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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAVID LOWERY, VICTOR KRUMMENACHER, GREG LISHER, and DAVID FARAGHER, individually and on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SPOTIFY USA INC., a Delaware corporation,

Defendant.

Case No.: 2:15-cv-09929-BRO-RAO

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR CORRECTIVE ACTION TO PREVENT MISREPRESENTATIONS TO PUTATIVE CLASS MEMBERS

[Filed Concurrently with Declaration of Mona Z. Hanna and Proposed Order]

Date: May 16, 2016
Time: 1:30 p.m.
Judge: Hon. Beverly Reid O'Connell

TO THE COURT, ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 16, 2016 at 1:30 p.m., or soon thereafter as may be heard, in Courtroom 14 of the above-captioned court, located at 312 North Spring Street, Los Angeles, CA 90012, before the Honorable Beverly Reid O'Connell, Plaintiffs David Lowery, Victor Krummenacher, Greg Lisher, and David Faragher ("Plaintiffs"), individually and on behalf of themselves and all others similarly situated, will and hereby do move the Court, pursuant to Fed. R. Civ. P. 23, to issue an order protecting the putative class members by:

1. Requiring that all communications between Defendant Spotify USA Inc. ("Spotify") (and those in concert with Spotify) and putative class members concerning a settlement with Spotify be produced for review by Plaintiffs and this Court;

2. To the extent that any misleading communications have already occurred, authorizing issuance of corrective notices to putative class members and invalidating any releases obtained in connection therewith; and

3. Prohibiting Spotify (and those in concert with Spotify) from making any future misleading communications to putative class members in connection witha settlement with Spotify.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which took place on April 14, 2016. Because Spotify's counsel was not available to meet and confer by telephone seven days before Plaintiffs' filing date, Spotify requested that the conference take place on a later date, and stipulated that the meet and confer would be timely for purposes of this Motion. (Declaration of Mona Z. Hanna, ¶8 & Exhibit J.)

The Motion is based on this notice, the memorandum of law in support of the motion filed concurrently herewith, as well as the supporting Declaration of Mona Z.

Hanna and exhibits, the files and records in this action, and any further evidence or argument that this Court may receive at or before the hearing.

Dated: April 18, 2016

MICHELMAN & ROBINSON LLP

By 

Sanford L. Michelman
Mona Z. Hanna
David C. Lee
Ilse C. Scott
Melanie Natasha Howard
Attorneys for Plaintiffs and Proposed Class

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I. INTRODUCTION

As alleged in this action, Defendant Spotify USA, Inc. ("Spotify") has engaged in rampant and indefensible copyright infringement by streaming of thousands of musical works owned by publishers and songwriters without the required mechanical licenses, and without payment of mechanical royalties. In an obvious attempt to sidestep the massive statutory liability resulting from its admitted and well-chronicled misconduct, Spotify – conspicuously only after the filing of this class action lawsuit – apparently has announced a "settlement" in principle with numerous publishers (and their songwriting partners) in a deal brokered by the National Music Publishers Association (the "NMPA"); a trade association purportedly "representing all American music publishers and their songwriting partners" (See www.nmpa.org/about/) – many of whom are putative class members in this lawsuit. It is apparent that the NMPA is acting in concert with Spotify to "pitch" the Spotify Settlement to its members.

Concerned over the representations that Spotify may be making to the putative class members regarding the settlement, Plaintiffs have requested a copy of the proposed settlement agreement. To date, neither Spotify nor the NMPA have agreed to provide a copy of the agreement or to disclose the terms or representations being made by these entities to the putative class members. Thus, Plaintiffs' knowledge of the terms and any notifications provided to the putative class is currently based on the reporting by the media. However, the statements in the media regarding the settlement have raised serious concerns about misrepresentations to the putative class members.

According to statements by Spotify and NMPA to the media, Spotify has agreed to pay to NMPA members approximately $25 million (allegedly representing the amount of unpaid royalties) along with a "penalty" payment of $5 million (an atonement payment for Spotify's wrongful conduct). *See* Ed Christmas, *Spotify and Publishing Group Reach $30 Million Settlement Agreement Over Unpaid Royalties*, BILLBOARD (Marth 17, 2016), available at www.nmpa.org, and Declaration of Mona Z. Hanna ("Hanna Decl."), at ¶ 3 and Exhibit C. These purported amounts are merely

a fraction of the approximate $150 million that Plaintiffs seek to recover on behalf of the putative class in this lawsuit.

