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 ATTORNEYS' FEES, COSTS, AND SERVICE PAYMENT

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I. INTRODUCTION

This class action lawsuit challenged 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' artistic works who did not have express language regarding the calculation of those royalties in their contracts.[1] 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. On September 16, 2020, this Court granted preliminary approval of the class Settlement[2] (*see* Preliminary Order for Notice and Hearing in Connection with Settlement Proceedings (ECF No. 68), hereinafter "Preliminary Order") which provides substantial benefits to the class, to wit, $12.7 million in non-reversionary cash for retrospective relief and an increase of the Class Members' going-forward royalty rates for foreign streaming by 36% in perpetuity (the Settlement is discussed in depth further below). Not only is the latter benefit likely larger than the cash component of the Settlement, it will also be provided automatically to all Class Members whether or not they make a claim.

[1] Digital streaming now accounts for 85% of all music consumption, with physical sales making up only 7%. *See* RIAA 2020 Mid-Year Music Industry Revenue Report, https://www.riaa.com/wp-content/uploads/2020/09/Mid-Year-2020-RIAA-Revenue-Statistics.pdf; *see also* Mark Savage, "Is this the end of owning music?," BBC News (Jan. 3, 2019), https://www.bbc.com/news/entertainment-arts-46735093. Even these statistics likely underrepresent the dismal state of physical record sales for legacy artists, as the majority of sales are attributable to newer artists with younger and more activated fan bases.

[2] The parties 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."). All capitalized terms used in this brief are intended to have the definitions set forth in the Settlement Agreement unless otherwise stated.

The law firms representing the Plaintiff[3] took on one of the world's largest record labels with unlimited resources to litigate. However, and despite the many challenges and obstacles they faced, the attorneys for the Plaintiff were able to negotiate the Settlement, which provides significant benefits to the Class. Through this Motion, Plaintiff requests that the Court approve the requested fee of one-third[4] of the common fund ($4,233,333.33), $27,927.96 in unreimbursed out-of-pocket litigation costs, an estimated $66,764.00 costs for the Claims Administrator JND Legal Administration ("JND"), and $25,000.00 as a combined service award for the two principals of Plaintiff The Rick Nelson Company, LLC.[5]

The requested attorneys' fees represent 33.33% of the Settlement Fund, which is well within the amounts of fees awarded in the Second Circuit, as explained below. And, the reasonableness of Plaintiff's fee request is confirmed by a lodestar cross-check. Plaintiff's requested litigation costs, which were advanced by Class Counsel without any guarantee that they would be reimbursed, were reasonably incurred and necessary to achieve the favorable

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[3] The law firms representing the class in this action, and which now move for payment of their attorneys' fees and expenses, are: Johnson & Johnson LLP, Kiesel Law LLP, Pearson Simon & Warshaw, LLP, and Shepherd, Finkelman, Miller & Shah, LLP.

[4] It must be recognized that the Settlement is likely multiple times the size of the amount of cash in the retrospective common fund since the Settlement provides for the going forward royalty rate to be increased by 36% across the board for all Class Members. Settlement Agreement ¶¶ 11, 20(b). As a result, it is a misnomer to state that the requested fee is "one-third" of the Settlement since in reality it will likely be a fraction of that once the amount of the increased royalty is realized by Class Members. Nevertheless, for purpose of this Motion counsel use the reference to one-third since against the cash component of the Settlement alone, the requested fee is more than reasonable, justified and in-line with awards in the Second Circuit, especially where other, non-monetary relief, is often included in analyzing the fee award which is not present here. *See e.g., Torres v. Gristede's Operating Corp.*, 519 F. App'x 1, 5 (2d Cir. 2013) (including in its review of fee award injunctive and non-monetary relief components of settlement); *see also*, *Ramsey v. Philips N. Am. LLC*, 2018 U.S. Dist. LEXIS 226672 at *6 (S.D. Ill. Oct. 15, 2018) (comprising "33 1/3% of the monetary recovery, and far less when non-monetary relief is considered, as it must be, Class Counsel's fee application is reasonable.").

[5] Pursuant to the Settlement, all fees, costs, claims administration expenses and service payments are to be paid out of the settlement fund. Settlement Agreement ¶¶ 1(bb), 10, 18, 19.

result in this case. Similarly, the requested claims administration costs were necessary to ensure proper and adequate notice of the Settlement to Class Members and administration of the Settlement. Finally, Plaintiff's requested service payment is reasonable to compensate the principals of Plaintiff for the work performed and service to the Class. As detailed herein, this Motion comports with applicable law, is well-justified, and should be granted.

II. BACKGROUND

A. Background and Summary of Settlement Negotiations

Plaintiff controls the estate of renowned singer/songwriter/actor Eric Hilliard "Ricky" 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 centered 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 Plaintiff 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. Defendant also argued its potential defenses to class certification.

