SANFORD L. MICHELMAN (SBN 179702)
smichelman@mrllp.com
MICHELMAN & ROBINSON, LLP
10880 Wilshire Blvd., 19th Floor
Los Angeles, CA 90024
Telephone: (310) 564-2670
Facsimile: (310) 564-2671

MONA Z. HANNA (SBN 131439)
mhanna@mrllp.com
JENNIFER A. MAURI (SBN 276522)
jmauri@mrllp.com
MICHELMAN & ROBINSON, LLP
17901 Von Karman Avenue, 10th Floor
Irvine, CA 92614
Telephone: (714) 557-7990
Facsimile: (714) 557-7991

Attorneys for Plaintiffs
DAVID LOWERY, VICTOR KRUMMENACHER,
GREG LISHER, AND DAVID FARAGHER

UNITED STATES DISTRICT COURT

NORTHERN 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.

RHAPSODY INTERNATIONAL, INC.

Defendant.

Case No.: 4:16-cv-01135-JSW

Hon. Jeffrey S. White
Hon. Jacqueline Scott Corley, Magistrate

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL; MEMORANDUM OF POINTS AND AUTHORITIES

Complaint Filed: March 7, 2016

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

PLEASE TAKE NOTICE that on March 22, 2019 at 9:00 a.m., or as soon thereafter as the matter can be heard before the Honorable Jeffrey White, in Courtroom 5 (2nd Floor), Northern District of California, located at the Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612, Plaintiffs David Lowery, Victor Krummenacher, Greg Lisher, and David Faragher (collectively, "Plaintiffs") will and hereby do move the Court pursuant to Federal Rule of Civil Procedure 23 for an Order:

1. Preliminarily approving the Settlement Agreement between Plaintiffs and Rhapsody International, Inc. ("Defendant" or "Rhapsody"), dated January 16, 2019, on the grounds that its terms are sufficiently fair, reasonable, and adequate for notice to be issued to the class;
2. Certifying the proposed settlement class for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23;
3. Approving the form and content of the proposed class notice and notice plan;
4. Approving the form and content of the claims form;
5. Setting the deadline for class members to object to the settlement, wherein said deadline is sixty (60) days following preliminary approval;
6. Setting the deadline for class members to opt-out of the settlement, wherein said deadline is sixty (60) days following preliminary approval;
7. Appointing Michelman and Robinson, LLP, to represent the class as class counsel;
8. Appointing Heffler Claims Group LLC as Settlement Administrator;
9. Scheduling a hearing regarding final approval of the proposed settlement, Class Counsel's request for attorneys' fees and costs, and enhancement payments to the named Plaintiffs on March 13, 2020; and
10. Granting such other and further relief as may be appropriate

This Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities below; the Declaration of Mona Z. Hanna filed concurrently herewith; all

supporting exhibits filed herewith; all other pleadings and papers filed in this action; and any argument or evidence that may be presented at the hearing in this matter.

Dated: February 15, 2019

MICHELMAN & ROBINSON, LLP

By: */s/Mona Z. Hanna*
Sanford L. Michelman
Mona Z. Hanna
Jennifer A. Mauri
Attorneys for Plaintiffs and Proposed Class

SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Procedure Rule 23, Plaintiffs David Lowery, Victor Krummenacher, Greg Lisher, and David Faragher (collectively, "Plaintiffs") move this court for an order preliminarily approving a proposed class action settlement agreement ("Settlement" or "Agreement") entered into by Plaintiffs and Rhapsody International, Inc. ("Defendant" or "Rhapsody").

As set forth in greater detail in Plaintiffs' Memorandum, the Settlement Agreement complies with the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3). Specifically, (1) the Settlement Class is sufficiently numerous and ascertainable; (2) class members share common issues of law and fact; (3) Plaintiffs' claims are typical of the class members' claims' and (4) Plaintiffs and their counsel will adequately protect the class. Further, pursuant to Rule 23(b)(3), common issues predominate over individual issues, and class action treatment is superior to tens of thousands of individual actions.

Further, the Settlement Agreement is fair and within the range of reasonableness. Specifically, the Settlement Agreement: (1) is the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.