Notably, publishers (and their songwriting partners) opting into the settlement must "release Spotify from any claims related to the identified pool of pending and unmatched works." *Id.* This is much broader than a waiver of claims for royalty payments or statutory penalties, as it relates to "any" related claims. Moreover, settling publishers, in exchange for receiving the very royalty payments that Spotify should have paid to them in any event, will be forced to waive their claims of copyright infringement and the recoverable statutory damages authorized by the Copyright Act (specifically, 17 U.S.C. § 504); damages which likely far exceed the paltry royalty payments available through the so-called "settlement." There is no information as to whether the settling members are being advised that they are entitled to these royalty payments as a matter of law, and do not need to waive any of their rights against Spotify to receive said payments. Nor is there any information indicating whether Spotify will be required to comply with the compulsory licensing requirements set forth at 17 U.S.C. § 115, going forward – if not, the settlement fails to provide any solution to Spotify's systemic failures to comply with that statutory mandate.

From Spotify's perspective, the more NMPA members who opt-in to the settlement, the better. More settling participants equals a smaller putative class in this lawsuit, and a reduced exposure to statutory copyright damages. For this reason, Spotify and its partner, the NMPA,[1] have every incentive to convince publishers to abandon this lawsuit in favor of the Spotify Settlement. As such, Plaintiffs are gravely concerned about the nature and content of the communications being sent to putative class members about that settlement and about their litigation rights. As discussed below, recent NMPA press statements evidence the use of slanted communications and

[1] Until recently, the NMPA owned the Harry Fox Agency. The Harry Fox Agency is Spotify's music licensing agent. Given this connection between them, the Spotify Settlement has drawn vocal public criticism that a settlement brokered by NMPA for Spotify could not be the result of a truly independent, arm's-length negotiation.

disparaging remarks about the Lowery class action and its legal counsel: comments intended to promote the Spotify Settlement and denigrate the lawsuit. Accordingly, it is highly suspected that their non-public statements to putative class members contain far more biased and deceptive information.

Publishers and their songwriting partners are free to decide which course of action best serves their interests, and they are entitled to fair and balanced statements concerning both the settlement and this class action lawsuit (as opposed to only slanted, self-serving communications promoting the settlement).

In the words of the late Justice Brandeis, "Sunlight is said to be the best of disinfectants." Therefore, by this motion, Plaintiffs, for themselves and on behalf of the putative class, seek an order under Federal Rule of Civil Procedure 23(d) and applicable law:

1. Requiring that all communications between Spotify (and those in concert with Spotify, including the NMPA) and putative class members concerning the settlement be produced for review by Plaintiffs and this Court;
2. To the extent that any misleading communications have already occurred, authorizing issuance of corrective notices to putative class members and invalidating any releases obtained in connection therewith; and
3. Prohibiting Spotify (and those in concert with Spotify) from making any future misleading communications to putative class members in connection with the Spotify Settlement.

The requested order is reasonable under the circumstances. Plaintiffs merely seek an order designed to protect putative class members from misleading communications that seek to unfairly deprive them of their legal rights, based on faulty information. Because Spotify and the NMPA refused to cooperate with Plaintiffs in resolving this issue, judicial action is necessary to ensure that communications to the putative class are fair and balanced. Simply put, neither Spotify, nor any person acting in concert with Spotify, should be encouraging prospective class members to waive

their copyright infringement claims and remedies without providing appropriate information about the pending class lawsuit as well, so that the putative class members may make an informed decision.