After spending many months engaged in this informal 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, Matthew Nelson and Gunnar Nelson, in attendance) and Hon. Louis Meisinger (Ret.) of Signature Resolution on January 22, 2020. Although neither 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 the Settlement eventually presented to the Court.

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 finalize the settlement documents and file the Motion for Preliminary Approval. (*See* ECF Nos. 33, 42,

44, 48.) The parties eventually negotiated the terms of the final settlement documents, the Settlement Agreement was finalized on September 4, 2020 (Koncius Decl. ¶ 6) and Preliminary Approval granted on September 16, 2020. (ECF No. 68.)

B. 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. Additionally, all Class Members will receive the benefit of prospective relief without their having to do anything 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 paid of foreign streaming royalties going forward 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. In exchange for all of these benefits, the Settlement provides for a narrowly tailored release that is specifically limited to claims arising out of the allegations in this case relating to the royalties paid on foreign streaming. Settlement Agreement ¶¶ 1(x), 1(z), 1(gg), 7; *see also Nat'l Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 16-18 (2d Cir. 1981).

The Settlement allows Class Counsel to make an application to the Court for an award of certain fees and costs payable from the common fund. Under the terms of the Agreement, Class Counsel may seek an award of attorneys' fees not to exceed 33.33% of the Settlement Amount,

in addition to reimbursement for costs not to exceed $60,000.00.[6] Settlement Agreement ¶ 18. Plaintiff is allowed to make an application to the Court for a service payment of $25,000, which is intended as compensation for Plaintiff instituting, prosecuting and bearing the laboring oar and risk of this litigation as Class Representative. Settlement Agreement ¶ 19. The Notice advised Class Members that Class Counsel would "ask the Court to approve payment of their attorneys' fees of up to $4,233,333.33, as well as for reimbursement for costs and expenses incurred in the prosecution of the lawsuit not to exceed $60,000" and a "$25,000 Participation Award to Plaintiff". (ECF No. 68, ¶ 10, Ex. 1.) The Settlement represents an excellent result for the Class.

C. Preliminary Settlement Approval, Notice and Class Reaction to Date

On September 16, 2020, the Court entered an order that granted preliminary approval of the Settlement, directed notice to Class Members, and scheduled a hearing on final approval. Pursuant to the Preliminary Order, to date, JND has provided direct mail and email notice to the 4,508 Class Members, publicized notice in newspapers, websites, and through social media, and set up a settlement website and toll-free telephone number. Declaration of Jennifer M. Keough, executed October 29, 2020 ("Keough Decl.") ¶¶ 5-8, 12, 14, 15, 17. Specifically, on September 30, 2020, the Claims Administrator, JND, caused direct notice to be sent to the Class Members via email and mail. Keough Decl. ¶¶ 7-8. After certifying the mailing data via the Coding Accuracy Support System ("CASS") from the list of 4,750 unique names it received from Defendant, running the results through the National Change of Address database, conducting an advanced address search (*i.e.*, skip trace) and a further advanced address search using LexisNexis, and removing 242 duplicates, JND identified 2,467 mailing addresses. *Id*. ¶¶ 5, 6. With respect to

[6] This amount does not include reimbursement of costs to the Claims Administrator for its services which are separately discussed, *infra*.

email notice, JND identified 1,698 unique email addresses, representing 2,041 class members. *Id.* ¶ 7. In addition, notice was publicized in *The Tennessean* and two industry publications, *Billboard Magazine* and *Music Connection*, and banner advertising was posted via three industry websites, MusicConnection.com, MusicRadar.com, and DigitalMusicNews.com. *Id.* ¶ 14. Further media outreach was performed via a digital media campaign comprising digital advertisements placed via the Google Display Network ("GDN"), behaviorally and contextually targeting adults 18+ nationwide in the music and recording industry; on Facebook, targeting adults 18+ interested in pages related to musicians and the Recording Industry Association of America; and on LinkedIn, targeting adults 18+ nationwide with recording artist and musician job titles. *Id.* ¶ 12. A website and toll-free number relating to the Settlement has been set up as well. *Id.* ¶¶ 15, 17.

As of October 23, 2020, JND received 67 online Claims and 65 mailed Claims[7] relating to the retrospective relief, no Class Members have objected to the Settlement and only one Class Member has chosen to exclude itself from the Settlement. *Id.* ¶¶ 19-24. Thus, the reaction of the Class to the proposed Settlement has been overwhelmingly positive.

III. LEGAL ARGUMENT

A. The Requested Attorneys' Fees Are Reasonable, Justified and Should Be Awarded

Courts have long recognized the "common fund" or "common benefit" doctrine, under which attorneys who create a common fund or benefit for a group of persons may be awarded their fees and costs based on the common benefit achieved. *Boeing Co. v. Van Gemert*, 444 U.S.