Finally, the proposed Class Notice, Notice Plan, Claim Form, and Claims Administrator are sufficient. Thus, approval of the instant motion is appropriate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Federal Rule of Procedure Rule 23, Plaintiffs David Lowery, Victor Krummenacher, Greg Lisher, and David Faragher (collectively, "Plaintiffs") move for an order preliminarily approving a proposed class action settlement agreement ("Settlement" or "Agreement") entered into by Plaintiffs and Rhapsody International, Inc. ("Defendant" or "Rhapsody"). The Settlement follows three mediations, initial discovery and due diligence, and an in-person settlement conference with Judge Corley (and multiple further telephonic conferences). A copy of that Settlement Agreement is attached hereto as Exhibit A.

As set forth in greater detail below, the Settlement complies with the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3). Further, the Settlement is fair and within the range of reasonableness. Finally, the proposed Class Notice, Notice Plan, and Claims Administrator are sufficient. Thus, approval of the instant motion is appropriate. Accordingly, Plaintiffs seek an order: (1) preliminarily approving the Settlement Agreement between Plaintiffs and Rhapsody International, Inc. ("Defendant" or "Rhapsody"), dated January 16, 2019, on the grounds that its terms are sufficiently fair, reasonable, and adequate for notice to be issued to the class; (2) certifying the proposed settlement class for settlement purposes only, pursuant to Federal Rule of Civil Procedure 23; (3) approving the form and content of the proposed class notice and notice plan; (4) approving the form and content of the claims form; (5) setting the deadline for class members to object to the settlement; (6) setting the deadline for class members to opt-out of the settlement; (7) appointing Michelman and Robinson, LLP, to represent the class as class counsel; (8) appointing Heffler Claims Group LLC as Settlement Administrator; and (9) scheduling a hearing regarding final approval of the proposed settlement, Class Counsel's request for attorneys' fees and costs, and enhancement payments to the named Plaintiffs.

II. RELEVANT BACKGROUND FACTS

A. The Instant Litigation

On March 7, 2016, Plaintiffs initiated a class action lawsuit against Rhapsody. Rhapsody is an interactive music streaming service with millions of users. Plaintiffs alleged that Rhapsody

violated copyright law by reproducing and distributing musical works on its service without consent or license. The crux of Plaintiffs' claim was that Rhapsody had not complied with Section 115 of the Copyright Act which at the time required that Notices of Intent ("NOIs") be served on copyright holders or filed with the Copyright Office by a user within 30 days of the work (songs) being made available to the public. Serving or filing an NOI resulted in a compulsory license to the work that allows the user to pay statutory mechanical royalties.[1] Plaintiffs assert that Rhapsody's failure to obtain comply with the Copyright act resulted in Rhapsody being liable for billions for statutory penalties.[2]

Between May 2016 and April 18, 2018, the parties attended three mediations and engaged in numerous phone calls and email exchanges in an attempt to reach a settlement. The parties agreed to the fundamental terms of the settlement in a Memorandum of Understanding signed by the parties in May 2017. Various disputes interfered with completion of the settlement. Accordingly, the parties attended a settlement conference with Judge Corley on October 11, 2018. Further progress was made, and a final settlement conference was held on January 15, 2019, wherein the parties agreed upon a written settlement agreement.

B. The Proposed Settlement Agreement

On January 16, 2019, the parties executed the Settlement. The following are summaries of the key provisions[3]:

- Rhapsody shall pay thirty-five dollars ($35.00) for each work that was played in its entirety at least once on the Rhapsody Music Service in the U.S. between March 7, 2013 and February 15, 2019, wherein that work was registered with the U.S. Copyright Office on or before certain dates (*see* Exhibit A at ¶30);

- Rhapsody shall pay one dollar ($1.00) for each work that was played in its entirety at least twenty four (24) times on the Rhapsody Music Service in the U.S. between March 7, 2013 and February 15, 2019, wherein that work was not registered with the U.S. Copyright Office on or before certain dates (*see id*. at ¶31);

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[1] Only mechanical royalties are at issue in this lawsuit.
[2] However, based on the factors discussed herein, including Rhapsody's ability to pay a larger settlement, the Settlement is extremely fair to the class members.
[3] The terms of the Settlement Agreement are more detailed than as set forth herein, Thus, a review of Exhibit A is required for a detailed understanding of the terms.

