UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MELISSA FERRICK, *et. al*.,

Plaintiffs,

vs.

SPOTIFY USA INC.,

Defendant.

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

JOINT SUBMISSION REGARDING SUPPLEMENTAL EXCLUSION PERIOD FOR WIXEN CLIENTS

The Court's December 15, 2017 Order requested a joint proposal from Class Plaintiffs and Spotify (collectively, "the parties"), as well as Wixen Music, regarding an "extended opt out period" for "Wixen Music clients." Dkt. No. 361, at 1. The parties and Wixen Music have met and conferred, but were unable to reach agreement on a joint process for the extended opt-out period, and therefore have set forth their respective positions below.

A. Class Plaintiffs' and Spotify's Position:

In its December 15 Order, the Court determined that Wixen Music's administration agreements with its clients are "ambiguous with respect to whether it gives Wixen Music the authority to file requests for exclusion on behalf of its clients," and "Wixen Music's August 2017 letter to its clients" may have created "uncertainty"; accordingly, the Court "deem[ed] it necessary and appropriate to extend the request for exclusion period" in order to "clarify which [Wixen Music] clients want to opt out of the settlement." *Id.* at 1.

The procedures that Class Plaintiffs and Spotify propose address fully the uncertainty flowing from the ambiguity of the administration agreements and Wixen's August 2017 letter. The latter indicated that a recipient's failure to respond would authorize a request for exclusion by Wixen Music notwithstanding the contrary principle set forth in the Court-approved class notices. The procedures proposed by the parties will allow the Court to determine conclusively whether the requests for exclusion filed by Wixen Music were in fact authorized by class members. Additionally, the 30-day time period allows for a supplemental opt-out period which is more than sufficient given the substantial length of time, now spanning several months, that Wixen Music and its clients who allegedly want to opt out have had to consider and address the exclusion issues. A more protracted time period would also harm the Class, who cannot be paid

any of the settlement proceeds until after the claiming process, which cannot commence until after any extended opt-out period.

1. Notice To Wixen Clients and Procedure for Opting Out

Class Counsel and Spotify propose that notice of the extended period for exclusion be sent via first class mail to the 435 individuals and entities in whose names Wixen Music submitted otherwise-facially compliant requests for exclusion (those requests that included copyright registration numbers as required by the Court's preliminary approval order, which are contained in Exhibit A at Docket No. 209). The notice would be sent by the Settlement Administrator (Garden City Group or "GCG" hereinafter). Wixen Music would be required to provide the Settlement Administrator with the mailing addresses of its clients within seven calendar days of the Court's issuance of an order authorizing the proposed opt-out procedure.

The Settlement Administrator would prepare a mailing individually addressed to each of the 435 individuals and entities on whose behalf Wixen Music submitted requests for exclusion. Each individual or entity would receive three documents:

- A notice stating that, although counsel for Wixen Music had purported to submit a Request for Exclusion on the recipient's behalf, the Court has determined that it is uncertain whether the class member had actually authorized the Request for Exclusion. (A draft notice is attached as Exhibit 1.) The notice would ask the class member to indicate whether he or she (or, in the case of corporate owners, it) wanted to opt out the listed works by signing and returning the enclosed opt-out form. If the class member did not wish to opt out, the class member simply would not have to respond—the standard procedure for Rule 23(b)(3) class actions.
- An opt-out form listing the information regarding the class member's musical works (and their copyright registration numbers and other information) that Wixen Music provided in

the prior Request for Exclusion. (A draft opt-out form is attached as Exhibit 2.) The opt-out form would ask the recipient to sign and mail back the form to GCG if the class member did indeed wish to opt out the works in question. The form would require the signer to state under penalty of perjury that (1) he or she owns the registered copyrights in the listed works, or (2) in the case of a corporate owner, that the company owns the registered copyrights in the listed works and the signer is an officer, director, or employee of the company authorized to make legal decisions for the company. The recipient also would have the option of opting out some, but not all, of the listed works by striking the works that he or she wished to be covered by the Settlement Agreement.

- A copy of the long-form notice that is currently available on the settlement website (*see* Dkt. No. 176-3, Ex. A (long-form notice); Dkt. No. 177, ¶ 12 (approving long-form notice)).

Class Counsel and Spotify propose that the recipients of the supplemental notice should be given 30 days to send opt-out forms (based on postmarked date) from the date that GCG mails the notices.

Finally, to ensure the integrity of the extended opt-out process and given the factual background that led to this dispute, during the pendency of the extended opt-out process, the Court should preclude Wixen Music (and/or its counsel) from *ex parte* communications with recipients of the supplemental notice regarding the supplemental notice. To the extent that recipients have questions about the supplemental notice or the extended opt-out process, they may communicate those questions to GCG, which will inform the parties and counsel for Wixen Music of those questions. Wixen Music (and/or its counsel) and the parties shall also be required to forward any questions submitted directly to any of them by recipients of the supplemental

notice to GCG. Wixen Music and the parties will be required to meet and confer regarding the questions and prepare an agreed-upon response to be transmitted by GCG. If Wixen Music and the parties cannot agree upon a response within two business days, they will provide a joint status report to the Court for prompt resolution.

2. This Proposal Provides A Fair and Reasonable Process For Determining Whether The Opt-Outs Previously Filed By Wixen Music Were Authorized By Class Members And Prevents Undue Delay.

The elements of this proposal address the concerns expressed in this Court's December 15, 2017 Order and mirror the procedure upheld by the Sixth Circuit in *Moulton v. U.S. Steel Corp.*, 581 F.3d 344 (6th Cir. 2009).

First, directing the Settlement Administrator to handle communications with class members is necessary to ensure that the extended opt-out process is orderly. It is of course commonplace in settlements to have a third-party notice and settlement administrator handle communications with class members relating to class notice, exclusion requests, and claims. The administrator here—GCG—has extensive experience with notice programs and with handling opt-out requests. See Dkt. No. 170 ¶ 3 & Ex. A. Having an experienced class action administrator handle notice and communications is clearly preferable to allowing the process to be administered by Wixen Music, which—as this Court has recognized—has already generated confusion by sending letters and making legal decisions on behalf of its clients on the basis of "ambiguous" contract language.

Moreover, this requirement protects class members from receiving confusing information from Wixen Music concerning their rights to participate in or exclude themselves from the settlement, which is what led to this extended opt-out process in the first instance. Otherwise, there is a substantial risk that Wixen Music would seek to advance its position with these class

members, and Class Counsel (which has been appointed as the lawyers to protect those class members unless they opt out) might need to provide those class members with potentially differing legal advice about the opt-out process. Restricting Wixen Music's direct communications with class members and ensuring that it instead goes through GCG or otherwise stipulated responses will ensure that those class members' interests are protected.

