 8, 2016, in the Central District of California. The Complaint asserted one claim for copyright infringement. *See* Case No. 2:15-cv-00180-BRO-RAOx (C.D. Cal.), Dkt. 1. After extensive briefing, which involved cross-motions to consolidate related cases, Susman Godfrey L.L.P. and Gradstein & Marzano P.C. were appointed Interim Co-Lead Class Counsel. *Id.* at Dkt. 72. Class Plaintiffs prepared and served discovery, including requests for production, interrogatories, and third party-subpoenas to Harry Fox Agency and the National Music Publishers Association. *See* Sklaver Decl. ¶¶ 5.

Following the Court's order appointing Interim Co-Lead Class Counsel, the parties negotiated a stipulated Protective Order, Case No. 2:15-cv-00180-BRO-RAOx (C.D. Cal.), Dkt.

[2] In addition to direct and email notice, the comprehensive notice plan also included print notice in *Rolling Stone*, *Variety*, *Billboard*, and *Music Connection*; targeted digital advertiseements on the Internet; social media outreach; a disclosure page on Spotify's website for artists and its website for publishers; and a press release. *See* Cirami Decl. (Dkt. 190) ¶ 6.

74, and Class Plaintiffs filed a Consolidated Class Action Complaint ("CAC"). The CAC named Ferrick, Pastorius, and G360 as Class Plaintiffs. After Class Plaintiffs filed their CAC, Spotify refiled its motion to strike class action allegations and motion to dismiss for lack of personal jurisdiction, or in the alternative, to transfer venue to the Southern District of New York. *Id.* at Dkts. 83, 84. After both motions were fully briefed, the Court transferred the case to the Southern District of New York. *Id.* at Dkt. 114. Spotify refiled its motion to strike class action allegations. Dkt. 148. After Class Plaintiffs filed their opposition to Spotify's motion to strike, the parties engaged in settlement discussions that ultimately resulted in the Settlement.

B. Settlement Negotiations and Terms

The Settlement Agreement is the result of extensive arm's length negotiations between the parties, with the assistance of an experienced, highly-credentialed mediator, retired federal Judge Layn Phillips. The mediation process began in September 2016 and continued into May 2017. Sklaver Decl. ¶¶ 5, 6. The parties conducted two full-day, in-person mediation sessions with Judge Phillips on November 7, 2016, and January 11, 2017, and submitted multiple rounds of mediation briefing. *Id.* ¶ 5. Both in-person sessions were attended by counsel for Plaintiffs and counsel and a corporate representative for Spotify. *Id.* Significant data and information were exchanged and evaluated by Plaintiffs' counsel and their experts over many months, with ongoing mediation occurring by telephonic conference. *Id.* The Settlement terms were also negotiated during extensive telephone and email discussions. *Id.* A confidential short-form term sheet was negotiated in-person before Judge Phillips in Newport Beach, California on January 11, 2017. *Id.* ¶ 6. A long-form settlement agreement was heavily negotiated thereafter, with the parties participating in telephonic mediation sessions and submitting mediation briefs to Judge Phillips over disputed terms and issues. *Id.* ¶ 5. Preparing the final the long-form settlement agreement took four months as the parties refined the terms and relief afforded the Class.

Throughout the process, the settlement negotiations were conducted by qualified and experienced counsel on both sides at arm's length. *Id.* ¶ 13. Spotify provided extensive confirmatory discovery to Class Counsel, including data related to streaming of the compositions at issue. *Id.* Class Counsel was well informed of material facts, and retained knowledgeable and experienced experts to develop a thorough understanding of the information provided by Spotify. *Id.* The parties engaged in rigorous negotiations, including countless phone calls and in-person meetings to reach a final executable agreement. *Id.* ¶ 12.

1. Financial Relief to Class Members

The Settlement provides the following substantial monetary benefits to the Class:

- A $43.45 million immediate cash payment to compensate the Class for Spotify making available tracks embodying their composition for past streaming and/or limited download, with no reversion of the Settlement Fund to Spotify. Dkt. 176-3 (Settlement Agreement) ¶ 3.1(a).

- Spotify's agreement to pay, over and above the Settlement Fund, all Settlement Administration Costs and Notice Costs, including Publication Notice, which the Settlement Administrator has estimated will cost more than $1 million. *Id.* ¶¶ 9.1, 9.2.

- For each Claimant, Spotify will pay ongoing (future) composition royalties calculated at the statutory rate for all tracks identified by that Claimant valued at $63.1 million. Dos Santo Decl., Ex. B ¶ 1.

- In addition, Spotify will reserve future royalties for all unmatched tracks and pay ongoing royalties whenever the claimant steps forward and provides proof of ownership—even if done long after the claims deadline. Moreover, to facilitate this process, Spotify will maintain a special website for at least five years after the Effective Date in order to assist class members in making claims for future royalty payments. Dkt. 176-3 (Settlement Agreement) ¶ 4.

2. Additional Relief to Class Members

- Class Members will be able to submit claims online, using a searchable database of information about tracks that were made available on Spotify during the Class Period, including audio links to play these tracks that are currently on Spotify. To facilitate the submission of claims, certain fields on the claim form will auto-populate based on information submitted by the Class Member, and Class Members will be able to submit claims in bulk using a templated spreadsheet. *See* Declaration of Keith Bernstein, filed concurrently herewith ("Bernstein Decl.") ¶ 8.