- This is a claims made settlement without a fund. The maximum total amount payable by Rhapsody shall be capped at ten million dollars ($10,000,000) (*see id.* at ¶32);

- If the total amount of eligible claims exceeds $10 million, the amount of payment per work shall be reduced by a percentage corresponding to the percentage that the eligible claims made that exceed $10 million (*see id.*);[4]

- Rhapsody shall institute an Artist Advisory Board ("AAB"), with an annual budget of not less than thirty thousand dollars ($30,000), designed to advance the parties' goals of improving and protecting artists' rights, promoting Rhapsody's service as an artist-friendly platform and thus growing its subscriber base, and providing compensation to artists (*see id.* at ¶49); and

- Rhapsody shall initiate an artist referral program ("ARP") that will provide artists with a ten dollar ($10) referral fee for each referral who becomes a Rhapsody paying subscriber (*see id.* at ¶50).

III. LEGAL STANDARD

The Court's review of a proposed class action settlement is governed by Rule 23(e) of the Federal Rules of Civil Procedure. That rule requires the Court "to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir.1998) (*citing Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir.1992)). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id*. (*citing Officers for Justice v. Civil Serv. Comm'n of S.F*., 688 F.2d 615, 628 (9th Cir.1982)). Where settlement is reached prior to class certification, the Court "must peruse the proposed compromise to ratify both the propriety of class certification for settlement purposes and the fairness of the settlement." *Staton v. Boeing Co*., 327 F.3d 938, 952 (9th Cir.2003); *see also Deaver v. Compass Bank*, 2015 WL 4999953, at *4 (N.D. Cal. Aug. 21, 2015) (*citing Staton*). In such circumstance, the propriety of class certification is established if the class meets all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Hanlon*, 150 F.3d 1011 at 1022. Fairness is established where the settlement "(1) appears to be the product of serious, informed, non-collusive negotiations; (2)

[4] Thus, the allocation plan as set forth in the Settlement provides for a set dollar amount to each class member who submits a valid claim form; should that amount be greater than the agreed upon cap, the dollar amount will be reduced proportionately.

has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." *Harris v. Vector Mktg. Corp*., 2011 WL 1627973, at *7 (N.D. Cal. Apr. 29, 2011).

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Churchill Village, L.L.C. v. General Elec. Co*., 361 F.3d 566, 575 (9th Cir. 2004). To that end, courts recognize that, as a matter of sound policy, settlements of disputed claims are encouraged, and a settlement approval hearing should "not be turned into a trial or rehearsal for trial on the merits." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). Courts must give "proper deference" to the settlement agreement, because "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027 (*quoting Officers for Justice*, 688 F.2d at 625).

IV. CERTIFICATION IS PROPER UNDER RULE 23.

Pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), Plaintiffs propose that the Court certify the following class for settlement purposes:

> Owners of mechanical distribution and/or reproduction rights in Qualifying Registered Works and Qualifying Unregistered Works that were first made available or played on the Rhapsody music service in the United States during the period from March 7, 2013 until February 15, 2019.

This definition is consistent with the class definition pled in the operative complaint, but expands on that definition by including owners of mechanical distribution and/or reproduction rights in unregistered works. (ECF No. 1 at ¶35). Also, as set forth below, such prerequisites are met.

A. Plaintiffs Satisfy Each of the Rule 23(a) Prerequisites

The four Rule 23(a) requirements are referred to as numerosity, commonality, typicality, and adequacy of representation. *Hanlon*, 150 F.3d 1011 at 1019.

1. The Settlement Class is Sufficiently Numerous and Ascertainable

The numerosity requirement mandates that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). "In general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010). In addition, the class should be ascertainable—i.e., the "the class can be ascertained by reference to objective criteria." *Hendricks v. StarKist Co,* 2015 WL 4498083, at *4 (N.D. Cal. July 23, 2015). Here, Plaintiffs' Counsel estimates that there are upwards of two million class members[5] within the proposed class, and thus, the class is both sufficiently numerous and ascertainable. *Cruz v. Sky Chefs, Inc*., 2014 WL 2089938, at *5 (N.D. Cal., May 19, 2014). Rhapsody believes that this estimate is too large based on, *inter alia*, a settlement agreement between Rhapsody and the National Music Publishers Association ("NMPA") that resolves the claims related to "98% of the works played on Rhapsody's service." (ECF No. 81 at 5). However, even if this were the case,[6] the remaining 2% is still over 150,000 works. Even if Rhapsody's contention were accurate, the class remains sufficiently numerous.

