

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

MELISSA FERRICK, et al.,

Plaintiff,

vs.

SPOTIFY USA INC., et al.,

Defendants.

No. 1:16-cv-08412 (AJN)

**PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT**

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Theodore Eisenberg & Geoffrey P. Miller,
*The Role of Opt-Outs and Objectors in Class Action Litigation:
Theoretical and Empirical Issues*, 57 *Vand. L. Rev.* 1529 (2004) 9, 10

I. INTRODUCTION

The efforts of the Paley and Wixen objectors, *see* Dkts. 306, 310, 323, to scuttle the outstanding settlement should be rejected, as none of the issues raised undermine the fact that the settlement is fair, reasonable, and adequate.

- Class Plaintiffs and Spotify agree that pursuant to the settlement agreement (and preliminary approval order), a musical composition may be excluded only if the Class Member provides a copyright registration number (or application number). That requirement makes sense; consistent with federal law, a copyright registration number is critical to establish standing to sue for federal copyright infringement.
- Their complaints about the financial value of the settlement are unconvincing, disregard all future benefits, and ignore this Circuit’s *Grinnell* factors.
- Wixen still has not definitively established its standing to object nor its authority to act on behalf of its hundreds of purported clients. Wixen provides nothing to show it is a “beneficial owner” of even a single copyright composition of its client, let alone a single one that it has not claimed to opt out.

The settlement’s numerous benefits to the Class, immediate and future, monetary and non-monetary, underscore the outstanding result achieved here, and strongly support final approval.

II. ARGUMENT

A. Wixen’s Objections Remain Meritless

Wixen’s recent briefing does not adequately address either the procedural deficiencies raised by Class Plaintiffs or Class Plaintiffs’ specific, substantive responses to Wixen’s objection. *See* Dkts. 283, 291.

1. **Wixen’s Objections Remain Procedurally Deficient**

The efforts by Wixen, a music publisher, purporting to object to the settlement on behalf of itself and more than 500 of its clients, raises two procedural issues: (1) standing to object (which applies to Wixen *and* Wixen’s clients), and (2) Wixen’s and/or its counsel’s authority to object on behalf of Wixen’s clients. Wixen’s recent submission fails to distinguish between these two separate, independent reasons why its objections are procedurally deficient, *see* Dkt.

310 at 5-6, and exacerbate the concerns regarding Wixen’s conduct, *see* Dkt. 291 at 5-8. To eliminate any possible confusion, Class Plaintiffs provide the following breakdown of their position with respect to Wixen and its clients:

Entity	Opt-Outs	Objections
Wixen (individually)	Effective only as to musical compositions for which copyright registration numbers (or application numbers) were timely provided.	No standing as Wixen submitted the <i>same</i> copyright registration numbers to support its objection and opt-outs. ¹
Wixen’s clients	<p><i>If Wixen had authority to opt out its clients’ works:</i> Effective only as to musical compositions for which copyright registration numbers (or application numbers) were timely provided. Ineffective as to all others.</p> <p><i>If Wixen did <u>not</u> have authority to opt out its clients:</i> Ineffective.</p>	<p><i>If Wixen had authority to opt out its clients:</i> No standing as Wixen submitted the <i>same</i> copyright registration numbers to support the objections and opt-outs.</p> <p><i>If Wixen did <u>not</u> have authority to opt out its clients:</i> No standing.</p>

Thus, however the Court decides Spotify’s Motion to Clarify Class Composition, *see* Dkt. 256, Wixen’s *objection* is procedurally deficient, both as to itself and as to its clients.

Wixen’s briefing does not compel a different result. First, Wixen wrongly characterizes Class Plaintiffs’ position as to the scope and validity of the requests for exclusion that Wixen submitted. *See* Dkt. 310 at 5. Class Plaintiffs have never endorsed the *effectiveness* of Wixen’s requests for exclusion on behalf of its clients, given the questions raised by Spotify about Wixen’s authority to opt out its clients. Class Plaintiffs have only cited the Claims Administrator’s judgment as to the *timeliness* of Wixen’s requests. *See* Dkt. 291 at 6. Likewise, Class Plaintiffs have never endorsed Wixen’s position that it has blanket authority to opt out *all* songs owned by itself and its clients without providing *all* corresponding copyright registration numbers or application numbers. Wixen’s statement that it “agree[s] with Plaintiffs that they

¹ Wixen’s assertion that its counsel Donahue Fitzgerald LLP (“Donahue”) was *authorized* to file an objection on behalf of *Wixen* only is uncontested. Dkt. 310 at 5. That does not cure Wixen’s standing problem.