Second, the requirement that class members who own their works themselves sign a request for exclusion ensures that the choice to opt out is genuinely in the hands of class members themselves—which is the reason for providing this procedure in the first place. In the absence of this requirement, Wixen Music could assert that an opt-out had been authorized based on ambiguous communications similar to the provisions of the administration agreements. Or Wixen Music could simply again assert it has authority to opt its clients out of this class action and file en masse opt-outs without giving its clients a genuine choice. That approach would lead the Court and the parties back to square one, because it would not eliminate the uncertainty over whether class members actually made the choice to opt out.

Moreover, the Sixth Circuit in *Moulton* expressly approved of this process, explaining that "because of the confusion that [opt-out attorney] Hadden had caused," the district court "created a new opt-out period" for the affected class members—and specifically ruled that those class members could opt out "only by submitting an ***individually signed*** opt-out form, as opposed to one signed only by Hadden." 581 F.3d at 348 (emphasis added). The same is true here; an individually-signed form will provide this Court with the certainty that previously was missing, and that continues to be lacking when it comes to whether Wixen has authority to act in legal matters for its clients.

Wixen's criticisms of the opt-out form are misguided. Wixen Music objects that the form specifies that it cannot be signed by licensees or administrators. But that notice is required to avoid confusion; because class members choose whether to opt out, class members should be signing the form. Wixen Music also objects that in listing the class member's works, the form does not discuss the possibility of co-ownership. But the form actually addresses co-ownership, stating: "**The form may be signed only by a person or entity that owns (whether alone or jointly with others) the copyright in the musical compositions to be excluded from the settlement**." Although Wixen Music objects to the statement that the signer of the form is signing under penalty of perjury, in light of the confusion about authority relating to Wixen Music, that language is needed to ensure that the signers understand that they are attesting that they are the class member (or have the authority to bind the class member). Finally, Wixen Music objects to the fact that the notice accompanying the form states that those who opt out will "get no benefits" from the settlement. But that language, which mirrors the language in the previous class notice that the Court approved (Dkt. No. 177, ¶ 12), merely explains the consequence of opting out—the class member will get no benefits from the settlement.

Third, the 30-day period that Class Plaintiffs and Spotify propose is more than reasonable and properly balances the need to provide these class members with an opportunity to make an opt-out decision with the strong countervailing interest of the rest of the Class in finally resolving these settlement proceedings and (should the Court grant final approval) obtaining timely payments under the settlement.

The class members who will receive supplemental notice have *already* had the benefit of the initial 75-day notice and opt-out period which followed a June 2017 preliminary approval by this Court. Moreover, these class members do not have to identify again the works they own that

were on Spotify's service during the relevant period—they will receive a list of their works based on the information already submitted by Wixen Music. The class members simply must decide whether they wish some or all of those works to be covered by the settlement, or whether they wish to opt-out. The 30-day period provides more than ample time for that decision.

A period longer than 30 days would delay further the date on which the Court will consider whether to grant final approval. Without adopting a reasonable schedule, thousands of class members will see a substantial delay in receiving payments under the settlement (should the Court grant final approval). Given the length of time since class members have had notice of the proposed settlement agreement and the intervening events, a 30-day opt-out period would not cause prejudice to Wixen Music or its clients.

3. Response to Wixen Music's Position.

Wixen Music's proposal ignores the reasoning in this Court's December 15 Order, which recognized that, due to ambiguities in Wixen's administration agreements and confusion caused by Wixen's August 2017 letter to its clients, the Court could not tell whether certain class members had in fact chosen to exclude their works from the settlement in this case.

Rather than proposing procedures to eliminate that confusion and uncertainty, Wixen Music's proposal doubles down on the problems that led the Court to allow a second opt-out period. Specifically, Wixen proposes to dispense with the use of a neutral, third-party settlement administrator and meaningful oversight by this Court. Instead, over a lengthy 105-day period, Wixen Music suggests that it be permitted to contact its purported clients and

- provide them with whatever information it wishes in explaining the reason for the inquiry;

- determine for itself whether the individual or entity contacted is an owner or co-owner of the works identified in Wixen Music's requests for exclusion and, for legal entities, determine for itself whether the individual with whom it communicates has authority to make the opt-out decision;
- decide for itself whether the individual and entity contacted has provided the necessary authorization for Wixen Music's opt-out filing; and
- force the Court to, once again, rely solely on Wixen Music's assertions in determining whether the exclusion requests have been authorized by class members because the ***only*** submissions to the Court would be declarations by Wixen Music and its counsel listing the class members who supposedly have authorized opt-outs, without any statements by the class members themselves.

This proposal is déjà vu all over again and would recreate the same problems that led to the extended opt-out period in the first place, which remain unacceptable.

As discussed below, Wixen Music's proposal should be rejected for at least four reasons.

a. The opt-out verification process should not include Wixen Music's facially defective requests for exclusion.

As noted above, Class Counsel and Spotify agree that the Court's order contemplated an extended opt-out period for the requests for exclusion submitted by Wixen Music that contained copyright registration numbers (the requests in Exhibit A at Docket No. 209). Wixen Music, however, believes that the process should also encompass the requests for exclusion that failed to provide copyright registration numbers for the excluded works (*i.e.*, the requests contained in Exhibit B at Docket No. 258-3, Ex. 3).

Wixen's attempt to stretch the extended opt-out period to cover these requests is improper for several reasons.

First, Wixen Music's proposal would give its clients greater exclusion rights than other class members—differential treatment that would be grossly unfair to other class members. The Court's Preliminary Approval Order required requests for exclusion to include copyright registration numbers for each work to be excluded. Spotify has explained in detail why this requirement by the Court was reasonable and valid. Dkt. No. 257 at 21-25; Dkt. No. 339 at 13-15.

No other class member has been permitted to opt out works for which copyright registration numbers were not provided; and no other class member has been permitted to exclude additional works by adding copyright registration information after the September 12, 2017 exclusion deadline set by the Court. Dkt. No. 177, ¶ 22-23. Permitting only Wixen Music's clients to receive this dispensation is inconsistent with the principle that class members should be treated alike. *See*, *e.g.*, Manual for Complex Litigation § 21.61 (4th ed. 2004) ("[R]ecurring potential abuses in class action litigation that judges should be wary of as they review proposed settlements" include "treating similarly situated class members differently," such as by providing more favorable treatment to "objectors[]" than to other "class members[]").