[7] Class Members who have submitted invalid claims will have the opportunity to cure the defect. Claim Forms that are not validated will result in the Claims Administrator notifying the Claimant in writing, by letter or email, depending on which method the Claimant used to submit the Claim Form, setting forth the reason for the invalidity. Settlement Agreement ¶ 22(d). The recipient will have at least 30 days to cure the invalid Claim Form. *Id.*

472, 478 (1980) ("[A] lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole."). As the Second Circuit has explained, the "rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

> When a common fund has been created, the Second Circuit has observed that the
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> trend in this Circuit is toward the percentage method, *Visa Check III*, 297 F. Supp. 2d at 520, which "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," *In re Lloyd's Am. Trust Fund Litig.*, 2002 U.S. Dist. LEXIS 22663 at *74, 2002 WL 31663577, at *25. In contrast, the "lodestar create[s] an unanticipated disincentive to early settlements, tempt[s] lawyers to run up their hours, and compel[s] district courts to engage in a gimlet-eyed review of line-item fee audits." *Baffa v. Donaldson Lufkin & Jenrette Secs. Corp.*, 2002 U.S. Dist. LEXIS 10732, No. 96 Civ. 0583, 2002 WL 1315603, at *1 (S.D.N.Y. June 17, 2002) (internal quotation marks omitted).

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc., 396 F.3d 96, 122 (2d Cir. 2005). Indeed, "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases." Manual for Complex Litigation (Fourth) § 14.121 (2004) (footnotes omitted) (citing, *e.g.*, *Goldberger*, 209 F.3d at 50). And, "one purpose of the percentage method is to encourage early settlements by not penalizing efficient counsel, thus ensuring that competent counsel continue to be willing to undertake risky, complex, and novel litigation." Manual §14.121 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338–39 (1980) (recognizing the importance of a financial incentive to entice qualified attorneys to devote their time to complex, time-consuming cases in which they risk nonpayment)). Of course, the fee however calculated must be reasonable. *Goldberger*, 209 F.3d at 47.

Courts in the Second Circuit look to the following "*Goldberger*" factors when considering a request for attorney's fees relating to the creation of a common fund: (1) the time

and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. Those factors are addressed in turn below[8] which all lead to the conclusion that the requested fee is reasonable and should be approved.

As for the percentage to be awarded from a common fund, "Courts in this Circuit have often approved requests for attorneys' fees amounting to 33.3% of a settlement fund." *Karic v. Major Auto. Cos.*, No. 09 CV 5708 (CLP), 2016 WL 1745037, at *8 (E.D.N.Y. Apr. 27, 2016); *see also*, *Springer v. Code Rebel Corp.*, No. 16-cv-3492 (AJN), 2018 WL 1773137, at *5 (S.D.N.Y. Apr. 10, 2018) (approving one-third fee from a common fund while noting "33.3% is within the range of fee awards typically awarded"); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 587 n.8 (S.D.N.Y. 2008) (collecting cases of common fund fee awards of one-third). Of note, this Court recently approved a one-third fee on a $9,500,000 common fund which represented 17% of the Class's total estimated damages. *Levin v. Res. Capital Corp.*, No. 1:15-CV-07081-LLS (S.D.N.Y. Aug. 3, 2018).

1. *The magnitude and complexities of the litigation*

"The size and difficulty of the issues in a case are [also] significant factors to be considered in making a fee award." *Viafara v. MCIZ Corp.*, No. 12 CIV. 7452 RLE, 2014 WL 1777438, at *11 (S.D.N.Y. May 1, 2014) (citing *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97 (S.D.N.Y. 1996)). Here, this case involved many intricate legal issues relating to complex recording contracts and their interpretation in light of decades of performance under

[8] The first factor, the time and labor expended by counsel (the lodestar cross-check), will be discussed last in light of the requested fee being a percentage of the common fund.

them. 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 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. Further, the risks of litigation, as explained in the next section, were significant as there was New York case law that could be argued to favor Defendant and a similar action in the Central District of California is now on appeal after certification was denied there.

Thus, when considering the complexity of the case, it is clear that the percentage requested here is reasonable and reflects the extensive work and risk Plaintiff's Counsel undertook to prosecute it. In sum, victory was far from assured at any stage, with meaningful hurdles to overcome to certify a class, overcome dispositive motion practice, win at trial, and preserve a favorable judgment on appeal.

2. *The risk of the litigation*

"It is well-established that litigation risk must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55. At the time of filing, this case involved numerous complex issues of fact and law, and presented significant risks which continue through today. In particular, the legal claims asserted herein have not always been met with successful results in federal and state courts.

First, Sony would have no doubt relied on *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562 (2002). There, an artist sued over her producer's failure to share royalties earned from licensing her recordings for film and television. The court rejected the artist's entitlement to such royalties, since her contract transferred ownership outright while only requiring royalties to be paid on sales of physical records: "the unconditional transfer of ownership rights to a work of art includes the right to use the work in any manner unless those rights are specifically limited by the terms of the contract." *Id.* at 572 (internal citations omitted). Thus, Sony was expected to argue here that because its recording agreements transfer ownership of the artists' recordings to Sony, it was entitled to exploit the recordings in any way it sees fit, including digital streaming, but with no concomitant obligation to pay royalties to the artists for those uses. Further, Sony would also likely have relied on *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239 (2014). In *Ellington,* the plaintiff sued his publisher after an audit revealed that it "had begun using affiliated foreign subpublishers, who retained 50% of the royalties generated from the foreign sale of the relevant musical compositions originally retained by the unaffiliated subpublishers. The remaining 50% was split equally between EMI and the First Parties as required by the royalty provision." *Id.* at 243. The court held that the plain language of the parties' contract permitted the use of foreign subpublishers without distinction for their affiliations. *Id.* at 245-46.

