



citizens of the state of Texas. Plaintiff and Class Representative Timothy Johnson is an individual resident and citizen of the state of Connecticut.

2. Defendant Bruce Bouton is upon information and belief a resident of the state of Tennessee who has appeared in this action and can be served via his counsel of record, Kenneth Doroshow and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

3. Defendant Duncan Crabtree-Ireland is upon information and belief a resident of the state of California who has appeared in this action and can be served via his counsel of record, Kenneth Doroshow and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

4. Defendant Augustino Gagliardi is upon information and belief a resident of the state of New York who has appeared in this action and can be served via his counsel of record, Kenneth Doroshow and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

5. Defendant Raymond M. Hair, Jr., is upon information and belief a resident of the state of New York who has appeared in this action and can be served via his counsel of record, Kenneth Doroshow and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

6. Defendant Jon Joyce is upon information and belief a resident of the state of California who has appeared in this action and can be served via his counsel of record, Kenneth Doroshow and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

7. Defendant Stefanie Taub is upon information and belief a resident of the state of California who has appeared in this action and can be served via her counsel of record, Kenneth Doroshov and Devi Rao, Jenner & Block LLP, 1099 New York Ave., NW, Suite 900, Washington, DC 20001.

8. Defendants all currently serve as trustees of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund (the “Fund”) and are sometimes referred to collectively herein as the “Trustees.”

### **JURISDICTION AND VENUE**

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(d)(2)(A), because it seeks certification of a class as to which the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and at least one member of the class of plaintiffs is a citizen of a state different from at least one of the Defendants.

10. This Court has personal jurisdiction over the Trustees and venue is proper in this District pursuant to Article XII, Section 1 of the July 26, 2012 Amended and Restated Agreement and Declaration of Trust of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund (the “Trust Agreement”), which provides that “venue for any dispute arising under this Agreement and Declaration of Trust shall be in New York.” Venue is also proper in this District pursuant to 28 U.S.C. §§ 1391(b) & (c) because a substantial part of the acts and events giving rise to Plaintiffs’ and the Class’ claims occurred in this District, in that the Trustees are withholding payment to Class members of royalties earned from licensees operating in this District and because the Trustees have failed to distribute royalties to Class members residing within this District.

**SUMMARY OF CLAIMS AND REQUESTS FOR RELIEF**

11. Plaintiffs, who include both union and non-union session musicians and vocalists, on their own behalf and on behalf of a class of similarly situated session musicians and vocalists further defined below (the “Class”), allege that the Trustees have breached their fiduciary duties owed to Plaintiffs and the Class by failing to properly identify and pay them royalties which the Trustees collected for their benefit and are legally obligated to pay over to them. Plaintiffs and the Class further allege that the Trustees control royalties which in equity and good conscience should be paid to Plaintiffs and the Class pursuant to the cause of action for money had and received.

12. Plaintiffs seek equitable, declaratory, and injunctive relief against the Trustees requiring them to: (1) provide an accounting of their collection and payment of royalties owed to Plaintiffs and the Class; (2) follow procedures ordered by the Court in order to identify the Plaintiffs and the other members of the Class to whom royalties are owed and then pay them those royalties held by the Fund; (3) to the extent royalties still remain unpaid, pay prejudgment interest to Plaintiffs and the Class; and (4) to the extent royalties still remain unpaid, to make additional pro rata payments to the Plaintiffs and the Class members to whom they previously paid royalties, such that all of the undistributed royalties which they hold are paid. Alternatively, Plaintiffs seek a judgment for damages payable out of the Fund in the amount of the undistributed royalties currently held in the Fund by the Trustees to be paid to a special master appointed by the Court to pay those funds to Plaintiffs and the Class. Plaintiffs also seek equitable, declaratory, and injunctive relief from the Court requiring the Trustees to adopt procedures specified by the Court to assure that royalties collected by them in the future are appropriately paid to Plaintiffs and the Class. Finally, to the extent the Trustees pay for their

attorneys' fees and other costs of defending this lawsuit out of the assets of the Fund and are found to have breached their fiduciary duties, Plaintiffs seek a judgment against the Trustees individually requiring them to reimburse the Fund for such amounts.

