

**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)

**PLAINTIFFS' RESPONSE TO DEFENDANT SPOTIFY USA INC.'S MEMORANDUM
IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Spotify's Memorandum in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement is right that settlement should be approved, but is wrong that, if settlement were not approved, class certification would be denied. Nonetheless, Spotify's brief serves to confirm again that both merits and class certification issues are hotly contested by the parties in this case. The \$112.55 million total value of the Settlement reflects the substantial risks to both Spotify and the Class on both fronts, and provides an extraordinary result for the Class. Spotify's brief directs the Court to alleged obstacles in proving ultimately class certification relating to manageability, including individualized issues of copyright ownership, determining whether each work has a valid copyright, determining whether Spotify has a license or authorization to distribute any particular composition, and determining whether and how Spotify has reproduced or distributed any particular composition. Spotify also contends there are manageability issues as to calculating damages and determining whether Spotify's infringement was willful. "[A] district court 'confronted with a request for settlement-only class certification ... need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.'" *In re American Intern. Group, Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) (citing *Amchem Prods., Inc. v. Windsor*, 525 U.S. 591, 620 (1997)). Spotify acknowledges that its concerns relating to manageability are irrelevant in the settlement context. Dkt. 294 at 1 (citing *In re American Intern. Group, Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) and *Amchem Prods., Inc. v. Windsor*, 525 U.S. 591, 620 (1997)).

The issues Spotify believes it might prevail on if there were no settlement have no bearing on the determination of whether final approval is appropriate but instead only underscore the vigorous opposition the Class could expect in litigating this case further. "[S]ome inquiries essential to litigation class certification are no longer problematic in the settlement context. A

key question in a litigation class action is manageability—how the case will or can be tried, and whether there are questions of fact or law that are capable of common proof. But the settlement class presents no management problems because the case will not be tried.” *American Intern. Group*, 689 F.3d at 239 (quoting *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J., concurring) (citing *Amchem*, 521 U.S. at 620)). The key concerns for a court in pre-certification settlements are collusion, inadequate prosecution, and attorney experience. *Id.* (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 795 (3d Cir. 1995)) (identifying “collusion, inadequate prosecution, and attorney inexperience [as] the paramount concerns in pre-certification settlements”). As detailed in Plaintiffs’ Motion for Final Approval, this action was resolved through an arms-length negotiation with the assistance of a skilled mediator, Dkt. 283 at 3-4, 9-10; and Plaintiffs received tens of millions of rows of data from Spotify to inform their assessment of Plaintiffs’ legal positions, and worked intimately with experts to evaluate the case, Dkt. 283 at 16. And as detailed in Class Counsel’s Motion for Attorneys’ Fees, Class Counsel are experienced in copyright actions and class actions, Dkt. 290 at 17-18.

Even though inquiries into manageability are irrelevant to the Court’s determination as to whether final approval is warranted, Plaintiffs dispute these purported problems pertaining to manageability would hinder this case from proceeding, as already thoroughly detailed in Plaintiffs’ Opposition to Spotify’s Motion to Strike Class Action Allegations, Dkt. 153. While Plaintiffs strongly disagree with Spotify’s characterization of potential hurdles as to predominance and manageability, any questions as to the level of risk in obtaining class certification and maintaining it through trial only corroborate the propriety of granting final approval. *See, e.g., Davenport v. Elite Model Management Corp.*, No. 1:13-CV-01061-AJN,

2014 WL 12756756, at *7 (S.D.N.Y. May 12, 2014) (“The level of risk involved in obtaining class certification and maintaining it through trial are also significant in this case. As noted above, the Second Circuit has recently determined to weigh in on whether unpaid internship cases may be maintained as class actions, and what standard to apply to the merits of such claims. Accordingly, the Parties anticipate that a determination as to the suitability of a class action would be reached only after the Second Circuit's decisions in the *Wang* and *Glatt* cases, and then only after further discovery and briefing. The fact that the settlement eliminates these complications favors final approval.”).