[i.e., Wixen and its clients] are opted out” grossly misstates Class Plaintiffs’ stance by eliding these two important distinctions. Dkt. 310 at 5 (capitalization omitted).

Wixen then raises three bases for its authority to object to the settlement on behalf of its clients. First, Wixen now contends it is the “beneficial owner” of the relevant copyrights by purporting to be “exclusive licensee” of those copyrights. *See* Dkt. 310 at 7-8. However, the record fails to demonstrate that Wixen is its clients’ exclusive licensee; at most, the record suggests Wixen is an exclusive *administrator*. That is not enough to confer standing to sue for federal copyright infringement and in turn to opt out or object. *See Greg Young Publ’g, Inc. v. Zazzle, Inc.*, 2017 WL 2729584, at *2 (C.D. Cal. May 1, 2017) (“Although GYPI is Westmoreland’s exclusive representative for soliciting, negotiating, and administering agreements with third parties, it does not have authority to exercise any exclusive right with respect to Westmoreland’s works.”); *Kevin Chelko Photography, Inc. v. JF Restaurants, LLC*, 2017 WL 240087, at *2 (W.D.N.C. Jan. 19, 2017) (“Absent a written assignment or exclusive license from the original copyright owner, any alleged right to distribute or manage the Subject Copyrights does not provide standing to sue for copyright infringement.”).

Second, Wixen repeats its refrain that its clients have authorized (by mere silence) Wixen and/or its counsel to act on their behalf, *see* Dkt. 310 at 8-10, but it does not seriously address concerns about that claimed “authorization,” *see* Dkt. 291 at 7-8. Third, Wixen makes the conclusory assertion that Donahue represents Wixen’s clients, *see* Dkt. 310 at 10, while failing to address the absence in the record of any engagement letters or other evidence that *all* of Wixen’s clients actually entered into attorney-client relationships with Donahue, *see* Dkt. 291 at 7. These arguments do nothing to prove that Wixen had authority to act.

2. Wixen's Substantive Objections Remain Meritless

Even if the Court were to consider the substance of Wixen's objection, it remains meritless at its core. Wixen repeats its refrain that copyright registration numbers have no place in a class settlement for claims of copyright infringement and attempts, without any basis, to manufacture a conflict between Class Plaintiffs and Spotify. Dkt. 310 at 6 (alleging that "Plaintiffs and Spotify continue to disagree on this point"). There is no disagreement: Class Plaintiffs and Spotify agree that a copyright registration number (or application number) is required to exclude a composition from the class settlement or to support an objection. The parties' settlement agreement, the Court's preliminary approval order, and the long form notice are fully consistent in stating the requirement. *See* Dkts. 176-3 ¶¶ 13.4-.5, 14.2 (settlement agreement), 177 ¶¶ 16, 24 (preliminary approval order), 176-3 at 93-96 (long form notice). Wixen, in fact, submitted many copyright registration numbers in conjunction with its requests for exclusion and objection, yet chose not to comply (even to this date) with respect to other musical compositions.

Moreover, there is no legitimate question over "how putative Class Members who wished to exclude themselves but were unable to obtain the copyright registration information for some or all of their works in time to meet the exclusion deadline would be treated." Dkt. 310 at 6. The answer lies in the Court's order preliminarily approving the settlement: "[T]he Request for Exclusion shall be valid only with respect to that Settlement Class Member's claims with respect to the compositions identified on a timely submitted Request for Exclusion." Dkt. 177 ¶ 17. Whatever "burden" Wixen might face in "collecting the copyright information" of works for which Wixen is supposedly the beneficial owner, Dkt. 310 at 11, the Copyright Act places that burden squarely on Wixen, *see* 17 U.S.C. § 411(a) (requiring registration to bring a claim for federal copyright infringement).