- Class Members will have access to a third-party Settlement Claim Facilitator – retained by Class Counsel –with expertise in identifying unmatched tracks to assist them in determining compositions underlying Spotify's tracks that are eligible for royalties and with submitting claims. Class Counsel has been working closely with the Settlement Claim Facilitator – Royalty Review Council – over the past months, preparing a searchable portal that will aid Class Members. Bernstein Decl. ¶¶ 6-8.

- Spotify will establish an audit procedure for Class Members to verify the accuracy of Spotify's royalty payments. Dkt. 176-3 (Settlement Agreement) ¶ 5.

- Spotify will collaborate with Class Plaintiffs to develop tools or processes to further facilitate the mechanical licensing of content on Spotify's service. *Id.* ¶ 6.

- Spotify will collaborate with other industry participants to improve the sharing of catalog and other data among publishers, labels, and online music services. *Id.* ¶ 7.

- Spotify will invest time and resources to initiate and support an industry-wide effort (to include representatives of composers, publishers, streaming services, labels, and others) with the goal of obtaining and digitizing all U.S. Copyright Office registration records for musical works registered before January 1, 1978, and making that information far more accessible to the Class. *Id.* ¶ 8.

  The Settlement defines the Class as:

  > All persons or entities who own copyrights in one or more musical compositions (a) for which a certificate of registration has been issued or applied for on or before the Preliminary Approval Date; and (b) that was made available by Spotify for interactive streaming and/or limited downloads during the Class Period (December 28, 2012 through the Preliminary Approval Date) without a license.

Dkt. 176-3 ¶ 11.2.[3]

[3] Excluded from the Class are (i) Spotify and its affiliates, employees, and counsel; (ii) federal, state, and local governmental entities; (iii) the Court; (iv) persons and entities who, in 2016, executed a Participating Publisher Pending and Unmatched Usage Agreement in connection with the Pending and Unmatched Usage Agreement, dated as of March 17, 2016, between Spotify and the National Music Publishers' Association, or any other person or entity who has agreed not to bring a claim against Spotify in this Action; and (v) any person or entity who has already provided Spotify with a release with respect to claims concerning musical compositions for which a certificate of registration has been issued or applied for, but the exclusion applies solely with respect to such released claims. *Id.*

In exchange for the consideration provided, Plaintiffs and Class Members will release any and all rights, duties, obligations, claims, actions, causes of action, or liabilities, whether arising under local, state, federal, or foreign law, whether by Constitution, treaty, statute, regulation, rule, contract, common law, or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, that were, could have been, or could ever be asserted as a consequence of Spotify's making a musical work that was ever available for interactive streaming and/or downloading without a valid license during the defined Class Period (between December 28, 2012 and the Preliminary Approval Date) available for interactive streaming and/or downloading without a valid license, including Spotify's marketing or promoting that fact, except for an action to enforce the Settlement Agreement. *Id.* ¶ 17.3.

3. Attorney's Fees, Costs, and Class Representative Incentive Awards

The Settlement recognizes that Class Counsel may seek attorneys' fees and reimbursement of costs and expenses incurred in the prosecution of these actions, subject to approval of the Court. The Notice informed Class Members that Class Counsel may seek fees up to one-third of the cash portion of the settlement plus up to $5 million that Spotify agreed to pay over and above the benefits provided to the class in cash and other relief, including the value of future royalty streams under Spotify's future royalty payment program, which would have equaled $63.1 million. *See* dos Santos Decl., Ex. B ¶ 1. In a concurrently filed motion, Class Counsel seeks payment of a total of $15.86 million in attorneys' fees from the Settlement Fund, representing 14% of the overall Settlement value or using a less-accepted and more conservative methodology, 25% of the cash fund, plus up to $5 million in attorneys' fees Spotify agreed to pay in conjunction with the prospective relief provided by the Settlement.[4] Class Counsel also seek $632,111.92 in unreimbursed expenses necessarily incurred in connection with the prosecution of this action, plus future such expenses, and incentive awards of up to $25,000 for each of the named Plaintiffs.[5]

4. Distribution Plan

The Distribution Plan, as also set forth in the Notice, allocates funds to Class Members on a *pro rata* basis. The cash payment will be allocated as follows: Each Authorized Claimant shall receive a minimum guaranteed payment from the Net Settlement Fund. Authorized Claimants whose works have been streamed more than 100 times additionally shall receive a payment that shall be a percentage of the Net Settlement Fund remaining after deduction for the minimum guaranteed payments determined by dividing (i) the total number of streams (through the Preliminary Approval Date) for the Claimed Musical Works of the Authorized Claimant by

[4] (0.25 * $43,450,000.00) = $10,862,500.00 + $5,000,000.00 = $15,862,500.00
[5] The limited objections to these terms are addressed in detail below.

(ii) the total number of streams (through the Preliminary Approval Date) for all Claimed Musical Works identified by all Authorized Claimants. In the event that an Authorized Claimant is a partial owner of the copyright for a particular Claimed Musical Work, the number of streams for that Musical Work shall be discounted in accordance with that Authorized Claimant's ownership share. Dkt. 176-3 ¶ 3.5(a). None of the money from the Settlement Fund shall revert to Spotify.