2. Class Members Share Common Issues of Law and Fact

"All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019; *Ellis v. Costco Wholesale Corp*., 285 F.R.D. 492, 506 (N.D.Cal. 2012). Here, the only cause of action is for copyright infringement. Because Rhapsody failed to obtain licenses, it streamed unlicensed works of all Class Members. Therefore, the lawfulness of Rhapsody's conduct is a common question for the Class. This is sufficient to meet the Rule 23(a)(2) requirements. *In re Napster, Inc. Copyright Litig*., 2005 WL 1287611, at *3 (N.D. Cal. June 1, 2005).

3. Plaintiffs' Claims are Typical of Class Members' Claims

"[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id*. Here, the named Plaintiffs

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[5] *See* Hanna Decl. at ¶2.

[6] Plaintiffs' Counsel cannot confirm the accuracy of this because it is unaware of the specific works included in the NMPA settlement.

are typical of the class: all have been injured by Rhapsody's failure to obtain licenses and pay royalties for musical works it played on its service, and all assert the same claims and request the same damages and/or penalties. Thus, Plaintiffs meet the Rule 23(a)(3) typicality requirement.

4. Plaintiffs and Their Counsel Will Adequately Represent the Class

Members of a class may sue as representatives on behalf of the class only if they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Here, neither the Named Plaintiffs nor their counsel have any conflicts of interest with other class members. Named Plaintiffs do not seek any different relief from the relief they seek on behalf of all other class members. The Named Plaintiffs have shown they are familiar with the basis for the suit and their responsibilities. *Inter alia*, David Lowery (Named Plaintiff) was actively involved in the mediation/settlement efforts and attended several sessions (either via telephone or in person).

Plaintiffs' Counsel has also demonstrated their ability to zealously represent the interests of the class by, *inter alia*, engaging in numerous rounds of discovery motions/letter briefs, three mediations, settlement conferences with Judge Corley, and extensive phone conferences and email correspondence. Further, Plaintiffs' counsel flew to Rhapsody's out-of-state headquarters to inspect documents, even where the costs and attorneys' fees incurred would not be recoverable as part of the attorneys' fees award in this action. Also, as further discussed in the concurrently filed Hanna Declaration, Plaintiffs' Counsel (Michelman & Robinson, LLP or M&R) has substantial experience litigating and settling complex class actions. (*See* Hanna Decl. at ¶¶3-6; *see also id*. at Exhibit A (chart of details as to Plaintiffs' counsels' past comparable class settlements)). M&R is nationally recognized due in part to the innovative work it has performed on countless high-stakes state and federal class actions and complex matters over the past years, across a broad spectrum of practice areas, including intellectual property. (*Id.*). In defense of class actions, M&R has represented over 50 cases that all resolved positively for the clients, and were handled efficiently and without issue for the parties, counsel, or court. (*Id.*).

M&R has a well-established intellectual property and copyright practice, and regularly handled matters involving copyrights and other digital rights in the music and entertainment industry. (*Id.*). Moreover, M&R handles all stages of trademark and copyright prosecution in the U.S. Patent and Trademark Office and U.S. Copyright Office. (*Id.*). In addition to the firm's broad litigation experience, the lead trial attorneys on this case have each been individually recognized as leading practitioners in the areas of complex and class action litigation. (*Id*. at ¶4-5).

M&R will efficiently and effectively serve the putative class. It has dedicated attorneys to this case who have worked together for years on dozens of high-stakes class action lawsuits, and possesses the internal bench strength and in-house expertise necessary to handle the issues in this action. (*Id.* at ¶6). With multiple offices across the U.S., M&R also possesses the infrastructure and know-how to handle case-related activities regardless of where they occur. (*Id.*). Accordingly, M&R has the capabilities, requisite knowledge, and experience to handle the complexities and scale of the instant lawsuit in a manner that serves and protects the interests of the putative class.