Wixen’s arguments regarding “four circumstances” where copyright registration numbers are *not* required to sue for copyright infringement undermine — rather than buttress — Wixen’s point. Dkt. 310 at 11-12. This is the rare instance where the exception *does* prove the rule: That these four limited exceptions exist *supports* the validity of the general rule that copyright registration numbers are required to sustain suits for copyright infringement. Moreover, three of the exceptions recited by Wixen have nothing to do with this settlement, let alone Wixen’s excuses for not providing copyright registration numbers to opt out or object to the settlement:

1. **Foreign works:** Non-U.S. works that have not been registered with the U.S. Copyright Office are not included in the Class. *See* Dkt. 176-3 ¶ 11.2 (defining class).
2. **Rights of attribution and integrity:** Owners of works of *visual art* may enforce rights of attribution and integrity as to unregistered works. *See* 17 U.S.C. §§ 106A(a), 411(a). This cause of action, provided to owners of copyrights in visual works, has nothing to do with copyrights in musical compositions.
3. **Works where registration was refused:** A work whose registration has been refused is not within the Class. *See* Dkt. 176-3 ¶ 11.2. Wixen does not claim that any of the songs for which it does not have copyright registration numbers falls in this category.

The fourth exception cited by Wixen—works for which copyright registration is pending—is explicitly acknowledged in the settlement. Class Members may exclude pending works or object to the settlement on the basis of pending works by providing the “copyright registration application number” associated with the pending application.² *See* Dkts. 176-3 ¶¶ 13.4, 14.2, 177 ¶¶ 16, 24. Yet Wixen completely ignores this provision of the settlement.

Wixen provides no basis for disputing the general rule that copyright registration numbers are required to sustain actions for copyright infringement, and thus fails to raise a serious challenge to the fairness of the settlement in requiring opt outs to provide copyright

² Wixen’s “request to serve discovery” on Class Plaintiff Gerencia 360 Publishing, Inc. (“G360”) has no relevance to the Court’s consideration of Wixen’s objection. G360 is not objecting to this settlement, on its own behalf nor on behalf of its clients, and “its agreements with its clients and those clients’ agreements with Class Counsel” do not answer the question of whether Wixen or its counsel has authority to represent Wixen’s clients. Dkt. 310 at 12 n.8.

registration numbers (or application numbers). Substituting an ISRC or ISWC number is not a solution, and Wixen did not even provide that information for all of the works it purports to exclude from the settlement. *See* Dkt. 310 at 12. Furthermore, the former identifies sound recordings, not music compositions, while the latter, which is not limited to registered works, does not prove class membership. *See Frequently Asked Questions*, ISWC International Agency, <http://www.iswc.org/en/faq.html> (last visited Nov. 24, 2017) (“ISWC’s are allocated regardless of copyright status.”).

Wixen also makes an apples-to-oranges comparison between this opt-out class settlement and Spotify’s opt-in agreement with the NMPA, though in doing so, conflates the Spotify-NMPA agreement with an entirely *different* NMPA agreement. *See* Dkt. 310 at 12. At his deposition, Wixen’s CEO had incorrectly identified an opt-in agreement between the NMPA and various record labels as an example of a class action in which Wixen had settled its clients’ claims without providing copyright registration numbers. *See* Dkt. 291 at 17 n.7. Class Plaintiffs later pointed out this mistake, *see id.*; Wixen’s response was to mischaracterize Class Plaintiffs’ briefing on the NMPA-record label settlement as pertaining to the NMPA-Spotify agreement.

Finally, Wixen cites no authority for the conclusory allegation that requiring Class Members to provide copyright registration numbers as part of a valid claim under the settlement fund “may also create an impermissible ‘opt in’ class action settlement procedure.” Dkt. 310 at 13. There is no unfairness in requiring claimants to a class settlement prove their membership in the class. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 2004 WL 2591402, at *12 (S.D.N.Y. Nov. 12, 2004) (rejecting objection that proof of claim form was unduly burdensome because the

simplified requirements suggested by objectors “would be insufficient to establish a right to recover from the settlement fund”).³

B. Paley’s Objection Remains Meritless

Objector Andrew Paley’s original objection purported to “join” Wixen’s objection and highlighted three arguments raised by Wixen, related to (1) pre-1978 musical compositions, (2) compulsory licensing of Class Members’ compositions, and (3) total compensation to Class Members. *See* Dkt. 211. The only basis that Paley continued to advance in his first response pertains to the third argument concerning the “adequacy of the common fund.” Dkt. 306 at 7-8 (capitalization omitted). The remainder of that objection raised new concerns regarding the number of objections received, *see id.* at 4-5; the state of formal discovery, *see id.* at 5-6; and the requirement that putative Class Members provide copyright registration numbers to opt out, *see id.* at 8-9. Paley then filed a second response that rehashes most of the arguments he previously raised but added a complaint about class notice. Dkt. 323 at 2-3. All lack merit.