C. Preliminary Approval and Notice to the Class

On June 28, 2017, the Court entered an order conditionally certifying the Settlement Class, naming Susman Godfrey L.L.P. and Gradstein & Marzano, P.C. as counsel for the Settlement Class, naming Plaintiffs as representatives of the Class, and preliminarily approving the settlement with Defendants. Dkt. 177 at ¶¶ 2-3, 7, 10. The Court also appointed Garden City Group LLC ("GCG") to serve as the Settlement Administrator, approved the proposed Notice Program, and set a final approval hearing for December 1, 2017. *Id*. at ¶¶ 12, 18, 22. The Notice was mailed to the persons and entities identified in the U.S. Copyright Office Records on August 3, 2017. *See* Cirami Decl. (Dkt. 190) ¶ 9.[6]

III. ARGUMENT

A. Final Approval of the Class Action Settlement is Appropriate

The settlement of complex litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("*Wal-Mart*") (internal quotation marks and citation omitted).[7] "In exercising this discretion, courts should give

[6] It was also emailed to the persons and entities identified in the U.S. Copyright Office Records. *Id.* ¶ 13. Further, the comprehensive notice plan also included print notice in *Rolling Stone*, *Variety*, *Billboard*, and *Music Connection*; targeted digital advertisements on the Internet; social media outreach; a disclosure page on Spotify's website for artists; and a press release. *See id.* ¶ 6.

[7] *See also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class

proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Id.* (internal quotation marks omitted).

A court may approve a class settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart*, 396 F.3d at 116. For the negotiating process, "[s]o long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997). For approval of the settlement's terms, recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has held that a court should not give "rubber stamp approval" to a proposed settlement, but has recognized it can "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974).[8]

In addition to a presumption of fairness that attaches to a settlement reached as a result of arm's-length negotiations, the Second Circuit has identified nine factors for a court to consider in making a Rule 23(e) fairness determination:

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actions."). The approval of a class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995).

[8] *See also In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

Grinnell, 495 F.2d at 463. In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (internal quotation marks omitted).

B. The Proposed Class Action Settlement is Procedurally Fair

The Settlement is entitled to an initial presumption of fairness and adequacy because it was reached by experienced, fully-informed counsel after extensive arm's-length negotiations. *See Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8831(CM)(MHD), 11 Civ. 7961(CM), 2014 WL 1224666, at *7 (S.D.N.Y. Mar. 24, 2014). Counsel on both sides are well-versed in copyright and class action litigation. The terms of the Settlement were vigorously negotiated, and included two mediation sessions before a highly experienced mediator in Newport Beach, California, all attended by Class Counsel and counsel and a corporate representative for Spotify; as well as numerous telephone calls, in-person meetings, emails and briefing on substantive provisions. Sklaver Decl. ¶ 5. The discussions culminated in an executed confidential term sheet after Class Counsel participated in comprehensive settlement negotiations, which included the exchange of tens of millions of rows of Spotify's data and substantial work on the part of experts on both sides to evaluate the potential settlement value of the case. *Id*. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 387 (S.D.N.Y. 2013) (granting final approval where parties

participated in two mediation sessions with Judge Phillips).[9] The above facts establish that the Settlement is procedurally fair.[10]

C. The Proposed Class Action Settlement Is Substantively Fair: *Grinnell Factors*

Evaluation of this settlement under the *Grinnell* factors supports final approval.

1. Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

The first factor, which addresses "the complexity, expense and likely duration of the litigation," strongly supports approval. *Grinnell*, 495 F.2d at 463. The litigation was indisputably complex, and involves novel issues regarding the application of the copyright laws to an emerging industry, and a sharp dispute as to whether the Class could be certified as a litigation class. By reaching a favorable settlement prior to dispositive motions or trial, Class Plaintiffs seek to avoid significant expense and delay, and instead ensure a favorable recovery for the Class as soon as possible, and without the need to incur millions of dollars in expert costs and other litigation expenses that would deplete the Settlement Fund if a settlement were reached later. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). These complex claims were bitterly fought, as reflected in the defenses to damages and class certification outlined by Spotify in its motion to strike.

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[9] *See also Athale v. Sinotech Energy Ltd.*, No. 11 CIV. 05831 (AJN), 2013 WL 11310686, at *3 (S.D.N.Y. Sept. 4, 2013) (The presumption that the settlement is fair, reasonable, and adequate, applies to this case where the Settlement was reached after two years of litigation and extensive investigation, involved the use of an experienced mediator (Judge Weinstein) in negotiating settlement, and all parties were represented throughout by experienced counsel."); *Kelen v. World Fin. Network Nat. Bank*, 302 F.R.D. 56, 68 (S.D.N.Y. 2014). The extensive participation of an experienced mediator "reinforces that the Settlement Agreement is non-collusive." *Johnson*, 2011 WL 1872405, at *1; *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator's involvement . . . helps to ensure that the proceedings were free of collusion and undue pressure.").

[10] *See McReynolds v. Richards–Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (There is a "presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery" (alteration and internal quotation marks omitted)).

The Settlement also ends future litigation and uncertainty. Even if the Class could recover a judgment at trial and survive any decertification challenges, post-verdict and appellate litigation may have lasted for years. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class").[11] Thus, this factor weighs strongly in favor of approval of the Settlement.