Wixen Music's proposal appears to contemplate the blanket validation of all of these requests notwithstanding the absence of copyright registration numbers. That would be patently unfair to all other class members, who followed the rules set forth in the Court's Order, but might have wished to add works for which they lacked a copyright registration number. And there is no basis for permitting these particular class members additional time to add registration numbers—again, that would treat them in a significantly different way from other class members. That differential treatment is improper because it is wholly unrelated to the reason for the extended opt-out period, which is to determine whether Wixen Music's actions were in fact

authorized by the class members on whose behalf it purported to act for otherwise facially-compliant requests.

b. The Court should not rely on Wixen Music to administer the notice and opt-out process.

Wixen Music requests that it be entrusted with engaging in unsupervised oral and written communications with class members in order to inform them of the supplemental exclusion period, determine whether they authorize Wixen Music to opt out the specified works, and then to report back a list of authorized exclusions. That is effectively a re-run of the defective process that led to the Court's Order—entrusting Wixen Music alone with the process of informing class members, determining whether an individual has the requisite legal authority, and deciding whether or not the opt-out decision was in fact authorized. Class Counsel and Spotify object to this aspect of Wixen Music's proposal for two reasons.

First, under Wixen Music's proposal, the Court would not be permitted to review and approve the communications with class members—many of which Wixen Music indicates would be verbal rather than in writing. Yet principles of due process and Rule 23(e)(1) itself, which requires "notice in a reasonable manner to all class members who would be bound by the proposal," call for courts to ensure that "the settlement notice . . . fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005). That is why "fashioning notice to a class" is committed to the "discretion of the district court" (*In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987))—not left to an interested third party.

This requirement is particularly important here, given Wixen Music's recent assertion—without supporting evidence—that it has exclusive ownership interests in the works in question.

That assertion was made in a lawsuit filed last week by Wixen Music against Spotify in the Central District of California asserting the same copyright infringement claims set forth in this action. *See* Compl., *Wixen Music Publishing, Inc. v. Spotify USA, Inc.*, No. 2:17-cv-09288 (C.D. Cal.) (filed Dec. 29, 2017) ("Wixen Music C.D. Cal. Compl.").[1]

Wixen alleges that it has the "exclusive rights" "under Section 106 of the Copyright Act" to "reproduce and distribute the Works, as well as the right to authorize others to exercise any of those rights." Wixen Music C.D. Cal. Compl. ¶ 28. And Wixen certified to the court that no parties other than Wixen Music "may have a pecuniary interest in the outcome of th[e] case." Certification and Notice of Interested Parties, Dkt. No. 9, *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, No. 2:17-cv-9288-GW-GJS (C.D. Cal.) (filed Dec. 29, 2017).

Class Plaintiffs and Spotify are unsure of the basis for those statements, because the evidence in this case revealed that Wixen's administration agreements (to the extent they have been disclosed) are just that—*administration* agreements. As explained in an earlier brief, those agreements do not assign the copyrights to Wixen Music or grant Wixen Music *any* license to the copyrights, much less an exclusive one. Dkt. No. 359, at 10-12. And the allegations of exclusive ownership rights are wholly inconsistent with Wixen's marketing efforts, in which it touts the benefits to its clients of its role as an "administrator" by emphasizing that no ownership interests are transferred to it (as distinguished from a publisher). *id.* at 11-12. If Wixen Music had the exclusive license to exercise the rights conferred by Section 106 of the Copyright Act, it would have produced documents establishing that fact, but none of the agreements produced is a license at all.[2]

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[1] And Wixen Music repeats this assertion in today's filing. *See* note 10, *infra*.

[2] Recognizing that it is not an actual owner of the copyrights at issue, Wixen Music argues that it is a "beneficial owner." But Wixen Music bases that contention entirely on it being an

Similarly unsubstantiated is Wixen Music's claim (at pages 23-24, *infra*) that its counsel represents all of the Wixen clients. Neither Wixen Music nor its counsel has ever provided evidence of retention agreements executed by the more than four hundred individuals and entities. Rather, the assertion rests only on counsel's retention agreement with Wixen Music and therefore suffers from the same flaw as Wixen Music's ambiguous claims of authority—which are the reason for the extended opt-out period.

Wixen Music's contention that it owns the works, combined with the filing of the separate copyright infringement lawsuit based on those works, means that Wixen Music perceives itself as having a stake in the opt-out question. That creates a high risk that its communications with these class members could mischaracterize the benefits of participating in the settlement, or that Wixen Music would again fail to ensure that the owners of the works lawfully authorize the opt-outs.

Moreover, the fact that many of the communications with class members would be oral—Wixen Music promises to send postcards only to those of its clients "who have not yet provided affirmative consent" (*as determined by Wixen in its sole discretion*)—underscores the danger of Wixen Music's proposal. Any finding by this Court that these potential class members have been afforded their due process right to notice would rest entirely on Wixen Music's say-so.

Second, GCG, a major and impartial claims administrator with a long track record of dealing with class members, can provide straightforward information about opt-outs to this Court. Indeed, the Court appointed GCG to provide previous notices to the class, handle the opt-

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exclusive licensee, which it is not. In any event, even if it were, it would still not be a "beneficial owner" because it was never a "legal owner," as is required. 6 Patry on Copyrights at § 21:26, 21:27.

out process, and "field[] telephone" and "email inquiries about the Settlement." Dkt. No. 177, ¶ 18.

It is long-settled that the content and distribution of class notice is subject to judicial oversight and supervision. For example, Rule 23(e) requires that "the *court* must direct notice in a reasonable manner to all class members who would be bound" by a class settlement. Fed. R. Civ. P. 23(e)(1) (emphasis added); *see also*, *e.g.*, 3 William B. Rubenstein, Newberg on Class Actions § 8:15 (5th ed. Supp. 2017) (discussing judicial review of class notice). Courts typically approve of the use of expert "settlement claims administrators" to implement the notice program approved by the court. Manual for Complex Litigation § 21.312. That is why the Court appointed GCG to handle the notice program in this case.

There is no reason to have Wixen Music supplant GCG's function here. Wixen Music suggests that it would be confusing for the notice to come from GCG because Wixen Music has been telling its clients to ignore communications from anyone else. But that assertion only underscores the parties' point because Wixen has been advising its clients to ignore the Court-approved notice.[3]

Allowing Wixen to communicate notice to class members would suggest incorrectly Wixen is acting as an agent of this Court, and might also suggest that Wixen Music has authority over the class members' decisions to opt out—when in fact the Court found the basis of that claimed authority "ambiguous."

Wixen Music alternatively objects to providing addresses for its clients to GCG. But Wixen Music's protestations that the addresses are "private client information" ring hollow.

[3] Both the postcard notice and long-form notice indicate that they are from the "United States District Court for the Southern District of New York," and the first page of the long-form notice says: "***A court authorized this notice***." Dkt. No. 176-3, Ex, A at 1 (emphasis in original); *id.* Ex. B at 1 (same).