II. STATEMENT OF FACTS

As alleged, since its launch in 2011, Spotify has unlawfully reproduced and/or distributed copyrighted musical compositions to over 75 million users via its interactive commercial music streaming service, without obtaining the requisite mechanical licenses. Pursuant to the express language of 17 U.S.C. § 115(b)(2), such conduct is "actionable as acts of infringement under Section 501 and fully subject to the remedies provided by section 502 through 506…" including the recovery of statutory damages enumerated at Section 504 (ranging from $750 to $30,000 per work infringed). Plaintiffs filed this class action lawsuit against Spotify on December 28, 2015, alleging violations of the Copyright Act (the "Lowery class action"). Hanna Decl., ¶ 2 and Exhibit A.

On March 17, 2016, a mere three months after this lawsuit was filed, Spotify and the NMPA announced that the NMPA had brokered a settlement between its publisher members and Spotify to address Spotify's chronic unlicensed use of musical works and accompanying nonpayment of royalties. Hanna Decl., ¶ 3 and Exhibit C. While the NMPA will not disclose its membership list, it is anticipated that many of the NMPA members eligible to receive the proceeds of the settlement fall within the putative class definition set forth in Plaintiffs' class complaint. *Id*. While the final details of the settlement have been conveniently cloaked in "confidentiality," the media has reported that Spotify will have to pay $25 million in unpaid royalties and an additional $5 million in penalties. *Id*. The media has also reported that the settlement requires participants to "opt-in" or "opt-out" during a narrow three-month period between April and June 2016. *Id.* Participants opting into the settlement are forced to release Spotify from all claims of copyright infringement and/or unpaid royalties relating to the pool

of copyrighted works owned by NMPA members that Spotify used without obtaining licenses or paying royalties. *Id*.

As evidenced by public statements announcing the Spotify Settlement, the NMPA and/or Spotify have made numerous misleading and inaccurate statements to the putative class members via the media. As discussed in detail below, those statements inaccurately report the scope of Spotify's total potential liability, misleadingly tout the Spotify Settlement as the "best option" (while failing to address any other available options, including the Lowery class action), and disparage and defame Plaintiffs' claims and legal counsel and thus undermine the class action. *See* Hanna Decl., ¶ 4 and Exhibit D, E.

On March 24, 2016, in an effort to ensure putative class members were not being misled and confused by Spotify's and the NMPA's statements concerning the settlement, Plaintiffs' counsel formally requested: (1) a copy of the settlement agreement, and (2) any correspondence sent to NMPA members regarding their ability to "opt in" or "opt out" of the settlement. Hanna Decl., ¶ 5 and Exhibit F, G.

On March 25, 2016, the NMPA transmitted its response to Plaintiffs' counsel and refused to share any such information. Hanna Decl., ¶ 6 and Exhibit H. Moreover, it claimed a providence to "provide its songwriters and publisher members with the information necessary for them to make informed decisions with respect to their claims and rights *vis a vis* Spotify and to opt in to the Agreement." *Id*. It further accused Plaintiffs' counsel of being "transparently motivated [] by the prospect of a large fee award." *Id.* Nor has Spotify's counsel agreed to produce the agreement and all related communications provided to the putative class. Hanna Decl., ¶ 7-8 and Exhibits I, J.

As addressed below, Spotify is incentivized to undermine the Lowery class action by convincing NMPA's membership to opt in to the Spotify Settlement. Indeed, the very timing and structure of the settlement (with its three month opt-in period), appears intended to force prospective class members to select the Spotify Settlement before the class certification is even determined in this lawsuit. Consequently,

prospective class members are forced to ingest whatever information is put before them in a rapid fashion without oversight by this Court, and without the benefit of counsel. As such, it is critical that the information communicated to putative class members (including NMPA's members) about the settlement and the Lowery class action is fair and balanced. Hence, Plaintiffs file the instant motion for an order to ensure that no misleading, coercive, or improper communications with the prospective class have been or will be made in connection with the Spotify Settlement.

III. SUMMARY OF RELIEF SOUGHT

To ensure that putative class members receive complete and accurate information about the full nature of their injuries and damages, as well as the full scope of requested relief, Plaintiffs seek an order pursuant to Fed. R. Civ. P. 23(d):

(1) requiring that Plaintiffs and this Court be provided with copies of any communications Spotify and those acting in concert with Spotify have already sent to putative class members concerning the Spotify Settlement;

(2) in the event that any improper communications have already occurred, establishing a method to rectify misleading communications, including a corrective disclosure to such putative class members and/or voiding any settlement releases obtained in connection with misleading communications; and

(3) prohibiting any future misleading communications with members of the putative class, by requiring that putative class members be informed in any written communication concerning the Spotify Settlement about the pendency of this litigation, the nature of the litigation and the claims, and their right to contact class counsel or any attorney of their choosing.