First, Paley’s renewed objection that the settlement is inadequate is unsupported. Paley points to the availability of statutory damages for copyright infringement, *see* Dkt. 306 at 7, but Class Plaintiffs already have addressed similar objections. *See* Dkts. 283 at 18, 291 at 9-11, 19. Here, Paley fails to explain why the settlement—which provides \$112.55 million in cash value to Class Members—is unfair or inadequate under this Circuit’s *Grinnell* factors.⁴

Paley’s complaint that there is insufficient “evidence” to evaluate the settlement wrongly ignores Class Counsel and its experts’ analysis, *see* Dkt. 283 at 16-29, and Class Counsel’s

³ Paley’s objections as to the copyright registration requirement fail for the same reason. *See* Dkt. 306 at 8-9.

⁴ Paley’s own calculation of classwide statutory recovery totaling \$240 million for “innocent infringement” and \$900 million for “culpable infringement”—which are speculative because they rest on the number of recipients of direct class notice, which was over-inclusive by design—itself demonstrates that the \$112.55 million result achieved here is well within the range of reasonableness. Dkt. 306 at 8; *see also Grinnell*, 495 F.2d at 455 n.2 (“[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”).

recommendation of the settlement based on the “extensive information” received “as part of the settlement negotiations, including as to the compositions at issue and data related to Spotify’s streaming of those compositions,” Dkt. 176 ¶ 10. Paley’s proposal to have this Court “determine how many infringements occurred,” Dkt. 306 at 7; *see also* Dkt. 323 at 1-2, invites the very burdens and expenses of litigating disputed issues that the settlement is designed to avoid, and would undermine “the strong judicial policy in favor of settlements, particularly in the class action context.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117-18 (2d Cir. 2005).

Paley also disregards a key data point confirming that even the \$43.45 million payment by itself for past damages would be fair, adequate, and reasonable, and that is the \$30 million NMPA settlement for 96% of the market share. *See, e.g.*, Dkt. 283 at 10, 19. As the Second Circuit long ago recognized, there is often uncertainty in class actions about the size of the class and the “best possible recovery.” *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). That is why courts, in assessing the adequacy of a settlement under *Grinnell*, reject invitations, such as Paley’s, to “use . . . a mathematical equation yielding a particularized sum.” *Massiah v. MetroPlus Health Plan, Inc.*, 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012).

Second, Paley does not explain why the number of objections received, let alone the number of requests for exclusion, makes this settlement unfair, unreasonable, or inadequate. *See* Dkt. 306 at 4-5. The empirical study Paley cites acknowledges that the mean and median number of objections in commercial class cases is 6.9 per million dollars recovered—here, that would translate to 300 to 777 objectors.⁵ *See* Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 *Vand. L. Rev.* 1529, 1550 (2004) (cited at Dkt. 306 at 5). The thirteen objections received as of

⁵ \$43.45 million x 6.9 per million = 300. \$112.55 million x 6.9 per million = 777.

Class Plaintiffs' motion for final approval are well below that benchmark. Paley's attempt to inflate that total by counting as a separate objector each Wixen client assumes Wixen's authority to make those objections, and runs headlong into the observation by Paley's own source that "when high numbers of dissenters emerge, it is often because an attorney or consortium of attorneys has solicited the class to encourage dissent." Eisenberg & Miller, *supra*, at 1560. The objections submitted by Wixen fit this description perfectly.

Third, Paley claims that more formal discovery is needed to establish Spotify's susceptibility to statutory damages, *see* Dkt. 306 at 5-6, but "the question that th[e] Court must answer is not how much or how little discovery was completed by the parties before they agreed to the settlement, but rather whether the discovery that was completed was sufficient for 'effective representation.'" *McBean v. City of New York*, 233 F.R.D. 377, 384 (S.D.N.Y. 2006); *see also, e.g., Ceka v. PBM/CMSI Inc.*, 2014 WL 6812127, at *1 (S.D.N.Y. Dec. 2, 2014) (approving class settlement before any formal discovery); *see also, e.g., In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *17 (D.N.J. Nov. 15, 2016) ("Courts in this Circuit frequently approve class action settlements despite the absence of formal discovery." (collecting cases)).

