UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE RICK NELSON COMPANY, LLC, **Plaintiff,** **v.** **SONY MUSIC ENTERTAINMENT,** **Defendant.**	Case No.: 1:18-cv-08791-LLS

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

I. INTRODUCTION ... 1

II. BACKGROUND AND SUMMARY OF SETTLEMENT NEGOTIATIONS ... 2

III. SUMMARY OF SETTLEMENT TERMS ... 4

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL ... 5

A. The Settlement Is the Result of Informed, Non-Collusive, Negotiations ... 6

B. The Settlement Falls Within the Range of Possible Approval ... 8

1. The Complexity, Expense and Likely Duration of the Litigation ... 8

2. The Stage of the Proceedings and the Amount of Discovery Completed ... 9

3. The Risks of Establishing Liability and Damages, and Maintaining Class Status Through Trial ... 10

4. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation ... 12

V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS ... 14

A. The Requirements of Rule 23(a) Are Satisfied ... 15

1. Numerosity ... 15

2. Common Questions of Law and Fact ... 15

3. Typicality ... 16

4. Adequacy ... 16

B. The Settlement Class Satisfies Rule 23(b)(3) ... 17

1. Common Issues Predominate ... 18

2. A Class Action Is Superior to Other Methods of Adjudication ... 19

VI. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN ... 20

A. Contents of Notice ... 22

VII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING ... 23

VIII. CONCLUSION ... 24

TABLE OF AUTHORITIES

Cases

Amchem Prods. v. Windsor
521 U.S. 591 (1997) 14, 18

Browning v. Yahoo! Inc.
2006 WL 3826714 (N.D. Cal. Dec. 27, 2006) 21

Cagan v. Anchor Sav. Bank FSB
1990 WL 73423 (E.D.N.Y. May 22, 1990) 13

Chatelain v. Prudential-Bache Sec.
805 F. Supp. 209 (S.D.N.Y. 1992) 11

Chin v. RCN Corp.
No. 08-7349, 2010 WL 1257586 (S.D.N.Y. Mar. 12, 2010) 6

Cotton v. Hinton
559 F.2d 1326 (5th Cir. 1977) 12

Cross v. 21st Century Holding Co.
No. 00 Civ. 4333 (MBM), 2004 WL 307306 (S.D.N.Y. Feb. 18, 2004) 15

Detroit v. Grinnell Corp.
495 F.2d 448 (2d Cir. 1974) 8, 10

Dura-Bilt Corp. v. Chase Manhattan Corp.
89 F.R.D. 87 (S.D.N.Y. 1981) 18

Frank v. Eastman Kodak Co.
228 F.R.D. 174 (W.D.N.Y. 2005) 11

Goldberger v. Integrated Res., Inc.
209 F.3d 43 (2d Cir. 2000) 8

Hicks v. Morgan Stanley & Co.
No. 01 Civ. 10071 (RJH), 2005 WL 2757792 (S.D.N.Y. Oct. 24, 2005) 9

In re "Agent Orange" Prod. Liab. Litig.
597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987) 12

In re AmBase Corp.
1995 WL 619856 (S.D.N.Y. Oct. 23, 1995) 13

In re China Sunergy Sec. Litig.
No. 07Civ.7895 (DAB), 2011 WL 1899715 (S.D.N.Y. May 13, 2011) 14

In re Gilat Satellite Networks, Ltd.
No. 02 Civ. 1510, 2007 WL 1191048 (E.D.N.Y. Apr. 19, 2007)....................................... 6

In re Global Crossing Sec. and ERISA Litig.
225 F.R.D. 436, 453 (S.D.N.Y. 2004) 17

In re Host Am. Corp. Sec. Litig.
Master File No. 05-CV-1250 (VLB), 2007 WL 3048865 (D. Conn. Oct. 18, 2007) 16

In re Lupron Mktg. & Sales Practices Litig.
228 F.R.D. 75 (D. Mass. 2005).. 18

In re Merrill Lynch Tyco Research Sec. Litig.
249 F.R.D. 124 (S.D.N.Y. 2008) 20

In re Michael Milken & Assoc. Sec. Litig.
150 F.R.D. 57 (S.D.N.Y. 1993) 7

In re NASDAQ Market-Makers Antitrust Litig.
176 F.R.D. 99 (S.D.N.Y. 1997) 5, 6

In re PaineWebber Ltd., P'ships Litig.
171 F.R.D. 104 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997)...................... 7, 8, 12

In re Prudential Sec. Inc. Ltd. P'ships Litig.
163 F.R.D. 200 (S.D.N.Y. 1995) 5

In re Sony SXRD Rear Projection Television Class Action Litig.
2008 WL 1956267 (S.D.N.Y. May 1, 2008) 21

In re Sturm, Ruger, & Co., Inc. Sec. Litig.
No. 3:09-cv-1293 (VLB), 2012 WL 3589610 (Aug. 20, 2012)....................................... 13

In re Traffic Exec. Ass'n
627 F.2d 631 (2d Cir. 1980)... 5

In re Union Carbide
718 F. Supp. 1099 (S.D.N.Y. 1989).. 14

In re Warner Chilcott Ltd. Sec. Litig.
No. 06 Civ. 11515 (WHP), 2008 WL 5110904 (S.D.N.Y. Nov. 20, 2008)........................ 5