2. Reaction of the Class to Settlement (*Grinnell* Factor 2)

The second factor, the "reaction of the class to the settlement," strongly supports approval. *Grinnell*, 495 F.2d at 463; *see, e.g.*, *In re FLAG Telecom*, 2010 WL 4537550, at *16. The reaction of the class to a settlement "is considered perhaps 'the most significant factor to be weighed in considering its adequacy.'" *Veeco*, 2007 WL 4115809, at *7 (citation omitted).

Here, pursuant to the Preliminary Approval Order, a total of 535,401 copies of the Notice were mailed or emailed to potential Class Members. Cirami Decl. (Dkt. 190) ¶ 5.[12] After the initial mailing and emailing of 535,401 Notices to potential Class Members, GCG continued to investigate and update addresses. Cirami Decl. (Dkt. 190) ¶¶ 9-10. Before and after mailing, GCG has conducted and will continue to conduct an advanced address search and promptly re-mail any undeliverable mail pieces where a new address can be located. *Id.* at ¶ 10.

Class Members were given until September 12, 2017, to object to or exclude themselves from the Settlement. Cirami Decl. (Dkt. 190), Ex. C. The deadline to object or request exclusion from the Class has passed, and the Court received a total of 13 timely objections out of the total

[11] *See also Prudential*, 163 F.R.D. at 210 ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)); *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("the complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement. . . . Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all.").

[12] The Notice Plan also included print notice in *Rolling Stone*, *Billboard*, *Music Connection* and *Variety*; targeted digital advertisements on the Internet; social media outreach; a press release; a settlement website; a toll-free information number; and a disclosure on a Spotify's webpage for arists. *Id.* at ¶ 6.

535,401 individuals and entities to which notice was mailed or emailed. Cirami Supplemental Declaration ("Cirami Supp. Decl"), ¶ 21. The objections were predominantly in three areas: dissatisfaction with the immediate cash payment of the Settlement Fund; a purportedly ambiguous notice was not clear; and excessive attorneys' fees. While the objections are addressed in brief below, they are discussed in more detail in Plaintiffs' Response to Objections to Class Action Settlement Agreement, which is incorporated by reference.

a. Cash Payment of Settlement Fund not Large Enough

Four Objectors claim the payment from Spotify should be greater. Dkts. 183, 184, 208, 211. But none of the objectors evaluated the Settlement Fund as a while – instead, they evaluated the Net Settlement Fund, which does not account for the value of the future royalty payment program (valued at $63.1 million) and additional non-monetary relief. This is contrary to the law of this Circuit. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.,* 246 F.R.D. 156, 168 (S.D.N.Y.2007) (finding that "conclusory statements are not sufficient to weigh against approval of the Settlement as fair and reasonable"). Indeed, when combining the immediate cash payment and the future royalty payment program, the cash value of the settlement is $112.55 million, an excellent result for the Class.

b. Unclear Notice

Certain Objectors also contend that the Notice is unclear or ambiguous. But the provisions referenced by Objectors are undoubtedly clear. For example, Hellouin objected on the basis that the notices did not provide streaming counts and other information needed for class members to calculate their payment from the settlement fund. *See* Dkt. 218, Settlement Agreement (Dkt. 176-3 at ¶ 3.5(a)). But it would be impossible for Class Counsel to know that information prior to the submission of claim forms.

c. Excessive Attorneys' Fees

As with valuation of the Settlement, Objectors are improperly focused on the Net Settlement Fund without considering the other relief from the Settlement, which has significant monetary value. Additionally, the Objectors all base their objection on the erroneous belief that Class Counsel are seeking 33% of the Net Settlement Fund, plus an additional $5 million in fees, which would be a $19.48 million fee request.[13] Class Counsel is seeking far less, $15.86 million. Further, to the extent Objectors suggest it is improper for $5 million to be earmarked for Class Counsel as compensation for the future royalty payment program, other courts have approved of similar financial structures. *See, e.g., Fleisher v. Phoenix Life Ins. Co.*, Civil Action No. 11-cv-8405 (CM) (S.D.N.Y. Sept. 9, 2015) (granting final approval where the parties had agreed defendant would pay an additional $6 million in conjunction with non-monetary relief).[14]

d. Miscellaneous Objections

The remaining objections similarly have no merit:

- Wixen's objection that the settlement was reached as the result of "collusion," is belied by the extensive settlement discussions with a highly regarded settlement judge, chronicled elsewhere in this motion.

- Wixen also claims it is unfair to Class Members to have to submit copyright registration numbers in conjunction with their claims. But copyright registration numbers are required for individuals to litigate claims pertaining to their copyrights. *See Calloway v. The Marvel Entertainment Group,* 1983 Copyright L.Dec. (CCH) ¶ 25,570, 1983 WL 1141 (S.D.N.Y. 1983) (dismissing complaint which failed to state copyright registration numbers and alleged dates of infringement).

- Wixen contends that it is overly burdensome to require class members to submit copyright numbers for copyrights registered pre-1978. Wixen overlooks the fact that one of the benefits conferred by the Settlement is to make it much easier for these class members to obtain copyright registration numbers for pre-1978 works. Spotify will

[13] 33% of $43.45 million = $14.48 million. $14.48 million + $5 million in fees = $19.48 million.