GCG would keep the addresses confidential.[4] Indeed, the Court could order GCG to do so, and Spotify and Class Plaintiffs would stipulate to such an order. GCG in fact mailed materials to other class members without any risk of disclosure. Moreover, GCG stands ready to send out the notices in as little as seven days (as specified in the proposed order submitted by Class Plaintiffs and Spotify)—far less time than the 30 days that Wixen Music insists that it needs.

c. Wixen Music's proposal fails because it does not provide the Court with affirmative indication from class members of their purported desire to opt out.

Another fundamental defect in Wixen Music's proposal is that it would prevent class members from actually communicating their own choices to this Court. Rather than have its clients who wish to opt out provide a signed opt-out form to the Court (via GCG), Wixen Music states that it will privately confer with its clients (or people whom Wixen Music believes represent those clients) and then report back which of them ratified the prior exclusions. Class Counsel and Spotify object to this aspect of Wixen Music's proposal for three reasons.

First, Wixen Music's proposal turns the law of ratification on its head. The Court called for the supplemental exclusion period because of the uncertainty about whether Wixen was authorized to submit the initial opt outs. It is true that the actions of an unauthorized agent can be validated in some circumstances if subsequently ratified by the principal. *See* Restatement (Third) of Agency § 4.01(1) (2006) ("Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."). But only the *principal*—not the purported agent—can ratify the prior act. As a comment to the Restatement puts it, "[t]he sole requirement for ratification is a manifestation of assent . . . *by the*

[4] If, as Wixen Music suggests, some class members will read mail only if addressed to a particular pseudonym, GCG could keep that information confidential as well.

principal." *Id.* § 4.01 cmt. b. Yet under Wixen Music's proposal, the Court would never learn of the principals' own assent except through Wixen's say-so.[5]

Second, Wixen Music acknowledges that in many cases, it would ask its clients' attorneys and various third-party "business" or "royalty managers" to confirm either orally or in writing that Wixen Music has authority to act. But Wixen Music has provided no reason to believe that these various entities in fact have authority to bind class members with respect to this action. For example, an attorney can make litigation decisions only if retained in connection with a particular case or is otherwise authorized by the client to bind it. And managers may vary widely on whether they can make litigation decisions about their clients' copyrights. Moreover, some Wixen Music clients in fact are not class members, but in fact themselves claim to have some relationship with class members, adding yet another degree of separation in the chain of necessary authority. *See*, *e.g.*, Dkt. No. 320-2, Ex. 3 at 1 (an accounting company describing itself as a "business manager" for class members).

Wixen Music complains that Class Counsel and Spotify have not challenged other attorneys' and business managers' authority to opt out class members, but that is irrelevant. After investigation, Wixen Music was unable to demonstrate that it has the requisite authority, as the Court's Order indicates.

The complaint is also false. As the Court is aware, Spotify subpoenaed the administration agreements of Bluewater, another publishing administrator, to investigate that administrator's authority to act. Spotify ultimately declined to challenge that administrator's efforts to opt out, because the administration agreement provided that it "shall have the right . . .

[5] It is telling that, in its lawsuit filed last week in California, Wixen alleges that it "has, and to the extent not yet effected, will opt out the Works from the Proposed Settlement." Wixen Music C.D. Cal. Compl. ¶ 2. That allegation indicates that Wixen sees *itself*—rather than class members—as the relevant actor for purposes of the extended opt-out period.

to ***prosecute, defend, settle and compromise all suits and actions*** respecting the Compositions [it is administrating], provided that any such settlement or compromise shall be subject to [the client's] consent, said consent not to be unreasonably withheld, and generally to do and perform all things necessary to prevent and restrain the infringement of copyrights or other rights with respect to the Compositions" (Dkt. No. 340, Ex. 2 at 5). In contrast, Wixen Music's conduct—filing requests for exclusion *en masse* and then stonewalling when the parties inquired into its authority to act (including frivolous privilege objections)—cried out for further scrutiny.

Wixen also objects that there is "no substantive difference" between allowing signatures from someone attesting that he or she is an corporate officer, director, or authorized employee of a class member that is a legal entity (which Class Counsel and Spotify propose to allow) and accepting signatures from any authorized representative—or representative of a representative—of a class member (such as Wixen Music itself). But doing so would open up the floodgates to the very sort of uncertainty about whether an exclusion is authorized that led to the December 15 order. The best way to eliminate any further ambiguity is to require signatures from class members themselves or, with respect to class members that are legal entities, from a limited set of representatives who by law would have authority to bind the class member (such as a corporate officer or director or the manager of a limited liability company).

Wixen asserts that some of its clients are on tour or at a meditation retreat and thus be unable to sign a second opt-out form in person. But the law already allows for such a possibility. Surely these individuals confer upon someone the authority to administer their legal affairs in their absence. But such an actor must provide evidence of that authority, and Wixen Music has not shown that it possesses such authority.

Third, Wixen Music's proposal to dispense with the submission of opt outs signed by the class members themselves is inconsistent with the Court's December 15, 2017 order. Dkt. No. 361, at 1. Wixen Music's proposal to verify its authority to act by engaging in unsupervised communications with class members—some of which would be oral—risks further confusion about the scope of Wixen Music's authority, given the potential for ambiguity at best (and malfeasance at worst) in those communications.

By contrast, requiring class members to sign and return opt-out forms eliminates any possible ambiguity. Indeed, in *Moulton*, which the Court cited in its December 15 Order, the Sixth Circuit endorsed this procedure, explaining that "because of the confusion" caused by the attorney who had submitted opt outs in class members' names, during the "new opt-out period" for those class members, they could opt out "only by submitting an ***individually signed*** opt-out form[.]" 581 F.3d at 348 (emphasis added).

Resisting the parallels between this case and the situation in *Moulton* (which this Court recognized in its December 15 Order), Wixen Music contends that the Court instead should follow the "instruction in *Plummer* [*v. Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982)]" that "'[a]ny reasonable indication of a desire to opt out should suffice.'" But *Plummer* discusses how "proposed *class members*" *themselves* may "be permitted to opt out" if their requests deviate in some fashion from the court's instructions. *See id.* at 657 n.2 (emphasis added). The issue here is different—it is whether the class members have done *anything* to indicate that they wish to opt out. So far, the only indications have come from Wixen Music, whose authority to speak for class members is—as this Court has found—"unclear." Dkt. No. 361 at 1. *Plummer* does not support Wixen Music's proposal to dispense with any "indication of a desire to opt out" from class members themselves.