Maley v. Del Global Tech. Corp.
186 F. Supp. 2d 358 (S.D.N.Y. 2002).. 10

Maywalt v. Parker & Parsley Petroleum Co.
67 F.3d 1072 (2nd Cir. 1995)... 22

McKenzie Constr. Inc. v. Maynard
758 F.2d 97 (3d Cir. 1985) 10

Milstein v. Huck
600 F. Supp. 254 (E.D.N.Y. 1984) 8

Phillips Co. v. Shutts
472 U.S. 797 (1985) 19

Reed v. General Motors Corp.
703 F.2d 170 (5th Cir. 1983) 7

Strougo v. Bassini
258 F. Supp. 2d 254 (S.D.N.Y. 2003) 5, 9

Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.
No. 01 Civ. 11814 (MP), 2004 WL 1087261 (S.D.N.Y. May 14, 2004) 10

Torrisi v. Tucson Elec. Power Co.
8 F.3d 1370 (9th Cir. 1993) 23

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.
396 F.3d 96 (2d Cir.), *cert. denied*, 544 U.S. 1044 (2005) 20

Weigner v. City of New York
852 F.2d 646 (2d Cir.1988) 20

Weinberge v. Kendrick
689 F.2d 61 (2d Cir. 1982) 13

Rules

Fed. R. Civ. P. 23 14

Fed. R. Civ. P. 23(a)(3) 16

Fed. R. Civ. P. 23(b)(3) 17

Fed. R. Civ. P. 23(c)(2)(B) 20

Fed. R. Civ. P. 23(f) 14

Fed. R. Civ. P. 23(g)(1) 17

Statutes

28 U.S.C. § 1715 24

Other Authorities

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.28 (3d ed. 1992) 7

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.45 (4th ed. 2002) 9

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 4.21 (3d ed. 1992) 18

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 4.25 (3d ed. 1992) 18

Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 8.2 (4th ed. 2002) 20

Manual for Complex Litigation (Third) § 30.41 (1995) 6

I. INTRODUCTION

This class action lawsuit challenges the legality of Defendant Sony Music Entertainment's ("Sony" or "Defendant") practice of how it calculates and pays royalties on the foreign streaming revenues generated by Class Members who did not have express language regarding the calculation of streaming royalties in their contracts. Plaintiff The Rick Nelson Company, LLC ("Plaintiff") alleged that Sony improperly reduced the foreign streaming royalties for Class Members' musical works through the assessment of an "intercompany charge" on the streaming revenues collected by Sony's foreign affiliates and subsidiaries.

Once this lawsuit was filed, Plaintiff and Sony recognized the tremendous risks and costs associated with protracted class action litigation, and agreed to explore the possibility of settlement. Over the next eighteen months, the parties engaged in an intensive arm's length settlement process which included numerous conferences (including one with the parties' experts), two separate all-day mediations with two different and highly seasoned mediators, and the exchange of legal and factual information necessary to assess the strengths and weaknesses of the claims so as to make an informed decision regarding settlement.

This process has resulted in a class action settlement which provides substantial relief to Class Members[1] and satisfies the standard for preliminary approval pursuant to Federal Rule of Civil Procedure ("Rule") 23. The Settlement calls for the creation of a $12.7 million common fund which will be paid or credited on a pro rata basis to the royalty accounts of Class Members who file claims, which amount is a substantial portion of the royalties at issue in the case.

---

[1] The parties have executed a "Stipulation and Agreement of Settlement" ("Settlement Agreement"), which is attached as Exhibit "A" to the supporting Declaration of Jeffrey A. Koncius ("Koncius Decl."). Koncius Decl. ¶ 3. All capitalized terms used in this brief are intended to have the definitions set forth in the Settlement Agreement unless otherwise stated.

Additionally, the Settlement also requires Sony to increase by 36% the amount of royalties calculated on foreign streaming revenues in the future for all Class Members' qualifying recordings (the "Additional Royalty") without the need to file claims or any temporal limitations. Plaintiff expects that the value for this prospective relief to be many millions of dollars and in excess of the common fund, since streaming is now the most dominant form of music distribution available. Thus, the Settlement provides substantial and significant relief to Class Members, while eliminating the risk, expense, and uncertainty associated with protracted, contested litigation through trial and appeals.

As set forth in this Motion, it is submitted that the Settlement is an exceptional result which satisfies the permissible standard for preliminary approval. The Settlement Class satisfies the requirement of Rule 23 and should be certified for settlement purposes. The proposed notice plan is robust, provides direct notice to Class Members where possible, and constitutes the best notice practicable. The Court should therefore grant preliminary approval to the Settlement and issue a schedule for granting final approval after notice is given to the Class.

II. BACKGROUND AND SUMMARY OF SETTLEMENT NEGOTIATIONS

Plaintiff controls the estate of renowned singer/songwriter/actor Eric Hilliard "Rick" Nelson, who released over 30 albums during his storied career, including chart-topping hits such as "Poor Little Fool" and "Travelin' Man." Plaintiff filed this class action lawsuit on September 25, 2018, in the Southern District of New York against Sony. The Complaint alleged causes of action for breach of contract and unjust enrichment. (ECF No. 1.) The core claims in the Complaint center on Sony's practices regarding the calculation and payment of foreign streaming royalties to so called "legacy artists" who do not have express provisions in their contracts relating to the calculation of such royalties. Specifically, Plaintiff alleged that Sony was

improperly assessing an intercompany charge in order to reduce the amount of foreign streaming revenue that was accounted for and therefore the corresponding royalties paid to these artists.

After Plaintiffs served Sony with the Complaint, the parties sought to resolve the matter through settlement. Over the next several months, the parties debated the strength of the operative claims and colorable defenses in the case. Plaintiff maintained that Sony had a legal obligation to pay royalties on foreign streaming revenues to Class Members and did not have a right to deduct intercompany charges from the "at source" streaming revenues collected by its foreign subsidiaries and affiliates. Plaintiff also stressed that this case satisfied the requirement for class certification and could be maintained as a class action lawsuit. Sony maintained (and continues to maintain) that, among other things, Sony has accounted correctly for royalties on foreign streaming; Plaintiff has not identified any contractual provision that requires Sony to account for royalties on foreign streaming "at-source"; and that, in the absence of contrary contractual language, New York law expressly permits Sony to pay royalties on foreign exploitations based on the amounts Sony receives from its affiliated foreign licensees and not based on the licensees' "at-source" streaming revenues. Moreover, Sony argued that any obligation to pay arising from the parties' course of dealing would be limited to the amounts and percentages already paid by Sony. Sony also argued its potential defenses to class certification.