[14] *See also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 283-84 (3d Cir. 2009) ("It was reasonable to include the $29,950,000 amount [that was provided in a separate fund] in the calculation of the settlement value created by Class Counsel in order to determine the percentage of the total recovery that the fee constitutes because in the typical common fund case, class counsel would be awarded a percentage of the fund and the balance would be available for the class members (e.g., defendants agree to pay $ 100,000,000 to a common fund, but class counsel is awarded 25% of the settlement value, leaving only $ 75,000,000 for the class.")).

invest time and resources to initiate and support an industry-wide effort (to include representatives of composers, publishers, streaming services, labels, and others) with the goal of obtaining and digitizing all U.S. Copyright Office registration records for musical works registered before January 1, 1978, and making that information far more accessible to the Class. Dkt. 176-3 at ¶ 7.2. For purposes of the claims administration process, individuals and entities can consult their own records or use services like archive.org in order to locate any copyright registration numbers.

- Wixen complains that the Settlement Agreement is unfair because it does not permit agents or delegates to file requests for exclusion on behalf of their clients. But this approach is consistent with what is required under copyright law. *See Hutson v. Notorious B.I.G., LLC*, 2015 WL 9450623, at *3 (S.D.N.Y. Dec. 22, 2015) (plaintiff must be "the legal or beneficial owner of an exclusive right under a valid copyright at the time of the alleged infringement" to have standing to sue).

- Wixen claims it is unfair to force settlement class members to license their works going forward. But the fact that the Settlement provides a mechanism for ensuring that members of the Class will receive the future royalties they are owed is a substantial ***benefit*** of the settlement, not a reason for faulting it. After all, plaintiffs brought this case to ensure that members of the Class would be paid the royalties they are owed. In any event, any member of the Class who for some reason was not interested in obtaining future royalties based on Spotify's use of their songs could have chosen to opt out of the Class.

- Some objections dealt with relief that is already forthcoming, such as a detailed table explaining costs incurred by counsel and the ability to submit claim forms.

- Other objections are sufficiently lacking in detail and explanation to justify any action on part of the Court. Claims that objectors do not want Spotify playing their music, want Spotify to put its playlist online, and don't want to pay for audit rights fail to explain why such objections are material. Similarly, claims that the release was too broad are insufficient where the objector failed to describe how the release should be narrowed and what components of the current release were too broad.

e. Standing

Wixen filed objections on behalf of 510 individuals or entities purportedly represented by Wixen.[15] The propriety of Wixen's objections is discussed in detail in the Omnibus Response to Objections to Plaintiffs' Motion for Final Approval, which is incorporated by reference, as there

[15] There is a dispute as to whether Wixen Music Publishing, Inc. ("Wixen"), an independent music licensing administration company based in Calabasas, California, properly excluded its clients from the Class.

is no evidence that Wixen had authority to file objections in the names of its clients.[16]

The overwhelming response of Class Members in favor of the Settlement, as evidenced by the limited number of objections, strongly weighs in favor of approval. "The fact that the vast majority of class members neither objected nor opted out is a strong indication" of fairness. *Wright v. Stern,* 553 F.Supp.2d 337, 344-45 (S.D.N.Y. 2008) (approving settlement where 13 out of 3,500 class members objected and 3 opted out).[17]

3. Stage of the Proceedings and Amount of Discovery Completed (*Grinnell* Factor 3)

The third *Grinnell* factor, which addresses "the stage of the proceedings and the amount of discovery completed," also strongly supports approval of the Settlement. *Grinnell*, 495 F.2d at 463. When courts "look [] to the stage of the proceedings and the amount of discovery completed" under the third *Grinnell* factor, they "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Techs., Inc. Sec. Litig.*, No. 11 Civ. 2279 (CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014) (internal quotation marks omitted); *see also Visa*, 396 F.3d at 118.

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[16] But even assuming those objections were valid, the fact that a group of Class Members represented by the same counsel purportedly objected to the settlement does not stand in the way of the "silent majority's" right to recover. *In re Lloyd's American Trust Fund Litig.,* No. 96 Civ. 1262, 2002 WL 31663577, at *24 (S.D.N.Y. Nov. 26, 2002) ("[T]his Court has a fiduciary duty to protect all Class Members-including the silent majority who have not voiced any objections to the Settlement."). Additionally, as discussed in the separately filed Omnibus Response to Objections to Plaintiffs' Motion for Final Approval, "a few objections from individuals who did not provide the required evidence of class membership or who provided evidence indicating they were not class members" has no utility in assessing the propriety of a settlement. *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 379 (S.D.N.Y. 2013).

[17] *See also Davis v. J.P. Morgan Chase & Co.,* 827 F.Supp.2d 172, 177 (W.D.N.Y.2011) (granting final approval and noting "very little negative reaction by class members to the proposed settlement" where 11 out of 3,800 class members opted out, and 3 objected); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 86-87 (2d Cir. 2001) ("The District Court properly concluded that this small number of objections [18 out of 27, 883 notices sent] weighed in favor of the settlement."); *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666, at *9 (S.D.N.Y. Mar. 24, 2014) ("A small number of objections are convincing evidence of strong support by class members. Indeed, in litigation involving a large class it would be extremely unusual not to encounter objections"); *Athale v. Sinotech Energy Ltd.*, No. 11 CIV. 05831 (AJN), 2013 WL 11310686, at *5 (S.D.N.Y. Sept. 4, 2013) (Nathan, J.) ("In sum, the absence of persuasive objections to the settlement and the overall positive reaction of the class weighs heavily in favor of approval.").