Next, the same counsel in this case have filed a similar action in the United States District Court, Central District of California, against Warner Music Group. *Leonard Williams v. Warner Music Grp. Corp.*, 2:18-cv-09691-JWH-PJW (C.D. Cal.). Koncius Decl. ¶ 9. There, class certification was denied on a contested motion and, after a successful Rule 23(f) Petition, the matter is now pending before the Ninth Circuit Court of Appeals where the briefing is not yet complete. *Id.* The gist of the denial in the District Court was that the plaintiffs' claims were not

typical. *Id.* Plaintiffs there obviously do not agree with that conclusion, have other bases for appeal, and are vigorously pursuing the case in the Ninth Circuit. *Id.* Nevertheless, even without the adverse New York case law referenced in the preceding paragraph (the Class sought to be certified in *Williams* was for artists with recording contracts with a California choice of law provision), it does demonstrate that in a very similar case, the outcome is far from certain.

Thus, while Class Counsel believe that Plaintiff's claims here are meritorious, there were substantial risks to achieving a better result for the Class through continued litigation. 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 be not 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 Federal Rule of Civil Procedure 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.").

That Class Counsel were able to achieve the results they did for the Class despite these risks speaks to the level of skill Class Counsel brought to bear in this case.

3. *The quality of representation*

"Generally, the factor given the greatest emphasis is the size of the fund created, because "a common fund is itself the measure of success . . . [and] represents the benchmark from which

a reasonable fee will be awarded."" Manual § 14.121 (quoting 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 14:6, at 547, 550 (4th ed. 2002)). Indeed, the "critical factor is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). "To evaluate the quality of the representation, courts review the recovery obtained and the backgrounds of the lawyers involved in the lawsuit." *Melito v. Am. Eagle Outfitters, Inc.*, No. 14-CV-2440 (VEC), 2017 WL 3995619, at *18 (S.D.N.Y. Sept. 11, 2017) (quoting *In re Citigroup Sec. Litig.*, 965 F. Supp. 2d 369, 400 (S.D.N.Y. 2013)). Here, Class Counsel's experience, and the quality of their representation, support the requested fee award.

In addition to being well-informed via the informal discovery undertaken in this case, Plaintiff's counsel are, and have also been, counsel of record in several other putative class actions pending in other Districts and in California state courts which involve royalties due music artists and members of the film industry. *See Leonard Williams v. Warner Music Group Corp.*, Case No. 2:18-cv-09691-JWH-PJW; *James v. UMG Recordings, Inc.*, Case No. 11-cv-01613-SI (N.D. Cal.); *In re Warner Music Grp. Corp. Digital Downloads Litig.*, Case No. 12-cv-0559-RS (N.D. Cal.); *Colin Higgins Prods., Ltd. v. Universal City Studios, LLC*, California Superior Court, Los Angeles County, Case No. BC499180; *Colin Higgins Prods., Ltd. v. Paramount Pictures Corp.*, California Superior Court, Los Angeles County, Case No. BC499179; *Martindale, et al. v. Sony Pictures Ent., Inc.*, California Superior Court, Los Angeles County, Case No. BC499182; *Stanley Donen Films, Inc. v. Twentieth Century Fox Film Corp.*, California Superior Court, Los Angeles County, Case No. BC499181. Koncius Decl. ¶ 8; *see also* Declaration of Daniel L. Warshaw ("Warshaw Decl.") ¶¶ 9-10; Declaration of Neville Johnson ("Johnson Decl.") ¶ 8.

Here, Class Counsel created a common fund of $12.7 million representing 36%[9] of the Class's retrospective damages. Further, 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. It is submitted that the quality of the representation speaks for itself and supports the requested fee.