B. Plaintiffs Satisfy the Rule 23(b) Requirements

In addition to satisfying Rule 23(a), the parties seeking certification must also show that the action is maintainable under Fed.R.Civ.P. 23(b)(1), (2) or (3). *Hanlon,* 150 F.3d at 1022. Rule 23(b)(3) requires the Court to find that "questions of law or fact common to class members predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id*.

1. Common Issues Predominate Over Individualized Issues

Questions of law or fact common to class members must predominate over any questions affecting only individual members. Fed. R. Civ. P. 23(b)(3). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id.* at 1022 (*citing* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1778 (2d ed.1986)). Here, as set forth above, the question of Rhapsody's failure to obtain licenses and pay royalties for musical works that Rhapsody

played on its service is common to all the members of the class, and thus, an adjudication as to whether such failure was violative of the Copyright Act would resolve the claims for all the members of the class.

2. A Class Action Is Superior

Class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Class certification is appropriate and encouraged "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon,* 150 F.3d at 1022. "From either a judicial or litigant viewpoint, there is no advantage in individual members controlling the prosecution of separate actions. There would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." *Id.* at 1023. Here, a class action is the superior method because a common legal question exists amongst all members of the class (i.e., whether Rhapsody's actions constitute copyright infringement), and thus, litigating this issue once is the most efficient way of resolution. Also, litigating this issue on an individual basis would be costly and such cost would outweigh the potential individual recovery: the royalties owed to the class members for Rhapsody's unlicensed use of their musical works is estimated to be less than $1.00 per class member (*see* ECF. No. 81 at p. 7:1-2) whose works are registered with the Copyright Office, and zero for those that are not. Further, the statutory damages available for each class member (per work) range from $7,500 - $35,000. 17 U.S.C. §504(c). Even an award at the maximum end of that range would likely not cover the fees and costs for an individual lawsuit (particularly in view of the disparity in size and resources between an individual and Rhapsody (a multi-million dollar entity)). Thus, class treatment is superior.

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

"At the preliminary approval stage, the Court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." *Harris v. Vector Mktg. Corp*., 2011 WL 1627973, at *7 (N.D.

Cal. Apr. 29, 2011). At this stage, "the settlement need only be potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final Approval, after such time as any party has had a chance to object and/or opt out." *Id*. "In conducting this evaluation, it is neither for the court to reach any ultimate conclusions regarding the merits of the dispute, nor to second guess the settlement terms." *McClellan v. SFN Grp., Inc.*, 2012 WL 2367905, at *2 (N.D. Cal. June 21, 2012) (*citing Officers for Justice*, 688 F.2d at 625). Preliminary approval of the class settlement is appropriate.[7]

A. Settlement Is The Product Of Serious, Informed, Non-Collusive Negotiation

The fairness and reasonableness of a settlement agreement is presumed where "that agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel." *In re Netflix Privacy Litig*., 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013). Also, "[t]he use of a mediator and the presence of discovery 'support the conclusion that the Plaintiff was appropriately informed in negotiating a settlement.'" *Deaver,* 2015 WL 4999953 at *7 (quoting *Villegas v. J.P. Morgan Chase & Co.,* 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012); *Harris*, 2011 WL 1627973, at *8. Here, the Settlement was the result of extensive, arm's length negotiations by counsel well versed in copyright and class action litigation. The Settlement was vigorously negotiated and included three mediation sessions, two settlement conferences with Magistrate Judge Corley, and numerous telephone calls and emails. Further, the parties engaged in discovery (and related motions/letter briefing and hearings) for the sole purpose of furthering settlement. Further, Plaintiffs' counsel engaged in substantial due diligence both before and throughout this case. *Inter alia,* Plaintiffs conducted discovery to determine the number musical works likely to be implicated in this action (such efforts are discussed in greater detail at paragraph 2 of the Hanna Declaration), and after key settlement terms were reached, conducted discovery to confirm that Rhapsody's assertions as to its financial status were accurate. Lastly, there is no spectre of collusion here because the fees are separate from the settlement cap, and the results for the class are exceptional. *Moore v. PetSmart, Inc.*, 2014 WL 1927309, at *4 (N.D. Cal. May 14, 2014). Thus, the Settlement is fair and reasonable.

[7] Plaintiffs also believe that the settlement will be appropriate for final approval.