After spending many months engaged in this process, the parties were unable to reach a settlement on their own, and agreed they needed the assistance of an experienced mediator in order to break the impasse. In fact, they ultimately needed the assistance of *two* mediators: David Heubener of JAMS on October 29, 2019 (with two of Plaintiff's principals in attendance) and Hon. Louis Meisinger (Ret.) of Signature Resolution on January 22, 2020. Although neither full-day mediation resulted in a settlement, the parties were able to make continuous progress

and, with the assistance of Judge Meisinger in the weeks following the second mediation, ultimately came to an agreement on the core terms of a settlement.

The parties filed their initial notice with the Court reflecting the likely settlement of the case on March 19, 2020. (ECF No. 26.) During the next several months the parties continued their settlement discussions which required the filing of multiple extensions of time to file the settlement documents and this Motion for Preliminary Approval. (*See* ECF Nos. 33, 42, 44, 48.) The parties eventually negotiated the terms of the final settlement documents, which required multiple drafts before being finalized and presented to this Court.

The Settlement Agreement was finalized on September 4, 2020. Koncius Decl. ¶ 4.

III. SUMMARY OF SETTLEMENT TERMS

Pursuant to the Settlement Agreement, Sony will make available a retrospective settlement fund of $12.7 million to the Settlement Class. *See* Settlement Agreement ¶¶ 10, 20(a). This represents an approximately 36% uplift on the total foreign streaming royalties credited by Sony between July 1, 2015, and June 30, 2019, to Class Members. The common fund is intended to compensate the Settlement Class for claims for retrospective damages and will be distributed on a pro rata basis to Class Members who file claims, in the form of credits or payment to their royalty accounts. Further, Class Members will receive the benefit of prospective relief as Sony will increase all Class Members' foreign streaming royalties for qualifying recordings going forward by 36%. Settlement Agreement ¶¶ 11, 20(b). This increase in the calculation and amount of foreign streaming royalties will provide significant relief to Class Members, and could very well result in even greater benefits than the $12.7 million being made available by Sony in the common fund.

Subject to the approval and direction of the Court, the common fund Settlement proceeds will be used to: (1) pay costs related to notice, administration, and distribution of the Settlement; (2) pay or credit the royalty accounts of eligible Class Members in accordance with the terms of the Settlement Agreement; (3) pay attorneys' fees, costs and expenses to Counsel for the Settlement Class, that may be awarded by the Court; and (4) pay a service award to the named Plaintiff.

IV. THE SETTLEMENT WARRANTS PRELIMINARY APPROVAL

Rule 23(e) requires judicial approval for any compromise of claims on a class basis. While approval of a proposed settlement is a matter within the discretion of the district court,[2] public policy strongly favors pretrial settlement of class action lawsuits. *See Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003); *see also In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515 (WHP), 2008 WL 5110904, at *1 (S.D.N.Y. Nov. 20, 2008) ("The settlement of complex class action litigation is favored by the Courts.") (citations omitted).

The issue now before the Court is whether the Settlement is within the range of what might later be found to be fair, reasonable, and adequate, such that notice of the proposed Settlement should be given to Class Members and a hearing scheduled to consider final approval of the Settlement. *See Prudential*, 163 F.R.D. at 210 ("At this stage of the proceeding, the Court need only find that the proposed settlement fits 'within the range of possible approval.'") (citation omitted); *In re Traffic Exec. Ass'n*, 627 F.2d 631, 634 (2d Cir. 1980) (finding that to grant preliminary approval, the court need only find that there is "'probable cause' to submit the [settlement] to Class Members and hold a full-scale hearing as to its fairness."); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("Preliminary approval of a

[2] *See, e.g., In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

proposed settlement is the first in a two-step process required before a class action may be settled."). "Once preliminary approval is bestowed, the second step of the process ensues: notice is given to the Class Members of a hearing, at which time Class Members and the settling parties may be heard with respect to final court approval." *See NASDAQ*, 176 F.R.D. at 102. Preliminary approval of a proposed settlement is warranted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the reasonable range of possible approval." *See id.* (*citing* Manual for Complex Litigation (Third) § 30.41 (1995)); *see also In re Gilat Satellite Networks, Ltd.*, No. 02 Civ. 1510, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007).

The Settlement here has none of the "obvious defects" typically screened for by courts, "such as unduly preferential treatment of class representatives . . . or excessive compensation for attorneys." *Chin v. RCN Corp.*, No. 08-7349, 2010 WL 1257586, at *2 (S.D.N.Y. Mar. 12, 2010) (quoting Manual for Complex Litigation (Third) § 30.41 (1995)). The Settlement itself is not contingent upon approval of attorneys' fees or any service awards to the Class representative. *See* Settlement Agreement ¶ 18. The Court will separately and independently determine the appropriate amount of fees, costs, and expenses to award to Class Counsel and any award to the Class representative. Moreover, the pro rata allocation of the Settlement fund will treat Class Members fairly. Accordingly, the Settlement treats all members of the Class equally, and there are no "obvious deficiencies" which would prevent preliminary approval.