As Spotify acknowledges in its memorandum, Dkt. 294 at 4, the Settlement resolves any issues as to manageability. A key benefit to the Settlement is the creation of a Settlement Portal, which will enable Settlement Class Members to search for information relating to their copyrighted works, like copyright registration numbers. *See* Bernstein Decl. (Dkt. 285) ¶¶ 4-6. Settlement Class Members will even be able to click on a link to listen to a clip of their song (so long as the song is streamed on Spotify) to ensure that they have located the correct version of the recording, which solves one of the key manageability issues highlighted by Spotify in its briefing. *Id.* ¶ 7. And critically, proof of ownership will not be required unless there is a dispute as to ownership between members of the Settlement Class. Dkt. 294 at 13-14 (“Under the settlement, by contrast, there is no requirement to prove ownership unless there is an ownership dispute between members of the Settlement Class—and the settlement provides a mechanism to resolve such disputes.”). The Settlement also has mechanisms for resolving any disputes as to ownership. *See* Settlement Agreement (Dkt. 176-3) at ¶ 3.4. This addresses the purported issues relating to claims of individual ownership and the validity of copyrights for purposes of the settlement class and administration.

As to determinations regarding whether Spotify had a license to distribute a particular composition and whether Spotify actually did reproduce a particular composition, these inquiries will not be problematic for purposes of the claims administration process because Spotify has provided the Spotify Track Database to permit the Settlement Administrator and Settlement Claims Facilitator to make these determinations. *See* Settlement Agreement (Dkt. 176-3) at ¶ 3.3(b). Further, the Plan of Allocation resolves any questions of how damages will be resolved on a class wide basis. *See id.* at ¶ 3.5. And as to willful infringement, a determination of whether Spotify's infringement is willful is unnecessary in light of the Settlement.

The Settlement Agreement provides substantial benefits to the Class including an immediate cash fund and additional relief beyond what could have been provided in the context of litigation, including the future royalty payment program, audit rights, establishment of a mechanical licensing committee, creation of a copyright data sharing committee, and receipt of publisher catalog information. *Id.* at ¶¶ 4-8; Dkt. 294 at 4 (“Not only do these difficulties disappear in the settlement context, but as part of the settlement Spotify will undertake substantial efforts to improve the long-standing problem of unmatched works.”).

In short, Plaintiffs disagree with Spotify's positions both on the merits and as to the likelihood that they could obtain class certification if this case proceeded through litigation. In seeking the best result possible for the Class, Class Counsel has strongly advocated their position that they would likely prevail on both fronts. By advancing their positions regarding the strength of the case, Class Counsel ultimately were able to achieve a Settlement with a total value of \$112.5 million to the Class. But Class Counsel also recognized that all of the key merits and class certification issues in this case were sharply disputed, and that the risks associated with the denial of class certification or a loss on the merits would be substantial. Spotify's brief further

illustrates that the Settlement reflects a fair of reasonable compromise of those risks—and the hotly contested nature of the claims -- and that final approval should be granted.

Dated: November 17, 2017

Respectfully submitted,

By: /s/ Steven G. Sklaver
Steven G. Sklaver

Steven G. Sklaver (pro hac vice)
Kalpana Srinivasan (pro hac vice)
Krysta Kauble Pachman (pro hac vice)
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars
Los Angeles, California 90067-6029
Telephone: 310-789-3100
Facsimile: 310-789-3150
ssklaver@susmangodfrey.com
ksrinivasan@susmangodfrey.com
kpachman@susmangodfrey.com

Stephen E. Morrissey (pro hac vice)
SUSMAN GODFREY LLP
1201 Third Avenue, Suite 3800
Seattle, WA 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
smorrissey@susmangodfrey.com

Jacob Buchdahl (JB1902)
Geng Chen (GC2733)
SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Fl.
New York, New York 10019
Telephone: 212-336-8330
Facsimile: 212-336-8340
jbuchdahl@susmangodfrey.com
gchen@susmangodfrey.com

Henry Gradstein (pro hac vice)
Maryann R. Marzano (pro hac vice)
GRADSTEIN & MARZANO, P.C.
6310 San Vicente Boulevard, Ste 510
Los Angeles, California 90048
Telephone: 323-776-3100
hgradstein@gradstein.com
mmarzano@gradstein.com

Interim Co-Lead Class Counsel

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 17, 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.

/s/ Steven G. Sklaver

Steven G. Sklaver