IV. ARGUMENT

This Court has both the authority and the duty to review and impose reasonable restrictions on communications with putative class members under Rule 23(d) when such communications (a) are misleading or inaccurate, (b) fail to inform putative class

members of the pending action and the nature and strength of claims alleged, and/or (c) fail to adequately or accurately inform putative class members about their rights or their options for protecting those rights. Spotify's apparent goal is to capitalize on the lack of accurate information available to the public about Spotify's misconduct and this pending class action lawsuit, and to induce putative class members to make time-pressured decisions to waive their rights to participate in the pending action.

To prevent such abuses, this Court should require Spotify to provide Plaintiffs and this Court with copies of any and all communications from Spotify (and those acting in concert with Spotify, such as the NMPA) relating to the settlement which are directed to members of the putative class. If such communications are deemed misleading or inaccurate, the Court should also take steps necessary to ensure that neither Spotify, nor its settlement "broker" the NMPA, make such statements in the future, and that they properly inform putative class members of any information the Court deems necessary to cure the deceptive statements, so that putative class members can make informed decisions about whether to opt-in to the settlement agreement and thereby waive their rights to participate in the Lowery class action.

A. Misleading Statements Have Already Been Distributed To The Putative Class Members

Plaintiffs' worries about deceptive statements to the putative class are not mere theoretical concerns. In spite of Spotify's and the NMPA's failure to disclose any of their communications with putative class members, even the limited information available through the press demonstrates that class members have already been provided with distorted "information."

1. Misleading Statements About The Extent of Spotify's Liability

For example, NMPA's President and CEO David Israelite stated that: (1) "a hundred percent of what Spotify owes in royalties will be part of the deal"; and (2) "for any songs that are not claimed, those royalties will be liquidated on a market share basis, which will be to the benefit of all the publishers who participate." Hanna Decl.,

¶ 4 and Exhibit D. These statements misleadingly suggest that Spotify has agreed to pay "100%" of the mechanical royalties owed to all putative class members – which is patently false. Plaintiffs, like many other publishers and/or songwriters, are not members of the NMPA and therefore are owed royalties beyond those offered in the Spotify Settlement. Therefore, the inaccurate claim that the Spotify Settlement is redressing "all" past wrongs by Spotify gives NMPA members false information concerning the extent and scope of Spotify's infringing conduct. Spotify's infringing conduct affected hundreds or even thousands of songwriters who are not members of the NMPA. These misleading statements further create the erroneous impression that if potential class members choose not to opt into the Spotify Settlement, the royalties that belong to them will instead be paid to those who do opt in.

Mr. Israelite also deceptively claimed, "[w]hen 100% of the royalties owed are paid, along with a $5 million bonus pool, it will be worthwhile for every music publisher to opt in." Hanna Decl., ¶ 4 and Exhibit E. Such statements, however, ignore the reality that the settlement pool does not include any of the mechanical royalties Spotify owes to publishers and songwriters who are not NMPA members. *See id*. Further, there is no information as to how this $5 million bonus pool was arrived at, how it is being distributed, or how/if the NMPA will be paid some or all of the bonus pool for its involvement in "brokering" the agreement with Spotify.

The NMPA also misleadingly touted its settlement as "a good deal for songwriters," but admits that songwriters are not directly able to participate in the settlement – only publishers who are members of NMPA can be parties to the settlement. Hanna Decl., ¶ 4 and Exhibit D.

Finally, any member who opts in to the settlement will be required to waive any of his/her claims against Spotify, even though they are already entitled to these royalties as a matter of law. The settling members should be advised that they do not need to waive their rights against Spotify to receive their royalties. A failure to disclose

this fact would be a significant misrepresentation to the settling putative class members.