"[T]he pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [, but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176 (internal quotations omitted). The parties participated in comprehensive settlement negotiations, which included the exchange of a significant amount of information including tens of millions of rows of Spotify's data and substantial work on the part of experts to evaluate the potential settlement value of the case. Sklaver Decl. ¶ 13. Counsel had ample information against which to measure the adequacy of the Settlement. *See Athale v. Sinotech Energy Ltd.*, No. 11 CIV. 05831 (AJN), 2013 WL 11310686, at *5 (S.D.N.Y. Sept. 4, 2013) (granting motion for final approval even though parties had not engaged in significant discovery because plaintiffs had undertaken a significant investigation that enabled them to realistically appraise the settlement).[18] This factor weighs in favor of approval.

In sum, Class Counsel had the benefit of extensive discovery and expert analysis with which to make an intelligent, informed appraisal of the strengths and weaknesses of the Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Class if this litigation continued.[19]

4. Risk of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial (*Grinnell* Factors 4, 5, & 6)

The fourth, fifth and sixth *Grinnell* factors, which address "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. In assessing factors 4, 5 and 6, which are often considered together, the Court is not required to

[18] *Frank v. Eastman Kodak Co.,* 228 F.R.D. 174, 185 (W.D.N.Y. 2005) (approving settlement "in relatively early stages of discovery" where parties had exchanged extensive information pertaining to class members' identities and to Defendant's time and pay practices and where counsel's negotiations had "been in no way collusive"); *Global Crossing,* 225 F.R.D. at 458.

[19] *See In re Bear Stearns Cos. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues").

decide the merits of the case, resolve unsettled legal questions, or to "foresee with absolute certainty the outcome of the case." *Shapiro*, 2014 WL 1224666, at *10. "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *In re Global Crossing Secs. And ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004). In assessing the risks, courts recognize that "the complexity of Plaintiff's claims *ipso facto* creates uncertainty." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009). While Plaintiffs and Class Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals.

a. Risks to Establishing Liability

Plaintiffs believe their position on liability is strong, but recognize that there are complex issues that pose risk. The Court is well aware of the challenges that Plaintiffs would face at trial. Defendants laid out their contentions regarding class certification alone in their motion to strike class action allegations. Dkt. 150. For example, Defendants argued that class certification was improper because (1) Plaintiffs proposed an improper "fail-safe" class; (2) Plaintiffs' proposed class fails to satisfy the ascertainability requirement of Rule 23; (3) the lawsuit lacks the commonality that Rule 23(a)(2) requires for certification of any class; and (4) Plaintiffs' class action allegations fail on the pleadings because they cannot satisfy either Rule 23(b)(3)'s requirements for a damages class action or Rule 23(b)(2)'s standards for an injunction-only class action. *Id.* Although Plaintiffs believe in the merit of their arguments, there is a risk that the Court would not certify the class.

In addition, Spotify has asserted numerous affirmative defenses to Class Members' claims, such as whether the copyright registration was valid; whether Spotify had an express, implied, or compulsory license; whether there was any copyright infringement; and if so,

whether the infringement was willful. Even assuming these claims would survive dispositive motion practice, it is unclear how a jury would decide these disputed issues at trial. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) (comparing advantages of immediate cash payments with risks involved in long and uncertain litigation). The early stage of litigation, and the fact that Plaintiffs had not yet survived Spotify's motion to strike class action allegations (let alone the additional substantive motions Spotify surely would have pursued as the case proceeded through litigation), highlights the potential risks. *Athale v. Sinotech Energy Ltd.,* No. 11 CIV. 05831 (AJN), 2013 WL 11310686, at *7 (S.D.N.Y. Sept. 4, 2013) ("This is a significant recovery given the risks described, above, as well as in light of the fact that the action had not survived a motion to dismiss at the point at which it settled."). Further, even if a jury decided the claims in Plaintiffs' favor, there is a risk that Plaintiffs' would recover much less than the value of the Settlement.

b. Risks to Establishing Damages

Even if Plaintiffs won the liability phase, Plaintiffs also faced risks in establishing damages. The Settlement removes substantial uncertainties about Plaintiffs' chances of success in proving and recovering damages. *Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("[T]he litigation risks attendant to these possibilities [like decertification] weighed heavily in favor of the fairness of a settlement."). Although Plaintiffs are confident in their ability to prove damages, the prospect of a battle at trial and establishing recovery for all Class members without decertification adds substantial risk to Plaintiffs' claims. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any

certainty which testimony would be credited") (internal quotation marks omitted).[20]

c. Risks on Appeal.

Even if Plaintiffs succeed at trial, Defendants are certain to file post-trial motions and, if necessary, an appeal. The appeal of the complex copyright issues in this case is likely to be lengthy and expensive, and there is no assurance that Plaintiffs would prevail. *See In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success" and citing a case where a multimillion dollar judgment was reversed).