B. The Settlement Has No Obvious Deficiencies

The Court next considers "whether there are obvious deficiencies in the Settlement Agreement." *Deaver*, 2015 WL 4999953, at *7. Here, there are no obvious deficiencies. The scope of the release is not overly broad, as Class Members will release only those claims that could arise from Rhapsody's alleged infringement of their copyrights. *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1334 (N.D. Cal. 2014). Indeed, the scope of the release is consistent with the claim asserted in the operative complaint—a single claim for copyright infringement. (*See* ECF. No. 1, *generally*). Further, as set forth herein, the Settlement confers tangible monetary benefits to the class. *Chao v. Aurora Loan Servs., LLC*, No. C 10-3118 SBA, 2014 WL 4421308, at *3 (N.D. Cal. Sept. 5, 2014). Yet further, this is a claims made settlement, and thus, there is no issue of reverter. The amount of the award to each class member is set at $35.00 or $1.00, respectively, depending on whether the infringed work was registered with the Copyright Office. According to Rhapsody, the amount of royalties owed to the members of the class average less than $1.00. (*See* ECF No. 81 at p. 7:1-2). Thus, these amounts provide substantial benefit to the class members, and the class members have incentive to submit a claim.[8]

C. There is No Unfair Preferential Treatment Of Any Class Member

Under this factor, the court assesses "whether the Settlement Agreement provides preferential treatment to any class member." *Hendricks v. StarKist Co*, No. 13-CV-00729-HSG, 2015 WL 4498083, at *6 (N.D. Cal. July 23, 2015). Here, the recovery to class members is based on the number of musical works included in the Settlement, not simply by number of class members. If the cap is reached, the payment to class members will be reduced proportionally. Thus, each Class Member is given equal treatment. *Id*.[9]

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[8] An attorneys' fees provision may also be preliminarily evaluated as part of this inquiry, subject to final approval. Here, Plaintiffs' Counsel will apply for fees and costs via Motion to this Court and, thus, the settlement is not contingent upon the Court approving Counsel's application, nor will the award of attorneys' fees reduce the amount of the settlement available to class members. Thus, the settlement is fair. *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1331 (N.D. Cal. 2014). As set forth in the concurrently filed Hanna Declaration, Plaintiffs' Counsel intends to seek an attorneys' fee award of at least $5,511,878 and costs of at least $85,214. (Hanna Decl. at ¶¶5-6).

[9] In relation to this factor, the court may also preliminarily consider the propriety of agreed upon class representative enhancements, but may defer the issue until final approval. Deaver, 2015 WL 4999953, at *8. As will be briefed in later papers, the agreed upon enhancement for each of

D. The Terms of the Settlement Are Within the Range of Possible Approval

To determine if a settlement falls within the range of possible approval, the Court primarily considers "plaintiff's expected recovery balanced against the value of the settlement offer, in light of the risks of further litigation." *In re Tableware Antitrust Litig*., 484 F. Supp. 2d at 1080. "When determining the value of a settlement, courts consider both the monetary and nonmonetary benefits that the settlement confers." *Miller v. Ghirardelli Chocolate Co*., 2015 WL 758094, at *5 (N.D. Cal. Feb. 20, 2015) (*citing Staton*, 327 F.3d at 972–74). As set forth below, several factors bear on the amount of the anticipated class recovery under the settlement.

1. There Are Substantial Risks Associated With Further Litigation

A careful risk/benefit analysis must inform Counsel's valuation of a class's claims. *Lundell v. Dell, Inc*., 2006 WL 3507938, at *3 (N.D. Cal. Dec. 5, 2006). "Although each side could be expected to champion the merits of its case if this matter were to proceed to trial, both must also recognize the inherent uncertainty of litigation. *Id.* "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Noll v. eBay, Inc*., 309 F.R.D. 593, 606 (N.D. Cal. 2015) (*quoting Ching v. Siemens Indus., Inc*., 2014 WL 2926210, at *4 (N.D.Cal. June 27, 2014)). Here, the risks of continued litigation are substantial. Had this case proceeded to litigation, Rhapsody would have fought vigorously against Plaintiffs' claims at every step of the case. Rhapsody filed a motion to dismiss early on in the case which was taken off calendar pending settlement discussions. It would have re-filed the motion had the case not settled. Further, Rhapsody has indicated that it would have moved for Summary Judgement and vigorously opposed class certification. Thus, litigating this action would have been lengthy and expensive. "Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate success on the merits, has value to a class, especially when compared to risky and costly continued litigation." *Id*. (*quoting LaGarde v. Support.com, Inc*., 2013 WL 1283325, at *4 (N.D.Cal. Mar. 26, 2013)).