2. Misleading Statements Touting the Spotify Settlement Over The Lowery Litigation

Courts can also regulate communications that are "intended to undermine a class action by encouraging individuals not to join the suit." *Wright v. Adventures Rolling Cross Country, Inc.*, 2012 WL 2239797, at *4 (N.D. Cal. June 15, 2012) (citing *Belt v. EmCare Inc.*, 299 F.Supp.2d 664, 667 (E.D. Tex. 2003)); *see also Camp v. Alexander*, 300 F.R.D. 617, 622 (N.D. Cal. 2014) (explaining "where communications . . . undermine Rule 23 by encouraging class members not to join the suit, they may be limited by the court").

Here, the NMPA has suggested that the Spotify Settlement is superior to class action litigation, and that the instant action is an attempt to "punish" Spotify "for a [legal] system that is clearly broken". Hanna Decl., ¶ 4 and Exhibit D. Such statements are intended to inexplicably portray Spotify as a victim (as opposed to a serial infringer), which again portends that NMPA is misleadingly championing Spotify to its members and to the putative class, while disparaging the Lowery class action.

In response to criticisms that Spotify's $25 million settlement payment represents only a fraction of the statutory damages that could be available to putative class members under the Copyright Act, Mr. Israelite publicly stated to putative class members that the "NMPA has a 12-year track record of being right on these questions" and that "this was the same criticism when we settled with YouTube, and we turned out to be right on that one too." Hanna Decl., ¶ 3 and Exhibit C. Notwithstanding the fact that it is impossible to measure whether the NMPA has in fact been "right" in its prior 12-year track record, Mr. Israelite boldly stated that opting into the Spotify Settlement "is the best of all the options" for publisher members. *Id.*

Conspicuously, Mr. Israelite's statement is devoid of any actual discussion of any "option" other than the Spotify Settlement. Specifically, Mr. Israelite's statements make no reference to the range of remedies available to publishers in the Lowery class action case, including for example: (1) monetary remedies available to putative class members beyond the mere recovery of unpaid royalties, i.e., statutory damages as set forth in Section 504 of the Copyright Act; or (2) the injunctive relief as prayed for in Plaintiffs' lawsuit, including the requirement of a third-party auditor. At a minimum, putative class members should be provided with a fair and balanced description of the "options" referenced by, but not explained in, Mr. Israelite's statements.

3. Disparaging And Misleading Remarks Concerning Plaintiffs' Legal Counsel

The NMPA, through Mr. Israelite, has also made disturbing and disparaging remarks about Plaintiffs' counsel:

> I am concerned about the class action lawyers commenting on our settlement. In addition to there being an ethical question regarding such comment, these are lawyers who are hoping for a bigger payday, so their motives seem quite obvious.

Hanna Decl., ¶ 4 and Exhibit E.

Indeed, the NMPA repeated this gratuitous attack in response to Plaintiffs' straightforward request to review the settlement agreement and communications by again accusing Plaintiffs' counsel of being "transparently motivated [] by the prospect of a large fee award." Hanna Decl., ¶ 6 and Exhibit H.

The NMPA's statements characterizing Plaintiffs' counsel as unethical and greedy are inflammatory, disparaging and inaccurate. Equally significant, they are intended to turn potential class members against Plaintiffs' legal counsel and the Lowery class action. These types of harmful statements constitute precisely the type of communications that courts are permitted to regulate.

For example, in *Wright v. Adventures Rolling Cross Country, Inc.*, a class of former employees brought a lawsuit against an employer, asserting California and federal employment law claims. Prior to class certification, employer sent a letter to potential class members asking them to opt out of the class action. *Wright*, 2012 WL 2239797 at *2. The letter further alleged that plaintiffs' counsel was primarily motivated by his own financial gain. *Id*. The court found this comment (i.e. about plaintiffs' counsel) particularly "problematic" because it was "no doubt intended to encourage Plaintiffs and/or potential class members not to participate in the lawsuit." *Id.* at *5. Thus, the court ultimately held "plaintiffs have established that, at the very least, Defendants' communications were improper because they plausibly could have a chilling effect on participation in the class action." *Id*. (emphasis supplied). As a remedy, employer's counsel was not permitted to send a "mass communication" to potential class members unless he also provided plaintiff's counsel with a copy of the communication. *Id.* at *6.