Finally, Wixen contends that following *Moulton*'s example and requiring its clients all to return new opt out forms would be confusing for those class members who already provided statements that Wixen Music is authorized to opt them out of the class. But Wixen Music submitted only four statements—only one of which was from an actual class member. Dkt. No. 320-4 Ex. 1. There is no reason to dispense with asking the other 434 Wixen clients for signed opt-out forms because it might cause mild inconvenience to one of them. More importantly, it remains unclear whether those four Wixen clients actually have the right to opt out class members; two of the four statements were from "business" or "royalty" managers—one of whom appears actually to be an accounting firm. Dkt. No. 320-2, Ex. 3 at 1; *see also* Ex. 4 at 1. Neither attested that the class member actually authorized them to submit opt outs.

d. Wixen Music's request for a prolonged 105-day second opt-out period would harm other class members.

Wixen Music requests a 105-day second opt-out period—giving Wixen another 30 days to communicate with its clients and then another 75 days for the opt out decision. Wixen has ostensibly *already* been communicating with its clients about this settlement for many months, both before and after the final approval hearing held on December 1, 2017 and the filing of the separate action on December 29, 2017. This additional 105-day protracted period is unwarranted.

The proposal advanced by Spotify and Class Counsel would be much more efficient. To begin with, GCG can mail individual notices to the affected class members within a week of receiving their addresses from Wixen Music. The affected class members then would have 30 days to decide whether to sign and return the form to confirm that the opt out listing their works was authorized. That time period is more than sufficient; these class members would not need to gather any additional information (as the opt out forms would be preprinted with the works listed

on the prior Wixen Music exclusion forms). And these class members already have had substantial time to consider the merits of the settlement, including the initial notice period.

Moreover, the long opt-out period that Wixen Music proposes would further delay the date on which the many thousands of other class members can make claims and receive payments (assuming that the settlement receives final approval). Wixen Music identifies no reason to justify such a long delay, much less a reason that would outweigh the other class members' interest in obtaining payments under the settlement sooner rather than later.

B. Wixen Music's Position:

a. The Proposed Procedure

The Court concluded that "the language in Wixen Music's agreement with its clients … is ambiguous with respect to whether it gives Wixen Music the authority to file requests for exclusion on behalf of its clients" (the "Wixen Music Clients") and seeks "to clarify which [Wixen Music] clients want to opt out of the settlement[.]" Dkt. 361 at 1. The second opt-out should, therefore, for each Client (i) resolve the suggested ambiguity about Wixen Music's authority to file opt-out notices or (ii) clarify whether a client wants to opt out of the settlement.[6] In other words, the second opt out period should establish that a client either (a) recognizes Wixen Music's authority to opt out and/or (b) expresses a desire to opt out.

Wixen Music proposes submitting two declarations to the Settlement Administrator, one by Wixen Music and one by Donahue Fitzgerald, at the conclusion of the second opt-out period identifying all the Wixen Music Clients who have affirmatively expressed any of the following: (i) a desire to opt out, (ii) an affirmation of Wixen Music acting as their agent and/or exclusive licensee in this matter, or (iii) that Donahue Fitzgerald represents them in this case. A sample

[6] All parties agreed at the December 1, 2017, fairness hearing that if Wixen Music were the exclusive licensee, it had the right to opt out the works it administered.

declaration from Wixen Music is attached hereto as Exhibit A. Donahue will also concurrently submit a simple summary of the status of each of the 539 Wixen Music Clients.

The advantages of this approach are numerous. First, it is simple and efficient, avoiding multiple submissions to the Court or to the Settlement Administrator. Second, it fully addresses the Court's concerns regarding any ambiguity in the opt out requests. *See, e.g., Plummer v. Chem Bank*, 668 F.2d 654, 657 n. 2 (2d Cir.1982) ("Any reasonable indication of a desire to opt out should suffice."). Third, the burden on Wixen Music Clients is minimal and, aside from the second opt-out period itself, does not exceed the burdens imposed on other Class Members by the Settlement Agreement.

Spotify has previously challenged declarations from Wixen Music Clients and their representatives on numerous bases. We request, therefore, that the Court clarify that Wixen Music and Donahue Fitzgerald may receive affirmative consent orally or in writing from:

a) client attorneys,

b) client managers with known authority to handle music publishing and litigation matters for that client (*see, e.g.,* Ex. B (Dkt. 320-2 (Declaration of Melinda Elliott, business manager for Missy Elliott and director of her publishing company, Wixen Music Client Mass Confusion Productions, Inc.), Dkt. 320-3 (Declaration of Timothy Jorstad, business manager for multiple Wixen Music Clients) and Dkt. 320-4 (Declaration of Nancy Meyer, royalty manager for multiple Wixen Music Clients))), and

c) the client her-, him-, or itself (*see, e.g.,* Ex. C (Dkt. 320-1 (Declaration of Matt Langlois))), including, for corporate entities, an officer, a director, a manager, or a representative known to handle music publishing matters (*see, e.g.,* Ex. D (Declaration of Michael Vrionis for Starfaith, LLC)).

Attorneys are specifically permitted by the Settlement Agreement to represent Class Members and sign the initial opt-out notice, so should be permitted here to speak on behalf of their clients. Dkt. 176-3 (Settlement Agreement), Ex. A at 7. *See also* Dkt. 339 (Spotify's Reply Memorandum Of Points And Authorities In Support Of Its Motion To Clarify Class Composition)

at 2, fn. 4 ("Spotify of course does not question that class members may authorize their attorneys to opt them out from the settlement class"). It is industry custom for artists to hire managers to handle all kinds of matters, and in particular publishing matters, and the Settlement Agreement allows for third parties to "assist" Class Members. *See* Dkt. 291 (Plaintiffs' Omnibus Response to Objections to Plaintiffs' Motion for Final Approval) at 15 ("there was nothing in the Settlement Agreement that prevented agents or delegates from *assisting* with filing requests for exclusion.") (emphasis original). Spotify agrees that "*someone with demonstrated authority to act on their [i.e., Class Members'] behalf*—may submit an opt out." Dkt. 339 at 4 (emphasis in original). [7] To Wixen's knowledge, Spotify has not requested any further documentation, conducted any other investigation, or challenged the legitimacy of any opt-out of any other class member who submitted an opt out notice which was or possibly was completed by a manager, attorney or any other authorized party, *including publishers*, and further that none of the thousands of individual publishers who settled the same claims via the NMPA settlement with Spotify were required to confirm that they had the authority to act on behalf of their clients. *See* Dkt. 319 (Opposition to Spotify's Motion to Clarify Class Composition) at 7-11. Spotify has never explained why it did not challenge other publishers' authority in this matter to represent or opt out their clients.