5. Ability of Defendants to Withstand a Greater Judgment (*Grinnell* Factor 7)

The seventh *Grinnell* factor addresses the defendants' ability to withstand a greater judgment. Even if Spotify could withstand a greater judgment, "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato*, 236 F.3d at 86. Indeed, "a defendant is not required to empty its coffers before a settlement can be found adequate." *Sony*, 2008 WL 1956267, at *8 (internal quotation marks omitted). The mere fact that a defendant "is able to pay more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Global Crossing*, 225 F.R.D. at 460.

6. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

The final two *Grinnell* factors, "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. Courts typically combine their analysis of the final two *Grinnell* factors. *See Global Crossing*, 225 F.R.D. at 460. In analyzing these two factors, a

[20] *See also In re FLAG Telecom*, 2010 WL 4537550, at *18 ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable.").

reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, "there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Visa*, 396 F.3d at 119.

Moreover, the overall value of the settlement comprises immediate monetary relief as well as future relief. *See, e.g.*, *Velez v. Novartis Pharm. Corp.*, No. 04 CIV 09194 CM, 2010 WL 4877852, at *8, *18 (S.D.N.Y. Nov. 30, 2010) (both monetary and non-monetary relief considered in calculating value of settlement). Here, the overall Settlement value exceeds $112.55 million, including substantial immediate monetary as well as future monetary benefits. Subject to Court approval, Spotify will be paying $43,450,000.00 for distribution to Class Members, along with Spotify's agreement to separately pay $5 million in attorneys' fees awarded for, amongst other things, the substantial future monetary relief obtained for the Class. *See, e.g.*, *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 386-87 (S.D.N.Y. 2005) (holding value of settlement includes the value of any legal fees paid by defendants).[21]

The future monetary relief provided by the Settlement is also substantial and has an estimated value of over $63.1 million. Dos Santos Decl., Ex. B ¶ 1. Spotify has agreed to pay ongoing (future) composition royalties calculated at the statutory rate for all tracks identified by

[21] *See also Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996) ("The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class' recovery.").

each Claimant. Dkt. 176-3 at ¶ 4. Spotify will also pay future royalties to Class Members who fail to file claims, but who subsequently come forward and provide proof of ownership, and will also reserve future royalties for all unmatched tracks. *Id*. Spotify will also provide an online portal where Class Members can submit claims online using a searchable database of information about tracks that were made available on Spotify during the Class Period, including audio links to play those tracks currently available on Spotify. Bernstein Decl. ¶¶ 6-8. To facilitate the submission of claims, certain fields on the claim form will auto-populate based on information submitted by the Class Member, and Class Members will be able to submit claims in bulk using a templated spreadsheet. *Id.* In conjunction with this portal, Royalty Review Council ("RRC") will be available to assist Class Members with identifying the compositions underlying Spotify's tracks that are eligible for royalties and with submitting claims and will also proactively seek to identify unknown Class Members to inform them of their right to submit a claim. *Id.*

Additionally, Spotify will establish an audit procedure for Class Members to verify the accuracy of Spotify's royalty payments; collaborate with Class Plaintiffs to develop tools or processes to further facilitate the mechanical licensing of content on Spotify's service; identify a number of representatives who could participate in a "Best Practices" group that would meet regularly to discuss and implement processes to increase the percentage of usage that can be matched; request "split" and related information from participating Class Members to facilitate resolution of any conflicts regarding rights; collaborate with other industry participants to improve the sharing of catalog and other data among publishers, labels, and online music services; and invest time and resources to initiate and support an industry-wide effort with the goal of obtaining and digitizing all U.S. Copyright Office registration records for musical works registered before January 1, 1978, and making that information far more accessible to the Class.

Dkt. 176-3 at ¶ 7.2.

Plaintiffs' expert, Joao dos Santos, has more than 20 years of professional experience. Dos Santos Decl. ¶ 2. He holds a Master of Science degree in applied economics from Rutgers University, with field concentrations including econometric modeling and forecasting. *Id.* Mr. dos Santos' report measures the value of Class Members' royalty streams in the future, acknowledging that the other components of the future nonmonetary relief will have a significant impact that is not addressed in his report. Dos Santos Decl., Ex. B at 2, n.1. In assessing the value of the royalty streams, he adopted a discounted cash flow framework. *Id*. ¶ 6. For existing unmatched copyrighted compositions, the discounted cash flow analysis estimates: (i) the value of the future mechanical royalty stream expected to be payable to the Class for a number of years (until royalties are assumed to accrue at a stable rate); and (ii) a "terminal value" of future cash flows to account for cash flows into perpetuity. *Id.* Then, the stream of future cash flows and terminal value is discounted to a "Net Present Value" (NPV) at a discount rate which considers the risk of the expected royalty stream. *Id.*

Mr. dos Santos' calculations are particularly conservative because, *inter alia*, they do not calculate the value of Spotify's changed practices for future songs added by Class Members to Spotify's catalog. Dos Santos Decl., Ex. B, ¶¶ 28, 35; n. 2, 10, 14. The combination of monetary and future monetary and nonmonetary benefits is a sizable recovery in light of the total projected damages and the risks of litigation and even just considering the cash component alone, the settlement is well within the permitted range on final approval. *See Grinnell Corp*., 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement). The combination of immediate monetary and future monetary and non-monetary benefits is a sizable recovery. The Settlement is even more significant given the considerable risks involved in the litigation as set forth above. Plaintiffs and