4. *The requested fee in relation to the settlement*

Many courts in this Circuit have approved one-third fees on similarly-sized common funds. *See, e.g., In re Deutsche Bank Sec. Litig.*, No. 1:09-01714-RWL (S.D.N.Y.), ECF No. 330 (June 11, 2020) (awarding 33% of $18.5 million recovery plus $1.2 million in expenses); *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014) (awarding 33% of $15 million settlement); *In re Giant Interactive Grp.*, 279 F.R.D. at 165 (awarding 33% of $13 million settlement); *Maley v. Del Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 368 (S.D.N.Y. 2002) (awarding one-third of $11.5 million settlement). And, as

[9] The fact that more than one-third of the damages was recovered in the retrospective fund, speaks to the quality of the Settlement. *See, e.g., In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 162 (S.D.N.Y. 2011) (recovery of 16.5% of recoverable damages was "comfortably within the range of reasonableness"); *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 191 (S.D.N.Y. 2012) (approving recovery of approximately 13% of provable damages); *Torres v. Bank of Am. (In re Checking Account)*, 830 F. Supp. 2d 1330, 1346 (S.D. Fla. 2011) (recovery of 9% of maximum possible damages was reasonable); *Newbridge Networks Sec. Litig.*, 1998 WL 765724, *2 (D.D.C. Oct. 23, 1998) ("[A]n agreement that secures roughly 6 to 12 percent of a potential recovery ... seems to be within the targeted range of reasonableness"); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 715 (E.D. Pa. 2001) (noting that since 1995, securities class action settlements have typically "recovered between 5.5% and 6.2% of the class members' estimated losses").

stated above, this Court in *Levin* awarded a one-third fee of $3,166,667 on a $9,500,000 common fund settlement.

Moreover, any assessment of the percentage recovery must account not only for the litigation uncertainties detailed above—including with respect to class certification, summary judgment, trial, and any appeal—but also the certainty of delay as Plaintiff prepared for trial and inevitable appeals. In other words, "[a] very large bird in the hand of this litigation is surely worth more than whatever birds are lurking in the bushes." *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (stating that the certainty of the settlement amount in that case had to be judged in the context of the substantial legal and factual obstacles to plaintiffs eventually prevailing in the case). Plaintiff's Counsel should be rewarded for achieving this excellent recovery for Class Members without imposing on them the cost of potentially years of additional litigation toward an uncertain outcome.

"The quality of opposing counsel is also important in evaluating the quality of Lead Counsel's work." *City of Providence*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494, at *17. Plaintiff's Counsel faced top-notch defense attorneys[10] who were also able to draw on Sony's vast resources. The high quality of the lawyers opposing Plaintiff's efforts "further proves the caliber of representation that was necessary to achieve the Settlement." *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010). In sum, the requested fee relative to the Settlement is reasonable.

[10] *See* Covington & Burling LLP Firm Honors, https://www.cov.com/en/about/firm-honors.

5. *Public policy considerations*

Public policy supports the requested fee, as there is a "commendable sentiment in favor of providing lawyers with sufficient incentive to bring common fund cases that serve the public interest." *Goldberger*, 209 F.3d at 51. Indeed, "[p]ublic policy considerations strongly favor incentivizing skilled private attorneys to undertake this type of litigation, especially since the action is on behalf of small claimants who lack the financial incentive to obtain a recovery on their own behalf." *Fleisher*, 2015 WL 10847814, at *22 (discussing settlement of complex insurance class action); *see also*, *Maley*, 186 F. Supp. 2d at 373 (noting in securities class action context "Courts have recognized the importance that fair and reasonable fee awards have in encouraging private attorneys to prosecute class actions on a contingent basis . . . on behalf of those who otherwise could not afford to prosecute."). Further, the requested one-third fee would compensate Plaintiff's Counsel at a level that is in line with the benefits conferred on the Class, the substantial investment of time and money devoted to this case, as well as the fact that representation was brought contingent on a successful outcome.

6. *The time and labor expended by counsel*

The *Goldberger* Court noted that "lodestar remains useful as a baseline even if the percentage method is eventually chosen." *Goldberger*, 209 F.3d at 50. "Of course, where used as a mere cross-check, the hours documented by counsel need not be exhaustively scrutinized by the district court. Instead, the reasonableness of the claimed lodestar can be tested by the court's familiarity with the case (as well as encouraged by the strictures of Rule 11)." *Id.* (internal citation omitted). It is worth noting, however, that "[i]n practice, the lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation. In addition, the lodestar creates inherent incentive to prolong the litigation until sufficient hours

have been expended." Manual § 14.121. Indeed, "[s]o long as that object is achieved [, the avoidance of "unwarranted windfalls" per *Grinnell* opinion], we see no need to compel district courts to undertake the "cumbersome, enervating, and often surrealistic process" of lodestar computation. *Savoie* [*v. Merchants Bank*], 166 F.3d [456,] 461 n.4 [(2d Cir. 1999)]) (quoting Court Awarded Attorney Fees, 108 F.R.D. at 258)." *Goldberger*, 209 F.3d at 49-50. Regardless, here, the hours are well documented and in proportion to the work performed and the progress of the case.