In order to further address the Court's concern that an uncertainty resulted from its August 2017 letter to its clients, Wixen Music will also send postcards with the following

[7] Spotify has dropped its previous objections to corporate officers, directors, or authorized employees signing on behalf of a company. *See* Dkt. 339 (Spotify's Reply) at 9. However, that list should also include managers and members (for LLCs), as well as other authorized representatives. There is no substantive difference among, for example, a vice-president elected by a board, a manager appointed by an LLC's Articles of Incorporation, and a representative authorized by said vice-president or manager.

language to Wixen Music Clients who have not yet provided affirmative consent, to be signed by an authorized signatory and returned to Wixen Music:

> My signature below confirms the exclusive administration rights granted to Wixen Music Publishing, Inc. as our music publishing administrator, including the right to exclude us and/or our musical compositions from the *Ferrick v. Spotify* lawsuit and settlement, and to resolve and settle this and similar matters on our behalf as they see fit.

Wixen Music Clients have previously received numerous letters from Wixen Music stating that Wixen Music (a) has the authority to act on their behalf in *Ferrick*, (b) intends to act on their behalf in the *Ferrick* matter to opt-out their compositions, and (c) requests that the client contact Wixen Music if they would like to proceed differently. As discussed in previous briefs, one Wixen Music client requested to stay in the Settlement Agreement, and Wixen Music honored this request. This proposed follow-up communication, and the return of the signed postcard, clarifies any possible ambiguity in either Wixen Music's previous communications or Wixen Music's right to file a request for exclusion on behalf of the client. The declaration from Wixen Music will identify those that have returned the postcard.

There are several serious problems with Spotify and Class Counsel's proposal that the Settlement Administrator oversee this extended opt out period. First, the Settlement Administrator lacks the necessary information and infrastructure, including current addresses of Wixen Music Clients. The Settlement Administrator is relying on Copyright Office information that is in many cases woefully out of date. For example, Wixen Music received dozens of opt out notices for clients that it no longer represented. Ex. E (Declaration of Randall Wixen ("Wixen Decl.")) ¶ 2. In addition, the Settlement Administrator sent several hundred opt out notices for Wixen Music clients directly to Wixen Music. Dkt 321 (Wixen Decl. In Support of Opposition to Motion to Clarify Class Composition) ¶ 8, Ex. 3. Wixen Music is in a much better position to

contact its clients. Even worse, Spotify's proposal would have the Court force Wixen Music to hand over private client information to the Settlement Administrator. Wixen Decl. ¶ 5 ("Many of our clients are very famous, and mail addressed to them under their own name would very likely not reach them; they use a confidential pseudonym to protect their privacy, and anyone not using the correct pseudonym would likely have mail returned."). To avoid a duplicative, time-consuming, costly, and ineffective process, Wixen Music should simply administer the process of sending postcards to its Clients.

A second significant problem with Spotify and Class Counsel's approach is that an additional communication from the Settlement Administrator will only serve to *add* to the confusion about Wixen Music's rights to represent its Clients. From the beginning of this matter, Wixen Music has been in touch with its clients about this lawsuit. Based on numerous communications, the reasonable assumption of Wixen Music Clients is that Wixen Music and Donahue are handling this matter for them and opting them out. Wixen Music has explicitly told its clients that Wixen Music is handling the matter on their behalf, that they should contact Wixen Music with questions or concerns, and that they need not be concerned about unsolicited communications from third parties about the lawsuit, since Wixen is handling the matter on their behalf as they have previously authorized. Wixen Decl. ¶ 2. To have a third party now send a notice to these Clients, which mimics the earlier notices that the Clients (a) received and did not return and (b) believe they can ignore because Wixen is handling this matter, will only cause the confusion that the Court seeks to avoid. Many would likely continue to believe that they need to do nothing further to opt out of the Settlement Agreement.

Third, for Wixen Music Clients that have already affirmatively granted their consent, Spotify's proposed procedure would very likely create a due process nightmare. Take, for

example, Wixen Music Clients Mass Confusion Productions, Inc.; Matt Langlois; and Starfaith, LLC, whose affirmative consents are, because of Spotify's aggressive tactics, now a matter of public record. Ex. B, C and D (Dkt 320-2 (Elliott Decl.); Dkt 320-1 (Langlois Decl.); (Vrionis Decl.)). These consents are more than sufficient to set aside any concerns about the validity of their original opt-out notices. Would Mass Confusion Productions, Mr. Langlois and Starfaith, LLC, be in or out of the settlement if they did not timely submit a second opt-out notice? They expressly acknowledged Wixen Music's authority, as well as Donahue's representation of them in this matter. Would their initial requests for exclusion now be void, even though they inarguably complied with all the requirements? What about all the other Wixen Music Clients who have expressly acknowledged the same, privately or orally, and are unable to return a second opt-out notice? *See* Wixen Decl. ¶ 5 ("One client whose works are at issue here has personally expressed his desire to opt out to me; he is on tour a lot, including in February and March of this year, and does not communicate by email, cell phone or fax, so it would likely be difficult to get him a notice, much less by first-class mail."). Some Wixen Music Clients are on tour for months at a time and hard to reach; some expressly delegate responsibility to managers, which delegation Spotify wants to invalidate; one has recently gone on a three-month meditation retreat after expressing once again, through his managers, his approval of Wixen Music's actions. *Id*. To invalidate obviously valid initial opt-out notices of Wixen Music Clients would leave the Court with an unmanageable mess that serves no one, except perhaps Spotify in its quest to invalidate as many opt-out notices as possible. Wixen Music's proposal avoids this morass.

Fourth, the Settlement Administrator is, based on past experience, the worst option to handle questions about any opt out notice. Prior to filing its Objection, Donahue sought guidance

from the Settlement Administrator, as set forth in the long form settlement notice, regarding partial versus complete opt-outs. GCG responded that the matter was being researched and that an answer would be provided as soon as possible. Months later, we have received no further communication from GCG on the matter. Ex. F (Declaration of Jonathan Wong) at ¶¶ 2-5. Wixen Music, in contrast, spent over 180 hours answering questions from its clients, including the Wixen Music Clients, regarding this litigation. Wixen Decl. ¶ 4. Aside from depriving Wixen Music Clients of the guidance of their chosen publishing agent, Spotify's proposal would be inefficient, unmanageable, and unduly expensive, with multiple attorneys vetting each question. Spotify's proposed procedure would also force privileged communications before third parties, *including the defendant*. Spotify's proposed bar on communications among Wixen Music, Donahue, and Wixen Music Clients regarding the second opt out notice gets very confusing when considering that Donahue represents Wixen Music, who is, after all, also a class member with works it seeks to opt out. It is equally irrational when considering other Wixen Music Clients. Under Spotify's proposal, any question Starfaith, LLC, has for Donahue, its longtime attorney on publishing and all other matters, would have to go to the Settlement Administrator first, who will then inform Spotify about the question. Presumably, Spotify will want to monitor and confirm the substance of the weekly, and often daily, communications between Donahue and representatives of Starfaith, to ensure there are no improper communications about the second opt-out notice. This, even though Spotify is now a defendant in a lawsuit regarding Starfaith's works. This invasion into the attorney-client relationship is similarly intrusive, and just as absurd, for those Wixen Music Clients whose representation by Donahue is limited to this matter. Donahue's clients have a right to confidential, privileged counsel from their attorneys.