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the named Plaintiffs is $2,500, which is in line with awards in other cases in California. *Covillo v. Specialtys Cafe*, 2014 WL 954516, at *8 (N.D. Cal. Mar. 6, 2014).

In addition to the inherent risks of litigation, there is a substantial factor specifically applicable to this case: the recent passage of the Music Modernization Act ("MMA"). The MMA was enacted into law on October 11, 2018, and set limits on liability for entities who did not acquire mechanical license in accordance with the prior statutory scheme. Specifically, for any copyright owner that commences a copyright infringement action "on or after January 1, 2018, against a digital musical provider", for "activities prior to the license availability date" be limited to a "sole and exclusive remedy" of royalties. (H.R. 1551(d)(10)). The "license availability date" is January 1, 2021. (*See* H.R. 1551(e)(15)). The instant action is not affected by the MMA's limits on liability. However, assuming *arguendo*, if this action were to continue and class certification were not granted (although Plaintiffs strongly believe that such certification would occur) then only the four named plaintiffs would have the ability to seek statutory damages from Rhapsody. The remaining putative class members would be barred from seeking statutory damages (the bulk of the liability) and would be left to seek royalties only—which Rhapsody asserts are less than $1.00 on average (*See* ECF No. 81 at p. 7:1-2).

2. Defendant's Inability to Pay A Larger Settlement

Although Plaintiffs believe Rhapsody faced substantial potential liability here,[10] the Settlement Agreement sets a $10,000,000 cap. (*See* Exh. A at ¶ 32.) This amount is reasonable because of Rhapsody's financial reality. The parties have engaged in discovery as to Rhapsody's financial status, and Plaintiffs' Counsel is satisfied that Rhapsody's financial status cannot support any larger settlement amount than the parties have agreed to.[11] It is highly unlikely that Rhapsody could pay a judgment beyond $10,000,000 and thus, a larger settlement would likely go unpaid. Accordingly, this factor weighs in favor of preliminary approval. (*Rinky Dink Inc v. Elec. Merch. Sys. Inc*., 2015 WL 11234156, at *5 (W.D. Wash. Dec. 11, 2015). Further, the

[10] Based on data provided by Rhapsody, Plaintiffs have estimated that Rhapsody's liability is in the range of $846,174,000 (applying even the lowest statutory damage rate (*i.e*., $750 per infringed work)) to $33,846,960,000 (applying the high end of the statutory damage rate (*i.e*., $30,000 per infringed work)). Even if Rhapsody's assertion that "98%" of the works at issue in this lawsuit were resolved by the NMPA settlement, statutory damages still range from $16,923,480 to $676,939,200.

[11] Plaintiffs' Counsel has reached this position based on representations by Rhapsody and on review of certain of Rhapsody's financial documents (a list of which is attached to the Settlement Agreement as Exhibit D.)

Settlement Agreement provides safeguards in the event that Rhapsody's representations as to its financial status are inaccurate: in such an event, the cap increases up to $20,000,000.