13. Pursuant to the Trust Agreement, the Fund is a trust and, under governing New York law, is not a legal entity capable of taking any action, including, but not limited to, receiving and disbursing money and suing or being sued. Rather, it is only the Trustees who can and do engage in such activities in the name of the Fund. This means that all of the acts and failures to act which are the subject of this Complaint were engaged in by the Trustees, and they are the proper defendants. Accordingly, except where noted as to individual liability of the Trustees, the Trustees and the Fund are one and the same, and a reference to "the Fund" constitutes a reference to the "the Trustees" and vice versa.

### **ALLEGATIONS**

#### *Statutory Background and Collection of Royalties by SoundExchange and Payment of Them by SoundExchange to the Fund*

14. Section 106 of the United States Copyright Act codified in Title 17 of the United States Code (17 U.S.C. §106) grants the owner of a copyright in a sound recording the exclusive right to perform and reproduce the sound recording publicly by means of a digital audio transmission. As a result of the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 114 provides a statutory license to perform and reproduce sound recordings to certain digital services, namely noninteractive webcasters and simulcasters, preexisting subscription services (i.e., residential subscription services which began providing music over digital cable or satellite television before July 1998), and preexisting satellite digital audio radio services (i.e., SiriusXM Radio). The royalty rates to be paid by these services in exchange for digital play of sound recordings pursuant to the

statutory license are determined by the Copyright Royalty Board, a tribunal of three judges established by the Copyright Royalty and Distribution Reform Act of 2004. The rates have always been a small fraction of one cent for each play of a sound recording. Pursuant to 37 C.F.R. § 262.4, SoundExchange, an affiliate and former subsidiary of the Recording Industry Association of America, has been designated as the sole entity in the United States authorized to collect these royalties from statutory licensees for digital performances of sound recordings.

15. Under 17 U.S.C. § 114(g), the royalties collected by SoundExchange from satellite radio, non-interactive webcasting, cable TV music channels, and other digital services transmitting sound recordings must be distributed by it as follows:

(2) An agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) [SoundExchange] shall distribute such receipts as follows:

(A) 50 percent of the receipts shall be paid to the copyright owner of the exclusive right under section 106(6) of this title to publicly perform a sound recording by means of a digital audio transmission.

(B) 2 ½ percent of the receipts shall be deposited in an escrow account managed by an *independent administrator* jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (*whether or not members of the American Federation of Musicians*) who have performed on sound recordings.

(C) 2 ½ percent of the receipts shall be deposited in an escrow account managed by an *independent administrator* jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (*whether or not members of the American Federation of Television and Radio Artists*) who have performed on sound recordings.

(D) 45 percent of the receipts shall be paid, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

17 U.S.C. § 114(g)(2) (emphasis added). In other words, under 17 U.S.C. §114(g), 50% of digital performance royalties are payable to the copyright owners of the sound recordings, 45% are payable to the featured artists, 2.5% are payable to the non-featured musicians (session musicians) and 2.5% are payable to the non-featured vocalists (session vocalists) (session musicians and session vocalists are sometimes collectively referred to herein as “non-featured performers”). The 5% of the digital performance royalties payable to non-featured performers are sometimes collectively referred to herein as the “Royalties.” Significantly, the statute requires payment of the Royalties to non-featured performers regardless of their union membership.

*The Formation of the Fund and Its Appointment as the Independent Administrator  
Required to Pay the Royalties to Non-Featured Performers*

16. The Fund was originally formed on September 16, 1998, in the City and State of New York as a trust under New York law by execution on that date of the original version of the Trust Agreement. The current version of the Trust Agreement is the version amended and restated as of July 26, 2012, also in the City and State of New York. The Fund was formed by the American Federation of Musicians of the United States and Canada, AFL-CIO-CLC (“AFM”) and the Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”) (sometimes referred to collectively herein as the “Union”) pursuant to the Trust Agreement, which was executed by the Trustees. A true and correct copy of the Trust Agreement is attached hereto as Exhibit A.