Spotify's and Class Counsel's proposed exclusion form (Spotify and Class Counsel's Exh. 2) has several defects. First, it incorrectly states the law. It states that "licensees or administrators, whether exclusive or otherwise" cannot sign the opt out forms. Exclusive licensees have the right under the copyright act to sue and exercise all aspects of copyright, and all parties agreed at the December 1st hearing that an exclusive licensee has the right to opt out works from this litigation. (This issue is discussed further, below.) While Spotify again concedes that an authorized representative may sign on behalf of a Wixen Music Client, the form does not permit an authorized representative to do so for an individual. *See, e.g.,* Dkt. 339 (Spotify's Reply Memorandum in Support of Its Motion to Clarify Class Composition) at 4 ("*someone with demonstrated authority to act on their [i.e., Class Members'] behalf*—may submit an opt out.") (emphasis in original). Spotify has never presented a reasonable or feasible method for determining such authorization, and merely challenges the right of obviously authorized representatives, such as Michael Vrionis and Melinda Elliott, to act on behalf of Wixen Music Clients. The proposed exclusion form also states that "if you do not own a work listed on the attached, you must cross out that work" without any mention in that sentence of co-ownership. The proposed claim form includes penalty of perjury language, which opt out forms normally do not and the original Request for Exclusion form does not, in an effort to scare off potential signers. Confusingly, Spotify wants to inform Wixen Music Clients that Wixen Music did not provide all ISWC Codes and Spotify Recording IDs, when it has strenuously argued that providing such codes is insufficient to identify works that class members want to opt out. Once again, Spotify is seeking to make opting out as difficult as possible. The form fails to inform the recipient that an attorney may sign on her or his behalf, pursuant to the Settlement Agreement, falsely stating that only the individual may sign. The proposed notice (Spotify and Class

Counsel's Exhibit 1) also contains misleading language designed to discourage opt outs, by stating that class members will "get no benefits" from opting out, as if opting out would be fruitless and pointless, while touting the $43.45 million settlement. Like Spotify's overall proposal, the proposed claim form and notice are obvious attempts to keep Wixen Music Clients in this settlement, regardless of their actual wishes.

Lastly, using the Settlement Administrator to send notices will cause undue delay. [8] The Settlement Agreement was preliminarily approved on June 29, 2017. However, the notices were not mailed out until 35 days later, on August 3, 2017. *See* Dkt. 287 (Supp. Cirami Decl.) ¶¶ 2, 7. To put this task in the Settlement Administrator's hands once again, and to take 35 days – or a similar length of time – simply to send the notices again to Wixen Music, who would then need to forward the notices to their Clients, constitutes undue delay. Under Spotify's proposal, Wixen Music would even be barred from sending copies of the notices by fax, email, or FedEx, even in instances where Wixen Music knows the Client has requested such method of communication, or such method is more likely to actually reach the Client. *See* Wixen Decl. ¶ 5. Wixen Music is better positioned than the Settlement Administrator to efficiently and effectively administer notices and resolve the Court's concerns.

In addition to the problems discussed above, Spotify and Class Counsel's proposal seeks to seriously disadvantage and disenfranchise Wixen Music Clients by preventing Wixen Music and Donahue from speaking freely to their clients regarding the second opt-out notices. As noted above, the Settlement Agreement specifically allows for third parties to "assist" Class Members, yet Spotify seeks to deprive Wixen Music Clients of the input of the one party they expressly

[8] Spotify and Class Counsel also wrongly presume that the Court has already ruled on the status of those Wixen Music Clients that want to opt out, but did not submit copyright registration numbers. (That is the source of the discrepancy between the 539 Wixen Music Clients in total and the 435 Wixen Music Clients to which Spotify would send a second opt-out notice.)

hired to handle these kinds of matters – their publisher. Similarly, Spotify seeks to prevent Wixen Music Clients from speaking to Donahue, despite Donahue's representation of the Wixen Music Clients in this matter. Spotify's reasoning rests entirely on the second opt-out period created in *Moulton v. U.S. Steel Corp.*, 581 F.3d 344 (6th Cir. 2009). What Spotify, however, fails to see are the fundamental factual differences between the present case and *Moulton*. There, the attorney sought to represent class members *with whom he had no pre-existing or contemporaneous relationship* by sending them *false and misleading* information in his solicitations. *Id*. at 347, 353. The *Moulton* attorney's unethical conduct warranted a severe restriction on further unsolicited contact. The kind of misconduct that occurred in *Moulton* is entirely absent here, and the Court is better guided by the Second Circuit's instruction in *Plummer*, 668 F.2d at 657 n. 2, that "Any reasonable indication of a desire to opt out should suffice." As has been extensively briefed, Wixen Music has a preexisting role as the Clients' publisher – a contractual relationship wherein Wixen Music is expected to handle music publishing matters for its clients. *See, e.g.,* Dkt. 319 (Wixen Music's Opposition to the Motion to Clarify Class Composition) at 7-11. Similarly, Donahue has never sent false or misleading information to any Wixen Music Client, and is ethically obligated to represent each Wixen Music Client as her, his or its attorney until the attorney-client relationship is terminated. There is no basis arbitrarily to exclude Wixen Music or Donahue from the group of counselors and consultants that a songwriter may seek assistance from, except perhaps, from Spotify's standpoint, the fact that Wixen Music, having been charged by its Clients with responsibility for handling their publishing rights, is the most knowledgeable about the value of those rights, and therefore best equipped to provide advice on whether the Client is receiving appropriate value in

the proposed settlement in exchange for giving up her rights. [9]

Spotify's proposal also ignores one of the key issues that the Court raised: Whether Wixen Music has the authority to submit opt-out notices. The supplemental opt out procedure should allow Wixen Music Clients to recognize said authority. A Wixen Music Client should be able to opt out by affirmatively consenting to Wixen Music's authority to handle the opt out on her, his or its behalf. Similarly, affirmative consent of Donahue's authority to represent them in this litigation should suffice, since representation by an attorney is specifically permitted by the Settlement Agreement.