3. The Settlement Provides Substantial Non-Monetary and Monetary Value

With the risks of further litigation and Rhapsody's ability to pay in mind, the next step of this analysis is the evaluation of the non-monetary and monetary terms of the Settlement. With respect to monetary value, "[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery will not per se render the settlement inadequate or unfair." *Officers for Justice*, 688 F.2d at 628. This is due, in large part, to the potential pitfalls of further litigation. *In re Omnivision Techs., Inc*., 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2008). Thus, the monetary value of the settlement need not meet any particular percentage threshold of the overall potential value of the case. *Id*. Here, the parties agreed to a claims made settlement with a cap of $10 million (which may increase up to $20,000,000 in the event that Rhapsody's financial representations were inaccurate). The $10 million cap is not "per se inadequate or unfair" given the limitations outlined above. *Officers for Justice*, 688 F.2d at 628. As a result of the Settlement, the class members will receive monetary compensation, including artists who had unregistered works that would not have been entitled to royalties. Indeed—over the span of just three years, Rhapsody streamed over 7.7 million songs at least once that were "unmatched" to the songwriter—meaning that Rhapsody was unable to identify the mechanical rightsholder to obtain a license, and/or pay out the royalties for the distribution and reproduction of those works. Through the Settlement, this situation will be rectified. Under the terms of the settlement, the rights holder for each Qualified Registered Work will receive $35.00, and the rights holder for each Qualified Unregistered Work will receive $1.00 (subject to proportional reduction is the cap is reached). This is a substantial monetary award compared to the "less than $1.00" amount of royalties which Rhapsody contends are owed. (*See* ECF No. 81 at p. 7:1-2). Although this amount is less than the amount of statutory damages that each class member could potentially receive, as explained above, there are substantial risks in further litigation, and thus, the cash settlement amounts to class members are both adequate and fair. Further, the Artist Advisory Board will have an annual budget of not less than $30,000, which, as discussed above, will be

used to promote artists' rights and improve Rhapsody's business practices as they relate to rightsholders. As such, this Settlement provides an incalculable benefit to the current members of the putative class, and to future copyright holders whose music Rhapsody will stream.

Here, the non-monetary aspects of this Settlement are also valuable. It provides practical and on-going benefits to Class Members, which strongly supports preliminary approval. *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049 (9th Cir. 2002); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104, at *5 (S.D. Cal. June 1, 2010). Rhapsody will institute an Artist Advisory Board that, *inter alia*, will work with Rhapsody to implement procedures to support artists' rights. This is an incalculable benefit. Ultimately, after considering the monetary and non-monetary terms of the settlement, and after assessing the substantial risks of further litigation, Plaintiffs' Counsel, drawing on decades of experience litigating cases like this one, and with the input of two mediators and Magistrate Judge Corley, determined that the Agreement is fair and reasonable and constitutes a positive result for the class in this case.

VI. THE CLASS NOTICE, NOTICE PLAN, CLAIM FORM, AND CLASS ADMINISTRATOR ARE SUFFICIENT.

Class Notice must clearly and concisely state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through an attorney if the member so desires; that the court will exclude from the class any member who requests exclusion; the time and manner for requesting exclusion; and the binding effect of a class judgment on members under Rule 23(c)(3). Fed.R.Civ.P. 23(c)(2)(B) (i)–(vii). "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Deaver*, 2015 WL 4999953, at *10 *(citing Churchill*, 361 F.3d at 575). Here, the proposed Class Notices are attached as Exhibits B and C to the concurrently filed Declaration of Jeanne C. Finegan ("Finegan Declaration") and satisfies each of the above requirements. Additionally, the Proposed Notice Program is sufficient. (*See* Finegan Decl. at ¶¶13-35). The proposed notice program includes multiple components, including print publication, targeted online banners, social media, and a website. (Finegan Decl. at ¶14). As

explained herein, the Class likely contains thousands of members with unknown identities and/or addresses, and thus, individual notice is not practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice to the individuals that will be bound by the class action judgment. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1129 (N.D. Cal. 2015), aff'd, 869 F.3d 737 (9th Cir. 2017); *Harrison v. E.I DuPont De Nemours & Co.*, 2018 WL 5291991, at *2 (N.D. Cal. Oct. 22, 2018).

Rhapsody undertook the selection of the claims administrator, and details as to that selection are described in the concurrently filed Declaration of Patrick Burns (Burns Decl. ¶¶3-5). Rhapsody selected Heffler Claims Group LLC as the claims administrator. (*Id.* at ¶5). Plaintiffs' Counsel has reviewed the qualifications of the Heffler Claims Group LLC (as set forth in the Finegan Decl. at ¶¶5-12) and believes it to be well qualified to handle the claims administration. Finally, a copy of the proposed claim form is attached as Exhibit E to the Finegan Declaration and should be approved.

VII. CONCLUSION

Based on the foregoing, Plaintiffs' respectfully request that the Court grant the instant motion.

Dated: February 15, 2019

MICHELMAN & ROBINSON, LLP

By: */s/Mona Z. Hanna*
Sanford L. Michelman
Mona Z. Hanna
Jennifer A. Mauri
Attorneys for Plaintiffs and Proposed Class