Compensable activities under the lodestar method include both pre-litigation activities (*e.g.*, interviewing the client, investigating the facts, researching the law, and preparing the initial pleading) and litigation activities (*e.g.*, conducting discovery, conferring with clients, drafting pleadings, making court appearances, travel time, and settlement negotiations). *See, e.g.*, *Hensley*, 461 U.S. at 434 (noting that district courts should exclude fees not "reasonably expended" on the litigation); *Webb v. Cty. Bd. of Educ.*, 471 U.S. 234, 243 (1985) ("drafting of the initial pleadings and the work associated with the development of the theory of the case" compensable). The first step employed in awarding fees under the lodestar method is to calculate the number of hours of work reasonably performed at a reasonable hourly rate. Here, contemporaneous time records were kept. *See* Koncius Decl. ¶ 11; Warshaw Decl. ¶ 13; Johnson Decl. ¶ 10; Declaration of James C. Shah ("Shah Decl.") ¶ 8. As of October 29, 2020, Class Counsel spent a total of 1,583.4 hours working on this case over the last two years and incurred a combined lodestar of $1,357,374.50 based on their current[11] hourly rates.[12] A breakdown of these fees and hours is as follows:

[11] It is appropriate to use an attorney's current rate when calculating the lodestar. *See, e.g, Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (utilizing current rate as "an appropriate

Class Counsel	**Hours**	**Lodestar**
Johnson & Johnson, LLP	647.0	$475,702.50
Pearson, Simon & Warshaw, LLP	419.1	$422,645.00
Kiesel Law LLP	431.1	$414,277.00
Shepherd, Finkelman, Miller & Shah, LLP	86.2	$ 44,750.00
Total	**1,583.4**	**$1,357,374.50**

The type of work performed, hours, and lodestar for the above law firms are set forth in the concurrently filed declarations of Messrs. Koncius, Warshaw, Johnson and Shah, and the accompanying exhibits. *See* Koncius Decl. ¶¶ 3, 4, 11; Warshaw Decl. ¶¶ 3, 13; Johnson Decl. ¶¶ 3, 10; Shah Decl. ¶¶ 3, 4, 8. The declarations of Class Counsel detail the amount of work that

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adjustment for delay in payment"); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998) (noting that rates used "should be current rather than historic") (internal quotations and citations omitted); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998) (current rates "should be applied in order to compensate for the delay in payment").

[12] Plaintiff's Counsels' hourly rates reflect "prevailing [rates] in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)—*i.e.*, the Southern District of New York. *See Farbotko v. Clinton Cnty.*, 433 F.3d 204, 208 (2d Cir. 2005) (relevant community is "the district in which the court sits"); *see also id.* at 209 (determination of reasonable rate entails "a case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant's counsel," which may include "judicial notice of the rates awarded in prior cases and the court's own familiarity with the rates prevailing in the district"). Plaintiff's Counsels' hourly rates range from $215.00 to $1,190.00. These rates are consistent with the rates approved for other experienced litigators. Indeed, rates "in excess of $1,000 an hour[] are by now not uncommon," in complex cases in the Southern District. *U.S. Bank Nat'l Ass'n v. Dexia Real Estate Capital Mkts.*, 12 Civ. 9412 (PAE), 2016 WL 6996176, at *8 (S.D.N.Y. Nov. 30, 2016) (awarding partner rate of $1,055 per hour); *see also Vista Outdoor, Inc. v. Reeves Family Trust*, 16 Civ. 5766 (JSR), 2018 WL 3104631, at *6 (S.D.N.Y. May 24, 2018) (awarding partner rates of up to $1,260 per hour); *MSC Mediterranean Shipping Co. Holding SA v. Forsyth Kownacki LLC*, 16 Civ. 8103 (LGS), 2017 WL 1194372, at *3 (S.D.N.Y. Mar. 30, 2017) (awarding hourly rates of $1,048.47 per hour for partners).

was necessary in order to secure a successful result on behalf of the Class Members at every stage of this litigation, including: (1) pre-litigation research and investigation; (2) litigation activities such as drafting the Complaint; (3) settlement related activities, including preparing for and attending the two separate mediations, drafting the mediation briefs, negotiating, and finalizing the terms of the Settlement Agreement; (4) obtaining Court approval of the Settlement; (5) ensuring that the notice plan was properly disseminated to the Class Members; and (6) communicating with Class Members about the Settlement. *See* Koncius Decl. ¶ 3; Warshaw Decl. ¶ 3; Johnson Decl. ¶ 3; Shah Decl. ¶ 3. Class Counsel will spend additional time responding to Class Member communications and objections (if any)[13], continuing to supervise the claims process, and preparing for and attending the Fairness Hearing on May 25, 2021.[14] Koncius Decl. ¶ 14; Warshaw Decl. ¶ 16; Johnson Decl. ¶ 13.

Taking into account the lodestar referenced above relative to the requested one-third fee, results in a 3.1 multiplier. This is well within the range of approved multipliers in this Circuit. Indeed, "Courts regularly award lodestar multipliers of up to eight times lodestar, and in some cases, even higher multipliers." *Hernandez v. Merrill Lynch & Co.*, No. 11 CIV. 8472 KBF DCF, 2013 WL 1209563, at *9 (S.D.N.Y. Mar. 21, 2013); *see also*, *In re Telik*, 576 F. Supp. 2d at 590 (awarding multiple of 1.6x while noting "[i]n contingent litigation, lodestar multiples of over 4 are routinely awarded by courts"); *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 CIV 10240 CM, 2007 WL 2230177, at *17, n.7 (S.D.N.Y. July 27, 2007) (awarding

[13] The reasonableness of the fee is underscored by the fact that no objections have been asserted as of the time of this filing. That fact alone strongly evidences that the fee request, as part of the Settlement, is fair and reasonable. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (noting number of objections in reaction to settlement as factor to consider in weighing reasonableness of settlement).