Likewise, in *Kleiner v. First Nat'l Bank*, 751 F.2d 1193 (11th Cir. 1985), plaintiffs brought a class action lawsuit against an Atlanta bank, alleging the bank had fraudulently reneged on its promise to charge lower interest rates. In response, the bank solicited "class exclusion requests" from its members in order to reduce its potential liability and quell any adverse publicity the lawsuit created. *Id.* at 1197. It also conducted a large scale telephone campaign, which secured more than 2800 individual settlements. *Id.* at 1198. Shortly thereafter, plaintiffs brought a motion to enjoin the bank from communicating with members who fell within the certified class. The court found that it was completely inappropriate for the bank to call borrowers who were potential class members and ask them to opt out of the litigation. *Id.* at 1202. The Eleventh Circuit noted that many of the potential class members were not only current borrowers, but might also depend on the bank for future financing, might need "discretionary financial indulgence from their loan officers" and might not have easy access to other sources of credit. *Id*. Thus, the court stated "if the class and the class

opponent are involved in an ongoing business relationship," unilateral communications encouraging class members to opt-out of the class are coercive, and therefore can undermine Rule 23. *Id*. (emphasis supplied). Accordingly, the court found the trial court had ample discretion "to prohibit the Bank's overtures." *Id*. at 1203.

Here, there is no question that the statements by Mr. Israelite promoting the Spotify Settlement are "problematic" and can "plausibly . . . have a chilling effect on participation in the class action" (*see Wright*, 2012 WL 2239797 at *5), particularly given the defamatory suggestion that Plaintiffs' counsel are unethical and motivated solely by a "bigger payday." As such, consistent with *Wright*, this Court is warranted in requiring the disclosure to Plaintiffs and the Court of any communications made to the putative class about the Spotify Settlement.

B. This Court Has Broad Authority To Protect The Prospective Class From Potentially Improper Communications or Efforts to Influence Their Decision to Participate In the Lawsuit.

Under Rule 23(d) "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." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Rule 23(d) was intended specifically to provide the court with broad authority to ensure "the fair and efficient conduct of the action." Fed. R. Civ. P. 23, Advisory Committee Notes (1966 Amendment). Indeed, "the purpose of Rule 23(d)'s conferral of authority is not only to protect class members in particular but to safeguard generally the administering of justice and the integrity of the class certification process." *Slavkov v. Fast Water Heater Partners I, LP*, No. 14-CV-04324-JST, 2015 WL 6674575, at *2 (N.D. Cal. Nov. 2, 2015) (quoting *O'Connor v. Uber Technologies, Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at *3 (N.D. Cal. May 2, 2014). Thus, this Court may issue orders to protect prospective class members and ensure the fairness of the proceeding directed both to parties and non-parties to the action. *See, e.g.*, *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1244 (N.D. Cal. 2000)

(enjoining third-party law firm due to conduct "unnecessarily disruptive to the class action process").

Accordingly, it is well established that this Court has authority to "issue orders to prevent abuse of the class action process." *In re Sch. Asbestos Litig.*, 842 F.2d 671, 680 (3d Cir. 1988). Indeed, "the Supreme Court has recognized that a court's authority" to manage a class action applies to conduct before a class has been certified, such as the situation here, that could impact "potential class members." *See O'Connor*, 2014 WL 1760314 at *4. California District Courts regularly issue orders to prevent pre-certification communications with prospective class members that are misleading or improper. *See, e.g.*, *Quezada v. Schneider Logistics Transloading & Dist.*, No. CV 12-2188 CAS DTBX, 2013 WL 1296761, at *4 (C.D. Cal. Mar. 25, 2013) (stating "a limitation on pre-certification communications is appropriate when misleading, coercive, or improper communications have taken place.").