Class Counsel carefully and thoroughly analyzed these risks when negotiating the present Settlement. The proposed Settlement is a favorable result for the Settlement Class in light of the range of possible recoveries and the risks of continued litigation.[22]

D. The Notice Program Satisfied Rule 23 and Due Process

Due process and the Federal Rules require that the class receive adequate notice of a class action settlement. *See Wal-Mart*, 396 F.3d at 114. The standard for the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id*. at 113 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e)).[23]

Here, the robust Notice Program, which included mailing or e-mailing individual Notices to all Class members, more than meets the requirements of due process, Rule 23, and the notice standards articulated by the Second Circuit. Pursuant to the Preliminary Approval Order, GCG obtained data from Spotify with the names, addresses, and email addresses of all registered claimants of copyrights in musical compositions whose names together with either mail addresses or email addresses appear in the electronic records maintained in a digitally searchable format by the U.S. Copyright Office starting in 2008. Cirami Decl. (Dkt. 190) ¶ 4. GCG re-mailed and will continue to re-mail mailed notices returned as undeliverable if a forwarding address is provided by the USPS. *Id.* ¶ 10. If a forwarding address was not provided by the USPS, GCG has conducted and will continue to conduct an advanced address search and promptly re-mail any undeliverable mail pieces where a new address can be located. *Id.* Through these methods, GCG was able to reduce the total number of undelivered notices to 20,093. *Id*.

[22] *Massiah*, 2012 WL 5874655, at *5 ("[W]hen a settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor.") (internal quotation marks omitted).

[23] As the Second Circuit has held, "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 113-14 (internal quotation marks omitted). The notice sent to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Based on the total number of notices mailed and the rate of undelivered notices, GCG estimates that the direct mail notice reached approximately 94% of the potential class members for whom a mailing address was included in the usable class data. *Id.* ¶ 11. GCG also provided email notice; included print notice in *Rolling Stone*, *Billboard*, *Music Connection* and *Variety*; targeted digital advertisements on the Internet; social media outreach; a press release; a settlement website; a toll-free information number; and a disclosure on a Spotify's webpage for arists and publishers. *Id.* ¶ 6.

The Notice communicated in plain language the essential elements of the Settlement and the options available to Class Members in connection with the settlement. Cirami Decl. (Dkt. 190), Ex. C. The Notice describes the litigation, summarizes the Settlement's terms and benefits, describes the manner of allocating the cash payments among eligible Class Members, quotes the releases verbatim, discloses the request for Court approval of attorneys' fees, expenses, and named plaintiff incentive awards, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the cash settlement class. *Id*. Additionally, the Notice prominently notifies class members how they can obtain more information from Class Counsel or the Settlement Administrator though a toll-free number, a website, and traditional channels including mail and telephone. *Id.* These features of the Notice all demonstrate due process and that the federal rules have been satisfied. *See Wal-Mart*, 396 F.3d at 114 (quoting *Newberg* §11.53, at 167) ("Notice is 'adequate if it may be understood by the average class member.'").

E. The Distribution Plan is Fair and Reasonable

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *In re Bear Stearns Cos. Sec., Derivative & ERISA Litig.*, 909 F. Supp. 2d 259, 270 (S.D.N.Y. 2012). Courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is

fair and reasonable in light of that information," not mathematical precision. *PaineWebber*, 171 F.R.D. at 133. The cash payment will be allocated *pro rata* as follows, which was fully explained in the Notice:

> Authorized claimants will receive a minimum pro rata payment from a fixed portion of the net settlement fund, and depending upon the number of streams of their qualifying musical compositions (through the preliminary approval date), they will also receive a pro rata share of the net settlement fund determined by dividing the total number of streams of your qualifying musical compositions by the total number of streams of all qualifying musical compositions. They will also receive payment of future mechanical royalties calculated using the statutory rate. Spotify will also provide nonmonetary benefits to class members, such as by taking steps to facilitate payment of royalties for unmatched works.

Cirami Decl. (Dkt. 190), Ex. E at 6.

This type of distribution, where funds are distributed on a *pro rata* basis, has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, No. 99-CV-197, 2000 WL 1737867 at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable.").[24] Furthermore, no Class member has objected to this straightforward and equitable allocation. Accordingly, the distribution plan is fair and reasonable, and should be approved.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the Settlement, approve the Notice as being in compliance with Rule 23 of the Federal Rules of Civil Procedure and due process, and approve the plan of distribution as fair, reasonable, and adequate.

[24] *See also In re Lloyds' Am. Trust Fund Litig.*, No. 96-CV-1262, 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*pro rata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits."); *PaineWebber*, 171 F.R.D. at 135 (approving pro rata distribution). Counsel's conclusion that the distribution plan is fair, adequate, and reasonable is entitled to great weight. *See In re Am. Bank Note Holographics*, Inc. 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (approving allocation plan and according counsel's opinion "considerable weight").

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By: */s/ Steven G. Sklaver*

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2017, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's SDNY Procedures for Electronic Filing.

Dated: November 13, 2017

/s/ Steven G. Sklaver
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