In addition to ignoring the issue of authority in their proposed notices, Spotify once again confuses beneficial ownership (i.e., an exclusive license) and actual ownership under the Copyright Act. *See, e.g., Cortner v. Israel*, 732 F.2d 267, 270–71 (2d Cir. 1984) (an exclusive licensee is a "beneficial owner"); *Davis v. Blige*, 505 F.3d 90 (2d Cir. 2007). As Donahue has argued extensively in briefs and at the December 1st hearing, Wixen Music is the exclusive licensee of the Wixen Music Clients. The language of Wixen Music's Exclusive Administration Agreement is clear (and has been briefed at length (*see, e.g.*, Dkt. 319 (Wixen Music's Opposition to Motion for Class Clarification) at 11-14)). Spotify's allegation that *no license at all* is granted to Wixen flies in the face of the plain language of the Exclusive Administration Agreements and contract and copyright law. Indeed, the Central District of California case

[9] The Music Modernization Act, H.R. 4706, was introduced on or about December 21, 2017. It would severely limit Wixen Music and Wixen Music Clients' remedies against Spotify, should they file suit on or after January 1, 2018. Because of this, Wixen Music scrambled to file a copyright infringement suit against Spotify on December 29, 2017, in the Central District of California, as the exclusive licensee for approximately 10,000 works, including the works at issue in this litigation. Donahue is representing Wixen Music in that litigation. Obviously, Wixen Music and Donahue need to speak with Wixen Music Clients about the Central District of California litigation and how it intersects with this litigation, including that works not opted out of this litigation will likely be subject to the release of claims in the Settlement Agreement.

against Spotify rests on the standing of Wixen Music as the exclusive licensee for the works in question. Spotify similarly misstates copyright law when it argues that Bluewater's agreement is substantively different than Wixen Music's exclusive administration agreement. The language in the Bluewater agreement granting the right to litigate *is legally meaningless*. In *DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978, 981 (9th Cir. 2017), the plaintiff had a contract that included similar language: "The undersigned agrees and fully transfers all right, title and interest in any accrued or later accrued claims, causes of action, choses of action ... or lawsuits, brought to enforce copyrights in the Images, appointing and permitting DRK to prosecute said accrued or later accrued claims, causes of action, choses in action or lawsuits, as if it were the undersigned." This, however, was legally irrelevant. The plaintiff did not actually have an exclusive right to any of the enumerated rights under 17 U.S.C. § 106 and, therefore, lacked standing to sue. *Id*. *See also Righthaven LLC v. Hoehn*, 716 F.3d 1166 (9th Cir. 2013) (an agreement that says it assigns a copyright, without an actual transfer of any of the rights, is not an assignment, and does not grant standing).[10]

Wixen Music also requests that the Court confirm that discovery is stayed in all respects, unless otherwise ordered by the Court. We do not believe the expense and burden of further depositions and written discovery in this matter is warranted.

Wixen Music has repeatedly offered reasonable solutions to Spotify's aggressive attacks on its contractual authority and its Clients' ability to opt out. For example, Wixen Music offered to present privileged communications from Clients *in camera*, showing their obvious affirmative consent to opting out. Wixen again makes this offer to the Court, should it want to evaluate the

[10] The Wixen Music Clients maintain that Wixen Music is an exclusive licensee with the right to opt out all of the works in its catalog from this class action, and do not hereby waive this argument.

many affirmative consents already received by Wixen. Unfortunately, Spotify has rejected every reasonable approach. Wixen Music's proposal for the procedure to govern the second opt-out period addresses the Court's concerns regarding any ambiguity in either Wixen Music's communications or its authority, in a reasonable manner that does not further unduly burden the Wixen Music Clients. Wixen Music and Donahue, on behalf of the Wixen Music Clients, respectfully request that the Court exercise its broad authority to implement this reasonable and fair proposal. *See, e.g., Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) ("[A] district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.").

Wixen Music and Donahue appreciate the Court's concern for the rights of their clients. In that light, we also ask the Court to consider the motivations of the different parties here. Spotify is motivated to keep as many Wixen Music Clients in the Settlement Agreement as possible, regardless of their wishes, to limit its considerable liability for copyright infringement. Class Counsel is motivated to work with Spotify to finalize the Settlement Agreement, and receive payment for their services, as quickly as possible. Spotify and Class Counsel's suggestion that the Court restrict and monitor Wixen Music and Donahue, of all the parties, to protect the interests of Wixen Music Clients is absurd. Wixen Music and Donahue are, in stark contrast to Spotify and Class Counsel, the party and counsel before the Court who have the Wixen Music Clients' best interests in mind. Legally, as discussed at the December 1st hearing, Wixen Music Clients would have a claim against Wixen Music and Donahue if they proceeded without authority. Financially, Wixen Music and its Clients are completely aligned, since they would both benefit from the greatest recovery from Spotify. Of course, Spotify, in contrast, gains the most financially by making it difficult for Wixen Music Clients to opt out. Most importantly,

Wixen Music's business, and Donahue's entertainment practice, is built on, and depends on, the trust of the artists it represents. Wixen Music has represented some of the Wixen Music Clients for decades; to abuse this trust would be both unethical and a terrible business decision. Indeed, over several months of this well-publicized case, *not a single Wixen Music Client has come forward to dispute Donahue or Wixen Music's authority to file opt-outs or otherwise act on her, his or its behalf in this litigation*. The late, great artist Tom Petty, whose publishing Wixen Music has represented since 1983 and whose publishing companies would like to opt out of this settlement, wrote in the foreword to Randall Wixen's book, THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING, that "Randall Wixen is that rare man of integrity in a business that I'm not gonna call crooked, but I'm not gonna call it anything else."

b. The Length of the Second Opt-Out Period

Wixen Music and its Clients have gone to great lengths and incurred significant expense to opt out of the *Ferrick* settlement. Spotify has uniquely challenged Wixen Music's ability to represent its clients and opt them out. The second opt-out period should not place Wixen Music Clients in a worse position than other Class Members. Therefore, the minimum length of the second opt-out period should be the same seventy-five days granted to all Class Members for the initial opt-out period. In addition, Wixen Music requests an additional thirty days to prepare postcards and other communications to its clients that comply with the Court's requirements for the second opt-out period. Spotify's argument that Wixen Music and Donahue have had more than enough time to notify their clients ignores two crucial facts. First, Wixen Music has already communicated numerous times, over many months, with its clients regarding this lawsuit and is confident it is acting with the authority and consent of its Clients. Second, it would be pointless to send another communication without knowing what the Court specifically requires in this second-opt out period, particularly when Spotify claimed each of the previous declarations of

consent were insufficient. Donahue Fitzgerald and Wixen Music, therefore, respectfully request a total of 105 days for the second opt-out period.

We thank the Court for its time and consideration.

Dated: January 5, 2018

Respectfully submitted,

By: */s/ Kalpana Srinivasan*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of January, 2018, this document was properly served on all counsel of record via electronic filing in accordance with the SDNY Procedures for Electronic Filing.

/s/ *Kalpana Srinivasan*
Kalpana Srinivasan