[14] Class Counsel will submit, if necessary, supplemental declarations detailing this work performed prior to the hearing on this Motion.

multiplier while collecting cases awarding multiples ranging from 4.7 to 6.96 and noting "[l]odestar multipliers of nearly 5 have been deemed 'common' by courts in this District."); *Fleisher v. Phx. Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *19 (S.D.N.Y. Sep. 9, 2015) (awarding multiple of 4.87 while noting that "[t]his is well within the range of crosscheck multipliers awarded in this circuit").

Each hour expended by Class Counsel on this case has ultimately benefitted the Class Members, and Class Counsel's lodestar amount is reasonable and compensable. In this case, the attorney declarations and supporting exhibits establish the basis and calculation for the hourly rates of the attorneys at each firm who worked on the case. The firms comprising Class Counsel have experience handling class actions and complex litigation. *See* Koncius Decl. ¶ 7; Warshaw Decl. ¶¶ 6-11; Johnson Decl. ¶¶ 6-8; Shah Decl. ¶¶ 5-6. Additionally, most of the firms involved in this case are also involved in other entertainment-related class action litigation and have gained relevant experience that was critical in this case. Their experience was invaluable in achieving an excellent result for the Class, and supports the reasonableness of Class Counsel's hourly rates. As a result, the lodestar cross-check supports the notion that the fee requested is reasonable and justified.

B. Plaintiff Should Be Reimbursed its Litigation Costs

"To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970). As a result, "Courts routinely note that counsel is entitled to reimbursement from the common fund for reasonable litigation expenses." *Fleisher*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *23 (noting as typical expenses in complex cases "fees paid to experts, mediation fees, notice costs,

computerized research, document production and storage, court fees, reporting services, and travel in connection with th[e] litigation"); *see also In re Marsh ERISA Litig.*, 265 F.R.D. at 150 ("It is well-established that counsel who create a common fund like this one are entitled to the reimbursement of litigation costs and expenses."). "When the lion's share of expenses reflects the typical costs of complex litigation such as experts and consultants, trial consultants, litigation and trial support services, document imaging and copying, deposition costs, online legal research, and travel expenses, courts should not depart from the common practice in this Circuit of granting expense requests." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 27 (S.D.N.Y. 2016) (internal quotation marks omitted).

Here, Class Counsel have incurred $27,927.96 in costs and expenses to date.[15] *See* Koncius Decl. ¶ 15; Warshaw Decl. ¶ 17; Johnson Decl. ¶ 14; Shah Decl. ¶ 11. These expenses include all filing, general litigation, mediation-related and travel expenses that were all incurred in the normal course of business and were essential to the successful prosecution of this lawsuit. Counsel are entitled to be reimbursed for those expenses in addition to the attorneys' fees. None of those expenditures have yet been reimbursed. Indeed, "[t]he fact that Class Counsel was willing to expend their own money, where reimbursement was entirely contingent on the success of this litigation, is perhaps the best indicator that the expenditures were reasonable and necessary." *Fleisher*, 2015 WL 10847814, at *19. Finally, should any additional expenses be incurred before the Final Approval hearing, they will be appropriately submitted by way of a subsequent filing.

[15] This amount reflects out of pocket costs incurred by each of Class Counsel's respective law firms, plus the amount expended from the litigation fund. It does not include the amount of the existing balance in the litigation fund. *See* Warshaw Decl. Ex. D.

C. The Claims Administrator, JND, Should Be Paid its Fees and Expenses for Providing Notice and Administering the Settlement

As set forth above, the Class Notice was disseminated in the manner prescribed by this Court pursuant to the Preliminary Order. To date, JND has been responsible for the following: (a) distributing the Class Notice by both mail and email; (b) publishing the notice in newspapers, websites, and on social media; (c) establishing and maintaining a settlement website and toll-free phone number; (d) receiving, validating and logging claim forms, objections and requests for exclusion; (e) researching and updating addresses through skip-traces and similar means; (f) answering questions from the Class Members; (g) reporting on the status of claim forms, objections and requests for exclusion; and (h) preparing a declaration regarding its due diligence; *See generally* Keough Decl.

Going forward, JND will continue to receive Claim Forms and process them, maintain the website and toll-free number, field questions from Class Members, and receive and process opt outs and objections, if any. *Id*. Having provided these services to the Class, and in contemplation of its future services, JND should be paid for its total expected costs of $66,764.00. Furthermore, as JND's services benefitted the entire Class, the Claims Administration costs should be deducted from the common fund.