A. <u>The Settlement Is the Result of Informed, Non-Collusive, Negotiations</u>

Where a settlement is reached after extensive arm's length negotiations by competent counsel well-informed regarding the circumstances of the litigation and the strengths and

weaknesses of their respective positions, it is entitled to a "strong initial presumption of fairness." *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). The supporting opinion of experienced counsel is entitled to considerable weight in a court's evaluation of a proposed settlement. *See In re Michael Milken & Assoc. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). Courts generally presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion, absent evidence to the contrary. Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.28, at 11-59 (3d ed. 1992) (counsel are "not expected to prove the negative proposition of a noncollusive agreement").

As detailed in this Motion and the supporting declarations, the settlement negotiations were extensive and highly adversarial in nature. Koncius Decl. ¶ 5; *See also* Declaration of Daniel L. Warshaw ("Warshaw Decl.") ¶ 3; Declaration of Neville Johnson ("Johnson Decl.") ¶¶ 6-7. As a result, the settlement process took well over a year to complete, during which time the parties held dozens of conferences and completed two full-day mediations with two different mediators. *Id*. There was no collusion with respect to the Settlement. During these protracted negotiations, Plaintiff requested and received information from Sony related to its practices regarding the payment of foreign streaming royalties to Class Members and the amount of foreign streaming royalties at issue in the litigation. Koncius Decl. ¶ 6. The parties also exchanged their views of the strengths and weaknesses of their claims and defenses, which allowed Plaintiff and Class Counsel to assess the substantial benefits against the risks and expense of continuing to litigate this case. *Id*. ¶ 7. Plaintiff and Class Counsel also retained

professional auditors as litigation consultants to assist in the evaluation of the case and the Settlement before it was finalized. *Id.* ¶ 8. After evaluating these factors, Class Counsel relied on their considerable experience in complex class action lawsuits to recommend the Settlement. Koncius Decl. ¶ 9; Warshaw Decl. ¶ 11; Johnson Decl. ¶ 8. Accordingly, it is entitled to a "strong initial presumption of fairness." *See In re PaineWebber Pshps. Litig.*, 171 F.R.D. at 125.

B. The Settlement Falls Within the Range of Possible Approval

Even when considered against the more exacting standard for determining the fairness of a settlement at final approval, the Settlement here is shown to be fair, reasonable, and adequate. The Second Circuit has identified nine factors relevant to approval of a class action settlement:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement[3], (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,[4] (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.

Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974) (internal citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). As discussed below, a review of the key factors support preliminary approval of the Settlement.

1. *The Complexity, Expense and Likely Duration of the Litigation*

"The expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement." *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984). This case involves many intricate legal issues relating to complex recording

---

[3] This brief does not discuss the reaction of the Class to the Settlement since notice has not been sent.

[4] Plaintiff cannot, and does not, argue here that Sony is unable to satisfy a judgment greater than the value of the Settlement.

contracts and their interpretation in light of decades of performance thereunder. The costs and risks associated with litigating to a verdict, not to mention through any related appeals, would have been high, and the process would require extensive time and resources. This is especially true in this case, which is at the pleading stage and would thus require Plaintiff to withstand motion(s) to dismiss and summary judgment, obtain class certification, and prevail at trial before obtaining a favorable judgment. Even in the event that the Class could recover a larger award after a trial, the additional delay through trial, post-trial motions, and the appellate process could deny the Class (which has many elderly members) any recovery for years, further reducing its value. And, because this litigation would have placed burdens on both parties and the Court, this factor militates in favor of the Settlement. *Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs [and] justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo*, 258 F. Supp. 2d at 261 ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation…the passage of time would introduce yet more risks…and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

2. *The Stage of the Proceedings and the Amount of Discovery Completed*

In evaluating a settlement, "[t]here is no precise formula for what constitutes sufficient evidence to enable the court to analyze intelligently the contested questions of fact. It is clear that the court need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation." Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.45 (4th ed. 2002). By the time the Settlement was reached here, Class Counsel had more than sufficient knowledge of the merits of the claims alleged in the litigation and the

defenses that would be asserted. Class Counsel are intimately familiar with the factual and legal issues and the ever-changing legal landscape surrounding the claims at issue in this litigation.

While the case was settled at an early junction, a substantial portion of the parties' early settlement efforts focused on an exchange of information and developing an understanding of: (1) the strength of their claims and defenses; (2) information regarding Sony's relevant payment practices; and, (3) the amount at issue in this litigation. Koncius Decl. ¶ 7. Class Counsel also retained professional auditors as litigation consultants to assist in the evaluation of the case and the Settlement before it was finalized. *Id.* ¶ 8. As a result of these efforts, Class Counsel were well informed of the strengths and weaknesses of Plaintiff's claims and Defendant's defenses, which permitted them to fully consider and evaluate the fairness of the Settlement to the Class. *See Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (finding action had advanced to stage where parties "'have a clear view of the strengths and weaknesses of their cases.'"); *McKenzie Constr. Inc. v. Maynard*, 758 F.2d 97, 101-2 (3d Cir. 1985) ("[A] prompt and efficient attorney who achieves a fair settlement without litigation serves both his client and the interests of justice."). In the context of a complex class action, early settlement has far reaching benefits in the judicial system. *Maley v. Del Global Tech. Corp.*, 186 F. Supp. 2d 358, 373 (S.D.N.Y. 2002).

3. *The Risks of Establishing Liability and Damages, and Maintaining Class Status Through Trial*

In assessing a proposed settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. While Class Counsel believe that Plaintiff's claims are meritorious, there are substantial risks to achieving a better result for the Class through continued

litigation. Namely, Sony has maintained that it is not liable because, among other reasons, it has accounted correctly for royalties on foreign streaming; Plaintiff has not identified any contractual provision that requires Sony to account for royalties on foreign streaming "at-source"; and that, in the absence of contrary contractual language, New York law expressly permits Sony to pay royalties on foreign exploitations based on the amounts Sony receives from its affiliated foreign licensees and not based on the licensees' "at-source." Moreover, Sony maintains that if its obligation to pay such royalties arises from implied terms and course of dealing, it is not required to pay additional streaming royalties to Class Members beyond what it has already paid. Sony would likely make additional attacks on the Class Members' claims, including any potentially applicable contractual or statutory limitations period that may apply.