In addition, Paley brushes aside Class Counsel's statement that it received significant amounts of information from Spotify pursuant to settlement negotiations—including several voluminous sets of data related to Spotify's service and its settlement with the NMPA, as well as agreements between Spotify, HFA, and various publishers—and does not address any of the analysis Class Plaintiffs submitted with respect to *Grinnell* factor 3. *See* Dkt. 283 at 21-22.⁶

⁶ Paley also wrongly suggests that Class Plaintiffs' statement that "it would be impossible for Class Counsel to know" all information required to calculate each Class Member's distribution from the settlement fund, Dkt. 283 at 18, has some relevance to the purported "radical information asymmetry" that Paley believes the Court should "assume," Dkt. 306 at 5, 6. Not so. Class Plaintiffs' statement regarding impossibility responded to objections concerning the information provided in the notice; it would be impossible to determine *ex ante* the precise awards each Class Member would receive under the settlement, as a pro rata distribution plan makes each member's recovery dependent on the total number of claims submitted. *See* Dkt. 291 at 12.

Relatedly, Paley objects regarding the timing of final approval preceding the claims submission process. But “courts often grant final approval of class action settlements before the final claims deadline.” *Montoya v. PNC Bank, N.A.*, 2016 WL 1529902, at *22 (S.D. Fla. Apr. 13, 2016).⁷ Here, Class Members will be compensated from a fixed common fund (with no reversion to Spotify) based on a number of streams, and will be guaranteed a minimum payment even with no streams, warranting a claims process that follows final approval. Additionally, the settlement provides for an independent claims facilitator whose services—to help Class Members identify compositions eligible for claims—cannot be finalized until the settlement is finally approved. Dkt. 176-3 ¶ 3.3. It would be irrational for the parties to agree to pay for *all* of the services of the claims facilitator, which will be substantial, prior to final approval.

Nor was there any deficiency in the notice provided to Class Members. Paley’s inchoate complaint about the notice appears to suggest that each recipient should have received an individually tailored notice listing qualifying works and potential damages, Dkt. 323 at 2-3—an unreasonable position supported by no case law and violates Rule 23’s requirement for the “best notice that is practicable under the circumstances.” *See also* Dkt. 291 at 11-12. Paley fails to establish any information deficiency here.

III. CONCLUSION

For the reasons set forth herein, Class Plaintiffs respectfully request that the Court grant their motion for final approval of the class action settlement.

⁷ As a well-known treatise has summarized, “many settlements will delay claim filing and distribution at least until after final approval.” 4 *Newberg on Class Actions* § 12:19 (5th ed. 2017); *see also, e.g., Marty v. Anheuser-Busch Cos.*, 2015 WL 6391185, at *3 (S.D. Fla. Oct. 22, 2015) (granting final approval before claims deadline); *In re Hydroxycut Mktg. & Sales Practices Litig.*, 2014 WL 6473044, at *3, *9 (S.D. Cal. Nov. 18, 2014) (same); *Hamilton v. SunTrust Mortg. Inc.*, 2014 WL 5419507, at *4-5 (S.D. Fla. Oct. 24, 2014) (“[F]inal approval often [is] grant[ed] . . . before the final claims deadline”); *Casey v. Citibank, N.A.*, 2014 WL 4120599, at *2 (N.D.N.Y. Aug. 21, 2014) (similar); *Dick v. Sprint Commc’ns Co.*, 297 F.R.D. 283, 291 (W.D. Ky. 2014) (granting final approval before claims deadline); *Walsh v. Kindred Healthcare*, 2013 WL 6623190, at *4 (N.D. Cal. Dec. 16, 2013) (same); *Vallabhupurapu v. Burger King Corp.*, 2012 WL 5349389, at *4 (N.D. Cal. Oct. 29, 2012) (same); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1383 (S.D. Fla. 2007) (same).

Dated: November 24, 2017

Respectfully submitted,

By: /s/ Steven G. Sklaver

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Geng Chen
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