In addition to orders to curb misleading, coercive, or improper communications to the putative class, a court "can order a corrective action" when misleading information has already been provided to putative class members. *Gonzalez v. Preferred Freezer Servs. LBF, LLC*, No. CV 12-03467-ODW FMOX, 2012 WL 4466605, at *1 (C.D. Cal. Sept. 27, 2012). Courts may also invalidate release agreements obtained by a party to a putative class action where information about lawsuit has been unfairly omitted. *See, e.g.*, *County of Santa Clara v. Astra USA, Inc.*, No. 05-3740 WHA, 2010 WL 2724512 (N.D. Cal. July 8, 2010) (invalidating releases obtained by letter to putative class that did not attach plaintiffs' complaint, explain plaintiffs' claims or the status of the case, or include contact information for plaintiffs' counsel).

It is important to note that such an order "***does not require a finding of actual misconduct***" — rather, "[t]he key is whether there is 'potential interference' with the rights of the parties in a class action." *Slavkov*, 2015 WL 6674575 at *2 (quoting *O'Connor*, 2013 WL 6407583 at *4-5.

C. Communications With Prospective Class Members About the Spotify Settlement Cannot Be Coercive, Misleading, or Unfairly Influence Class Members Not To Participate.

"Communications that mislead or otherwise threaten to create confusion" for the prospective class and communications "that seek or threaten to influence the choice of remedies are . . . within a district court's discretion to regulate." *In re Sch. Asbestos Litig.*, 842 F.2d at 683. "[W]hen a defendant contacts putative class members for the purpose of altering the status of a pending litigation, such communication is improper without judicial authorization." *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 253 (S.D.N.Y. 2005), appeal granted, order amended, No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005), and appeal granted, order amended, No. M 21-95, 2005 WL 1871012 (S.D.N.Y. Aug. 9, 2005). Accordingly, this Court may limit communications that encourage potential class members not to participate in the lawsuit. *See O'Connor*, 2014 WL 1760314 at *6-7 (citing *Kleiner*, 751 F.2d at 1203).

Communications concerning settlement offers containing a release of a prospective class member's claims against a defendant are frequently the subject of Rule 23(d) orders where "they fail to provide adequate information about the pending class action." *Slavkov*, 2015 WL 6674575 at *2. Such communications, ideally, should "contain an adequate description of the proceedings written in objective, neutral terms that, insofar as possible, may be understood by the average absentee class member." *Id.* (citing *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1104 (5th Cir. 1977)). "Courts routinely hold that releases are misleading where they do not permit a putative class member to fully evaluate his likelihood of recovering through the class action." *Cheverez v. Plains all Am. Pipeline, LP*, No. CV15-4113 PSG (JEMX), 2016 WL 861107, at *4 (C.D. Cal. Mar. 3, 2016). In fact, in *Cheverez*, the court found that the settlement agreements at issue were sufficient to establish a "likelihood that the fairness of the litigation process has been compromised." *Id.*

As settlement communications involving putative class members are properly subject to scrutiny, Plaintiffs request disclosure of the communications regarding the Spotify Settlement, to confirm that such communications contain appropriate, objective, and informative details about the Lowery class action. Plaintiffs, unfortunately, have been forced to bring this issue to the Court's attention because neither Spotify nor the NMPA were willing to disclose any information regarding the Spotify Settlement communications without a Court order. To the contrary, counsel for the NMPA responded to Plaintiffs' reasonable request for information by making unwarranted disparaging attacks on Plaintiffs' counsel, while Spotify (incredibly) suggested that the Spotify Settlement has no relevance to the instant lawsuit (thereby admitting its view that the Lowery class action should be kept segregated from its communications concerning the Spotify Settlement). The NMPA's public comments about the settlement also suggest that it likely is not providing putative class members with complete or accurate information about the settlement, the Lowery lawsuit, or Plaintiffs' counsel.

Furthermore, the fact that there are undisclosed communications between Spotify or the NMPA and putative class members is, by itself, a cause for concern. "[W]here there is unsupervised, unilateral communications with the putative class members, there is a particular risk of the sabotage of informed and independent decision-making." *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743 (9th Cir. 2010) (reversed on other grounds). According to one circuit court, such communications are "rife with potential for coercion." *Kleiner*, 751 F.2d at 1202. Unless the Court requires that some sunlight be shed on these *sub rosa* communications, they will remain a fertile ground for abuse by parties who have every incentive to encourage potential class members to opt out of any class that is certified in this lawsuit, and no incentive at all to disclose accurate information about this litigation.