Moreover, while Class Counsel believe that a class would be certified even over Defendant's objections, there is always a risk that Defendant would successfully oppose class certification. *See Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (noting that "[w]hile plaintiffs might indeed prevail [on a motion for class certification], the risk that the case might not be certified is not illusory"). In attempting to defeat class certification, Sony would point to, among other things, variations in contract terms among legacy artists and the inability to ascertain what may have been represented when they signed their contracts as long as 50 years ago (in some cases). Even if the Class were certified by the Court, Defendant could have then appealed the certification decision under Fed. R. Civ. P. 23(f), and/or argued for decertification as the litigation progressed. *Chatelain v. Prudential-Bache Sec.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) ("Even if certified, the class would face the risk of decertification.").

In short, the substantial risks of establishing liability and damages and prevailing at trial strongly support approval of the Settlement. Protracted litigation carries inherent risks that would

necessarily have delayed and endangered Class Members' recovery. The Settlement provides substantial relief to Class Members without further delay. Notwithstanding the confidence of Class Counsel in the merits of the Plaintiff's claims, Class Counsel are cognizant that significant obstacles existed at each stage of motion practice and trial. Although Plaintiff and Class Counsel would have obviously sought more damages in any trial than the amount of the Settlement, the value of the Settlement constitutes a substantial recovery under all of the circumstances.

4. *The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of All the Attendant Risks of Litigation*

The adequacy of a settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. Apr. 1987). Moreover, the Court need only determine whether the Settlement falls within a "'range of reasonableness.'" *PaineWebber*, 171 F.R.D. at 130 (citation omitted). When evaluating "the terms of the compromise in relation to the likely benefits of a successful trial . . . the trial court is entitled to rely upon the judgment of experienced counsel for the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). "Indeed, the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.*

Here, the relief the Settlement provides for Class Members is outstanding. Sony has agreed to create a Settlement Fund of $12.7 million to pay or credit Class Members for past royalties allegedly underpaid. Based on Class Counsel's investigation and the information exchanged by the parties, this amount comprises approximately 36% of all foreign streaming royalties earned by Class Members from July 1, 2015, through June 30, 2019. The recovery of

individual Class Members will be equitably calculated based on the percentage of foreign streaming royalties paid or credited to such Class Members for eligible works, as a proportion of all foreign streaming royalties paid or credited to all Class Members for all eligible works for the same period. Therefore, Class Members who file claims to participate in the retrospective relief fund will receive a larger portion of the fund if their eligible works resulted in greater royalties paid or credited to them.

Sony will also significantly improve the foreign streaming royalties it credits or pays to Class Members in the future, by increasing the calculation of relevant foreign streaming royalties for qualifying recordings by 36%. Given that streaming usage and revenues are continuing to increase, the value of this prospective relief should amount to many more times the amount of the Settlement fund.

Courts in this circuit routinely approve recoveries with far less favorable terms. *See Cagan v. Anchor Sav. Bank FSB*, 1990 WL 73423, at *12-13 (E.D.N.Y. May 22, 1990) (approving $2.3 million settlement over objections that "best possible recovery would be approximately $121 million."); *In re AmBase Corp.,* 1995 WL 619856, at *2 (S.D.N.Y. Oct. 23, 1995) (approving settlement where class members received 3% to 20% of their losses, calculated as if all damage issues were resolved in class members' favor); *see also Weinberge v. Kendrick,* 689 F.2d 61, 65 (2d Cir. 1982) (class action settlement approved as fair, reasonable, and adequate even where "it is not disputed that the recovery will be only a negligible percentage of the losses suffered by the class."); *Grinnell,* 495 F.2d at 455 ("The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."); *In re Sturm, Ruger, & Co., Inc. Sec. Litig.* , in No. 3:09-cv-1293 (VLB), 2012 WL 3589610 *21 (Aug.

20, 2012) (approving a 3.5% recovery where, "[i]n light of the legal and factual complexity, the unpredictability of a lengthy trial and the appellate process as discussed above, the settlement amount is well within the range of reasonableness for similar . . . cases.") (*citing In re China Sunergy Sec. Litig.*, No. 07Civ.7895 (DAB), 2011 WL 1899715, at *5 (S.D.N.Y. May 13, 2011) (noting that "average settlement amounts in securities fraud class actions where investors sustained losses over the past decade . . . have ranged from 3% to 7% of the class members' estimated losses")); *In re Union Carbide*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989) (acknowledging that "a settlement can be approved even though the benefits amount to a small percentage of the recovery sought" and that the "essence of settlement is compromise.").

Here, in light of the novel issues presented, factual and legal complexity entailed in the prosecution and defense, and the unpredictability associated with class certification proceedings, a lengthy trial and any appellate proceedings (both under Fed. R. Civ. P. 23(f) and on the merits), Plaintiff respectfully submits that the result achieved is excellent under all of the circumstances.

As the proposed Settlement meets the requirements for final approval, it clearly is "within the range" of possible approval, and thus preliminary approval should be granted and the Class should be notified and given the opportunity to evaluate the terms of the proposed Settlement.