D. The Court Should Grant a Service Payment to the Plaintiff

This Court should approve the requested service award to Plaintiff in the amount of $25,000. "Case law in this and other circuits fully supports compensating class representatives for their work on behalf of the class, which has benefited from their representation." *In re Marsh ERISA Litig.*, 265 F.R.D. at 150. Courts reason that such awards are compensatory in nature, reimbursing class representatives who "take on a variety of risks and tasks when they commence

representative actions." *Strougo v. Bassini*, 258 F. Supp. 2d 254, 264 (S.D.N.Y. 2003). The requested incentive award for Plaintiff is reasonable in light of the significant risk taken, time and effort expended, and institutional knowledge of the entertainment industry brought, by The Rick Nelson Company, LLC, through its partners Matthew Nelson and Gunnar Nelson, in this case.

As an initial matter, The Rick Nelson Company, LLC took on serious risk in serving as a class representative in this action. *See* Declaration of Matthew Nelson ("M. Nelson Decl.") ¶ 3; Declaration of Gunnar Nelson ("G. Nelson Decl.") ¶ 3. So too did Matthew Nelson and Gunnar Nelson, personally. *Id.* By pursuing a class action lawsuit against Sony, a music industry titan, The Rick Nelson Company, LLC, along with its partners, ran the risk of such action being broadcasted in the media and having a negative impact on Plaintiff's, Matthew Nelson's, and Gunnar Nelson's business relationship with Sony and other entities in the entertainment industry. *Id.* In fact, upon filing, various media outlets publicized The Rick Nelson Company, LLC's pursuit of an action against Sony. *See, e.g.*, Marc Schneider, "Ricky Nelson Estate Launches Class Action Against Sony Music Over Streaming Royalties," Billboard (Sept. 26, 2018), https://www.billboard.com/articles/business/8477056/ricky-nelson-estate-class-action-sony-music-international-streaming. Further, both Matthew Nelson and Gunnar Nelson are musicians, perform under the band name "Nelson" and have achieved success in their own right by, among other things, having their own double-platinum album. M. Nelson Decl. ¶ 3; G. Nelson Decl. ¶ 3. By participating in this action, it was not lost on them that they may be shunned or "black-listed" by record labels and distributors previously interested in their music. *Id.* Despite these risks, The Rick Nelson Company, LLC agreed to serve as a class representative. *Id.*

Furthermore, The Rick Nelson Company, LLC, through its partners, Matthew Nelson and Gunnar Nelson, spent a significant amount of time and effort in this case by performing the following tasks: (1) searching for documents related to this lawsuit; (2) reviewing and approving court-filings, including the operative Class Action Complaint and Settlement Agreement; (3) staying informed and communicating with Class Counsel regarding the status and progress of this lawsuit; (4) traveling from Nashville, Tennessee to Los Angeles, California to physically attend a full-day mediation in this case as was demanded by Sony; and (5) having many conversations about a potential resolution after the first in-person mediation took place and after the second mediation session. M. Nelson Decl. ¶ 4; G. Nelson Decl. ¶ 4.

Additionally, The Rick Nelson Company, LLC, through its partners, brought institutional industry knowledge and perspective to this case. As the sons of rock-star Rick Nelson, the grandsons of Ozzie and Harriet Nelson, and successful musicians themselves, Matthew Nelson and Gunnar Nelson have been involved in the music industry for the majority of their lives. This knowledge and perspective proved to be invaluable in prosecuting and litigating this case.

Again, "service awards are common in class action cases and serve to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by the plaintiffs. [Citation.] It is important to compensate plaintiffs for the time they spend and the risks they take. [Citation.]" *Hernandez v. Merrill Lynch & Co.*, No. 11 CIV. 8472 KBF DCF, 2013 WL 1209563, at *10 (S.D.N.Y. Mar. 21, 2013) (awarding $15,000 to five plaintiffs and $12,500 to another plaintiff). The amount of the requested award (effectively $12,500 to each principal of The Rick Nelson Company, LLC) is also in line with the amounts awarded in other complex cases. *See Sealock v. Covance, Inc.*, 17-CV-5857 (JMF), 2020 U.S. Dist. LEXIS 44753, at *11-

12 (S.D.N.Y. Mar. 13, 2020) (approving $10,000 service award); *Khait v. Whirlpool Corp.*, No. 06-6381 (ALC), 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (awarding $15,000 to five plaintiffs and $10,000 to ten plaintiffs). As the requested award in this case is fully consistent with the recognized rationale for such payments, it should be approved.

IV. CONCLUSION

Based on the foregoing, Class Counsel respectfully requests that the Court grant its application for: (1) attorneys' fees in the amount of one-third of the Settlement fund (or, $4,233,333.33 million); (2) reimbursement of $27,927.96 in out-of-pocket litigation expenses; (3) a participation award of $25,000 to the Class Representative; and (4) payment to JND for its fees and expenses.

DATED: October 30, 2020

Respectfully submitted,

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