Moreover, there is heightened cause for concern that communications between Spotify (or by the NMPA on behalf of Spotify) and members of the putative class may

be coercive, because Spotify and the prospective class "are involved in an ongoing business relationship." *Id*. Indeed, Spotify has admitted that putative class members' copyrighted compositions are currently available to be played on Spotify's service, for which putative class members are owed royalties.

Spotify has previously engaged in highly-publicized takedowns of the catalogs of publishers who have complained that Spotify failed to obtain the requisite mechanical licenses or pay mechanical royalties. Hanna Decl., ¶ 9 and Exhibits K, L. Given Spotify's history of retaliation, prospective class members legitimately may be concerned that Spotify could retaliate against them by removing their music catalogs from Spotify if they choose not to opt in to the Spotify settlement. *See* *Kleiner*, 751 F.2d at 1202-03 (noting the heightened concern of coercive communications where there is an ongoing business relationship with putative class members). The Court should ensure that communications with potential class members contain explicit assurances that no adverse consequences will befall prospective class members who opt-out of the Spotify Settlement, or at a minimum, contain no indicia of threats to opt-out candidates.

D. The Relief Requested Is Appropriately Tailored and Based On a Sufficient Record of Potential Inference With The Putative Class.

The Supreme Court has held that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for such a limitation and the potential interference with the rights of the parties." *Gulf Oil Co.*, 452 U.S. at 101. However, "[a]n order under *Gulf Oil* does not require a finding of actual misconduct — rather, the key is whether there is potential interference with the rights of the parties in a class action." *Slavkov*, 2015 WL 6674575 at *2 (internal quotation marks and citations omitted).

Spotify's negotiation of the settlement, which purports to release Spotify from litigation claims by prospective class members who opt-in, in conjunction with

Spotify's existing business relationship with members of the prospective class, undoubtedly poses a risk of potential interference with putative class members' rights. The refusal to disclose full information about the Spotify Settlement (notably, an unsupervised out-of-court settlement) and settlement communications only heightens that concern. The risk to the putative class is exacerbated by the structure of the settlement, which forces putative class members to quickly decide whether to opt-in even before the parties have been able to conduct any discovery in this case, and before the class has been certified. Statements by the NMPA that disparage the instant litigation (and the legal process in general), and seek to defame and undermine Plaintiffs' counsel, cements the need for an order to protect the rights of the putative class.

Furthermore, Plaintiffs' requested relief does not seek to prohibit Spotify or the NMPA from proper communications with prospective class members, or to prevent them from proceeding to a private settlement outside the court system. Plaintiffs are merely seeking to ensure that the Court has an opportunity to review any past communications to ensure they do not contain improper statements, and to require Spotify and the NMPA to provide appropriate information about the instant action in any future communications. Such orders are not extraordinary. *See, e.g.* *Talavera v. Leprino Foods Co.*, No. 1:15-CV-105-AWI-BAM, 2016 WL 880550, at *7 (E.D. Cal. Mar. 8, 2016). If, however, upon the production of communications already made it becomes apparent that such communications were improper attempts to discourage participation in the instant lawsuit, then the Court can and should provide appropriate relief by ordering a corrective notice, and invalidating any improperly obtained release. *See, e.g.*, *Cheverez*, 2016 WL 861107 at *7 (invalidating releases and ordering curative notice to those that signed the release).

V. CONCLUSION

Put simply, there is no reason that settlement communications with potential class members should be conducted under cloak-and-dagger secrecy, and the fact that

Spotify and the NMPA have insisted on such clandestine communications only heightens the concern that accurate and complete information is not what is being disseminated. A little daylight is sorely needed. Accordingly, Plaintiffs respectfully request that the Court issue the proposed order lodged herewith, to protect the rights of prospective class members.

Dated: April 18, 2016

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CERTIFICATE OF SERVICE

I certify that on April 18, 2016, I caused a copy of the foregoing to be filed electronically and that the document is available for viewing and downloading from the ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

By: _____
Mariam Tarzi