V. THE COURT SHOULD CERTIFY THE PROPOSED SETTLEMENT CLASS

One of this Court's functions in reviewing a proposed class settlement is to determine whether the action may be maintained as a class action under Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997). Rule 23(a) sets forth four prerequisites to class certification: (i) numerosity; (ii) commonality; (iii) typicality; and, (iv) adequacy of representation. In addition, the Class must meet one of the three requirements of Rule 23(b). *See* Fed. R. Civ. P. 23. Here, Plaintiff seeks to certify the following class for settlement purposes:

> All persons and entities who are parties to a "Class Contract" (defined by the Settlement Agreement as a contract (i) to which SME, or any entity of which SME is a member or partner and on behalf of which SME pays or credits royalties, is a party; (ii) that provides for exploitation of Recordings, the copyrights in which SME owns and/or controls; and (iii) in connection with which SME paid or credited any royalties for Foreign Streams calculated on a basis other than Foreign Streams At-Source Revenue during the period from September 25, 2012, through June 30, 2019, or any portion thereof).

Settlement Agreement § 2.

A. The Requirements of Rule 23(a) Are Satisfied

The Settlement Class meets the numerosity, commonality, and typicality standards of Rule 23(a)(1)-(3) as set forth below.

1. *Numerosity*

The number and location of putative Class Members is such that it is impractical to join them all in one lawsuit. *See Cross v. 21st Century Holding Co.*, No. 00 Civ. 4333 (MBM), 2004 WL 307306, at *1 (S.D.N.Y. Feb. 18, 2004) (certifying class logically exceeding 100 members). Here, the numerosity standard is satisfied as Sony is one of the largest record labels in the United States, and thousands of royalty recipients are included in the Class.

2. *Common Questions of Law and Fact*

There are substantial questions of law and fact common to all Class Members including, but not limited to, whether:

(a) Defendant has withheld international streaming revenue from Plaintiff and members of the Class;

(b) Plaintiff and the Class are entitled to an accounting;

(c) Defendant has been unjustly enriched by its actions;

(d) Defendant breached its contractual obligations by withholding international streaming revenue from Plaintiff and members of the Class;

(e) Class Members are entitled to restitution, and, if so, what is the proper measure of such;

(f) Defendant benefited financially from its wrongful acts; and,

(g) Plaintiff and Class Members have been damaged by Defendant's actions or conduct and the proper measure of damages.

These common questions are susceptible to common answers as this case centers on the legality of Sony's class-wide policies regarding the calculation and payment of foreign streaming royalties to Class Members. These answers, in turn, will determine the measure of damages.

3. Typicality

Typicality requires the class representatives' claims to be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Here, Plaintiff's claims are "typical" of other Class Members' claims because they were subjected to a uniform set of policies and a common course of conduct regarding Sony's calculation and payment of foreign streaming royalties that Sony used for legacy artists and legacy contracts. Additionally, Plaintiff and all other Class Members' claims are premised on the same legal theories and seek the same relief in the form of monetary damages and future injunctive relief. Accordingly, the typicality requirement is satisfied. *See In re Host Am. Corp. Sec. Litig.*, Master File No. 05-CV-1250 (VLB), 2007 WL 3048865, at *5 (D. Conn. Oct. 18, 2007) (Bryant, J.) (finding typicality where plaintiffs alleged defendants committed the same acts, in the same manner against all class members).

4. Adequacy

The adequacy requirement of Rule 23(a)(4) requires Plaintiff to demonstrate that: (1) there is no conflict of interest between Plaintiff and the other Class Members; and (2) Class Counsel are qualified, experienced and capable of conducting the litigation. *See In re Global*

Crossing Sec. and ERISA Litig., 225 F.R.D. 436, 453 (S.D.N.Y. 2004). Here, Plaintiff does not have any claims antagonistic to or in conflict with those of the other Class Members, as Plaintiff is pursuing the same legal theories as the rest of the Class relating to the same course of conduct. Plaintiff has further demonstrated it is a willing and suitable class representative, through its active participation in the litigation. *See* Declaration of Matthew Nelson ¶¶ 2-5; Declaration of Gunnar Nelson ¶¶ 2-5.

Additionally, Class Counsel have extensive backgrounds in complex litigation and consumer class actions, have been appointed class counsel in prior cases, and have the resources necessary to prosecute this action to its conclusion. *See* Koncius Decl. ¶¶ 10-11; Warshaw Decl. ¶¶ 4-10; Johnson Decl. ¶¶ 3-5. For the same reasons, Plaintiff's counsel should be appointed as class counsel. *See* Fed. R. Civ. P. 23(g)(1) (setting forth requirements for appointment of class counsel).

B. The Settlement Class Satisfies Rule 23(b)(3)

Rule 23(b)(3) authorizes class actions to proceed where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.* "In adding 'predominance' and 'superiority' to the qualification-for-certification list, the Advisory Committee sought to cover cases 'in which a class action would

achieve the economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 92 (D. Mass. 2005) (citing *AmchemProds.,* 521 U.S., at 615). Where, as here, a court is deciding certification in the context of a proposed settlement class, questions regarding the manageability of the case for trial purposes do not have to be considered. *Amchem*, 521 U.S. at 619.

1. *Common Issues Predominate*

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Lupron*, 228 F.R.D. at 91 (citing *Amchem*, 521 U.S. at 623). "Rule 23(b)(3) does not require that *all* questions of law or fact be common; it only requires that the common questions *predominate* over individual questions." *Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F.R.D. 87, 93 (S.D.N.Y. 1981) (emphasis added); *see generally* Alba Conte & Herbert Newberg, *Newberg on Class Actions*, §§ 4.21, 4.25 (1992).

In this case, the predominance requirement is satisfied because the claims and defenses arise from Sony's common policy of paying Class Members' foreign streaming royalties based on less than all their foreign streaming revenues. As alleged in the Complaint, Sony's common payment practices have been adopted on a class wide basis and consistently applied to all of the Class Members without regard to individual differences and determinations. These core facts give rise to and form Plaintiff's theory of liability, which seeks recovery of foreign streaming revenues that Sony has underpaid to Class Members. Thus, Plaintiff's challenge to the legality of Defendant's policy of withholding foreign streaming revenue earned by foreign subsidiaries and affiliates can be resolved on a class-wide basis without regard to individualized inquiries.

2. *A Class Action Is Superior to Other Methods of Adjudication*

Additionally, the superiority requirement of Rule 23(b)(3) is satisfied. A class action is not only the most desirable, efficient, and convenient mechanism to resolve the Class claims, but almost certainly the only fair and efficient means available to adjudicate such claims. *See, e.g., Phillips Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[c]lass actions . . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . [in such a case,] most of the plaintiffs would have no realistic day in court if a class action were not available").

A class action is superior in this case because there are thousands of Class Members, many of whom likely have relatively small claims, and the class-wide adjudication of their claims is the most efficient and economical option for the parties and the judiciary. Class Members likely would be unable or unwilling to shoulder the great expense of litigating the claims at issue against Defendant given the comparatively small size of each individual Class Member's claims. While the damages available to individual Class Members were they to prevail are not de minimis, for the vast majority of Class Members it will be outweighed by the significant costs and effort that is necessary to conduct an audit or litigate an individual case through trial. Moreover, the adjudication of thousands of separate individual actions asserting identical claims arising from the same course of conduct would be inefficient and place an undue burden on the federal court system as well as the Defendant. Conversely, this class action provides a fair, reasonable, and adequate recovery for Class Members without burdening the Court and the parties with a multiplicity of proceedings. Thus, it is desirable to adjudicate this matter as a class action.

In light of the foregoing, all relevant requirements of Rule 23 are satisfied, and the Court should certify this Class for settlement purposes in connection with the proposed Settlement.

VI. THE COURT SHOULD APPROVE THE PROPOSED NOTICE PLAN

Rule 23 requires that notice of a settlement be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 8.2 at 162-65 (4th ed. 2002). However, there are no rigid rules to apply when determining the adequacy of such notice; "the standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 113-14 (2d Cir.), *cert. denied*, 544 U.S. 1044 (2005). Further, it is clearly established that "notice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch Tyco Research Sec. Litig*., 249 F.R.D. 124, 133 (S.D.N.Y. 2008) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988), *cert. denied*, 488 U.S. 1005 (1989)).

The proposed Notice program in this case satisfies all of these criteria and is in fact the best notice practicable, as the proposed Notice: (a) informs Class Members of the substantive terms of the Settlement; (b) advises Class Members on how to submit a claim (including the claim deadline for doing so); (c) advises Class Members of their options for opting-out of, or objecting to, the Settlement; and, (d) explains how to obtain additional information about the Settlement. *See* Settlement Agreement Ex. A-1. Moreover, the Notice program was designed and is being implemented by a leading notice firm, JND Legal Administration. *See generally*, Declaration of G. Intrepido-Bowden ("Intrepido-Bowden Decl.").

As for the manner of giving notice, virtually all Class Members will receive direct and/or published notice within 60 days of this Court's preliminary approval of the Settlement. The Parties will employ Email Notice for those Class Members for whom Sony maintains valid email addresses. Settlement Agreement ¶ 14. Where Email Notice is not or cannot be successfully delivered to a Class Member, the Settlement Administrator will send, via First-Class Mail, the notice and claim form to those Class Members, using updated mailing address information. *Id*. Courts regularly approve such a process. *See, e.g., In re Sony SXRD Rear Projection Television Class Action Litig.*, 2008 WL 1956267 (S.D.N.Y. May 1, 2008) (email notice to all known addresses, and a hard copy mailing to persons who did not have an email address on file or where the email was returned as undeliverable); *Browning v. Yahoo! Inc.*, 2006 WL 3826714 (N.D. Cal. Dec. 27, 2006) (email notice sent to all available addresses, with a hard copy mailing sent to anyone who did not have an email address on file or where the email was returned as undeliverable).

These actions alone will ensure the majority of all Class Members will receive direct notice. However, and in addition, the Settlement Administrator has developed a supplemental publication notice plan which includes advertisements in: (1) industry print publications Billboard and Music Connection; (2) the *Tennessean* the largest daily newspaper in Nashville, widely known as "Music City"; (3) targeted internet banner advertisement on websites and social media sites such as the Google Display Network ("GDN"), Facebook and LinkedIn[5]; and (4)

[5] Over 8.3 million impressions behaviorally and contextually targeted to the music and recording industry will be delivered through GDN (including sites such as RollingStone.com, Pandora.com, AmericanSongwriter.com); over 1.5 million impressions targeting individuals interested in pages related to musicians and the Recording Industry Association of America will be delivered through Facebook; and over 380,000 impressions targeting recording artist and musician job titles will be delivered through LinkedIn. In addition, an estimated 230,000

banner notice placements in industry e-Newsletters including Music Connection Weekly Bulletin e-Newsletter, Digital Music News Daily Snapshot e-Newsletter and Music Radar Dedicated e-Blast, to provide notice to any Class Members who did not receive direct notice. Intrepido-Bowden Decl. ¶¶ 25-31. The Settlement Administrator will also create a Settlement Website with online claim filing and include information about the terms of the Settlement, host all of the relevant court, settlement and notice documents, and create a toll-free telephone line. *Id.* ¶ 32. Therefore, the Court should approve the Notice program and the form and content of the Notices attached to the Settlement Agreement, as described below.

A. Contents of Notice

The proposed Notices to be sent and the Claim Form are attached to the Settlement Agreement. The Notices include a summary of settling Parties' respective litigation positions; the general terms of the Settlement as set forth in the Settlement Agreement; instructions for how to opt-out of, or object to, the Settlement; the process and instructions for making a claim; the amount of requested attorneys' fees and representative Plaintiff Service Awards; and the date, time, and place of the Final Fairness Hearing. *See* Settlement Agreement Exs. A-1, A-3, A-4.

The proposed Notices are more than sufficient because they "fairly apprise the ... 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." *See Maywalt v. Parker & Parsley Petroleum Co.,* 67 F.3d 1072, 1079 (2nd Cir. 1995) (internal quotations omitted); *see also Shutts*, 472 U.S. at 812. The Notices provide Class Members with information on the Class, the purpose and timing of the fairness hearing, opt-out procedures and deadlines, and the deadline and process for filing

---

impressions will be delivered through top industry websites including MusicConnection.com, DigitalMusicNews.com, and MusicRadar.com. Intrepido-Bowden Decl. ¶ 26.

claims. The Settlement Administrator will provide a telephone number and website that Class Members may use to the extent they have any questions. Intrepido-Bowden Decl. ¶¶ 32, 33. The Notices clearly explain that any Class Member who wishes to opt out of the Class must timely submit written notice clearly manifesting his or her intent to be excluded from the Class to the designated Post Office box established for such purpose. *See* Settlement Agreement Exs. A-1, A-3, A-4. Class Members will be provided with sixty (60) days from the mailing or e-mailing of notice to submit requests to opt-out. *See* Settlement Agreement Exs. A-1, A-3, A-4. The Notices also clearly explain that any Class Member who wishes to object to the Settlement must timely file a written statement of objection with the Clerk of the Court and the Parties' counsel. *Id.* Such objections must be postmarked no later than sixty (60) days following the mailing of notice. *Id*. That is more than sufficient under applicable case law. *See Maywalt*, 67 F.3d at 1079; *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993).

VII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING

The last step in the settlement approval process is the final approval hearing at which the Court may hear all evidence necessary to evaluate the proposed Settlement. Proponents of the Settlement may offer argument in support of the Settlement's approval, and members of the Settlement Class or their counsel may be heard if they so choose. Plaintiff proposes the following schedule of events necessary for a hearing on final approval of the Settlement.

/ / /

/ / /

/ / /

/ / /

/ / /

DATE	EVENT
14 days after preliminary approval	Settlement Administrator to provide direct mail and email notice
30 days after preliminary approval	Settlement Administrator to cause the Publication Notice to appear
53 days after the mailing of Notice	Class Counsel shall file a motion for final approval of the Settlement and all supporting papers
60 days after the mailing of Notice	Last day for Settlement Class Members to: file claims; request exclusion from the Settlement Class; object to the Settlement; and, file notices to appear at the Fairness Hearing
20 days before the Fairness Hearing	Class Counsel shall file with the Court a list of all persons and entities who have timely and validly requested exclusion from the Settlement Class, and Class Counsel and Defendant may respond to any objections to the proposed Settlement
At least 250 days after preliminary approval[6]	Final Fairness Hearing

VIII. CONCLUSION

WHEREFORE, based on the foregoing, Plaintiff respectfully requests that the Court enter an Order:

(1) Preliminarily approving the Settlement as set forth in the Settlement Agreement;

(2) Approving the Notice plan;

(3) Appointing JND as Settlement Administrator;

(4) Certifying the Class for settlement purposes;

[6] This period of time between preliminary approval and the Fairness Hearing will allow the Settlement Administrator, Plaintiff, and Defendant to each satisfy their various pre-hearing obligations under the Settlement Agreement. Additionally, under the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), the Court may not issue an order giving final approval of a proposed settlement earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with notice of the proposed Settlement. *Id.* at § 1715(d).

(5) Appointing The Rick Nelson Company, LLC as Representative Plaintiff;

(6) Appointing as Class Counsel Johnson & Johnson, LLP, Pearson, Simon & Warshaw, LLP, and Kiesel Law LLP; and,

(7) Scheduling a Final Fairness Hearing in this matter.

Plaintiff respectfully submits the accompanying, proposed Preliminary Approval Order for the Court's review and consideration. Plaintiff stands ready to provide any additional materials that the Court may require to consider and preliminarily approve this Settlement.

DATED: September 4, 2020

Respectfully submitted,

By: */s/ Jeffrey A. Koncius*
JEFFREY A. KONCIUS

Jeffrey A. Koncius
Nicole Ramirez (Admitted *Pro Hac Vice*)
KIESEL LAW LLP
8648 Wilshire Boulevard
Beverly Hills, California 90211-2910
Telephone: (310) 854-4444
Facsimile: (310) 854-0812
koncius@kiesel.law
ramirez@kiesel.law

Daniel L. Warshaw (Admitted *Pro Hac Vice*)
Bobby Pouya (Admitted *Pro Hac Vice*)
PEARSON, SIMON & WARSHAW, LLP
15165 Ventura Boulevard, Suite 400
Sherman Oaks, California 91403
Telephone: (818) 788-8300
Facsimile: (818) 788-8104
dwarshaw@pswlaw.com
bpouya@pswlaw.com

Neville L. Johnson (*Pro Hac Vice* to be Filed)
Douglas L. Johnson (*Pro Hac Vice* to be Filed)
JOHNSON & JOHNSON, LLP
439 N. Canon Dr., Suite 200
Beverly Hills, California 90210
Telephone: (310) 975-1080
Facsimile: (310) 975-1095

njohnson@jjllplaw.com
djohnson@jjllplaw.com

Laurie Rubinow
James C. Shah
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
52 Duane Street, 7th Floor
New York, New York 10007
Telephone: (212) 419-0156
Facsimile: (866) 300-7367
lrubinow@sfmslaw.com
jshah@sfmslaw.com

Attorneys for Plaintiff and the Proposed Class