17. The Fund was formed to fulfill two purposes (1) to receive the Royalties from SoundExchange and pay them to the non-featured performers; and (2) to collect from any collecting society, rights organization or other appropriate entity royalties held by that entity and to pay such royalties and remuneration to eligible performers, including the non-featured

performers (the “Other Royalties”), such as, for example, royalties owed to the non-featured performers under the Audio Home Recording Act of 1992 codified at 17 U.S.C. Chapter 10, which contains identical language similarly obligating the Fund to distribute royalties to non-featured performers regardless of union status. The Trust Agreement specifically places the power, duty and obligation on the Trustees to collect the Royalties and distribute them to non-featured performers, and to do so regardless of their union membership. More specifically, the Trust Agreement places a non-discretionary fiduciary obligation upon the Trustees to pay Royalties to the non-featured performers who performed on the recordings that the Trustees have determined are Covered Recordings (described further below) and thus eligible for payment of Royalties. Pursuant to the terms of the Trust Agreement, three of the Trustees were appointed by the AFM and three were appointed by SAG-AFTRA.<sup>1</sup>

18. Pursuant to 17 U.S.C. § 114(g)(2)(B), SoundExchange, as the representative of the copyright owners of sound recordings, and the AFM have jointly appointed the Fund to receive the Royalties from SoundExchange and distribute them to the non-featured musicians (session musicians) to whom they are owed. Pursuant to 17 U.S.C. § 114 (g)(2)(C), SoundExchange, as the representative of the copyright owners of sound recordings, and SAG-AFTRA have jointly appointed the Fund to receive the Royalties from SoundExchange and pay them to the non-featured vocalists (session vocalists) to whom they are owed.

19. SoundExchange takes the position that its only obligation under applicable law is to remit the Royalties to the Fund and that it has no obligation to audit or ensure that the Trustees

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<sup>1</sup> SAG-AFTRA, of which three of the Trustees are officers (the other three are officers of the AFM), was formed in 2012 by the merger of SAG (the Screen Actors Guild) and AFTRA (the American Federation of Television and Radio Artists) and is the successor entity to AFTRA. Accordingly, SAG-AFTRA is the legal successor to AFTRA for purposes of 17 U.S.C. § 114(g)(2).

actually pay those Royalties. This has left the Trustees free from any oversight over their payment of Royalties pursuant to 17 U.S.C. § 114(g)(2)(B) & (C) and the Trust Agreement.

*The Fund's Determination of the Covered Recordings and, Thus, of the Non-Featured Performers Eligible for Payment of Royalties and the Amount of the Royalties Payable*

20. Each year thousands of sound recordings are digitally performed, and each year SoundExchange collects Royalties on thousands of songs, which Royalties are remitted to the Fund. Tens of thousands of non-featured performers perform on those sound recordings which are digitally performed each year. Given that a large number of those sound recordings may be digitally performed a very small number of times and given that the Royalty payable per each performance of a song is only a small fraction of one cent, the Royalties payable in connection with a particular sound recording to multiple non-featured performers who performed on it could be only a few dollars, or a few cents, or even less than one cent. Payment of Royalties on such sound recordings would not be efficient or desirable. Accordingly, the Fund must determine which sound recordings will be eligible for payment of Royalties (which recordings it refers to as "Covered Recordings") and, thus, which non-featured performers are eligible to receive Royalties (the non-featured performers who performed on Covered Recordings).

21. The Fund's determination of the Covered Recordings to which Royalties will be allocated starts with performance frequency reports that the Fund receives from SoundExchange. The Fund uses a frequency-based formula<sup>2</sup> to determine how far down the frequency list it will

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<sup>2</sup> The Fund's Guidelines set forth the formula as follows: "For each year, the Fund shall review the top 100 Frequency Report ranked recordings, or the album listing of the top 100 SoundScan ranked recordings as applicable and determine the number of non-featured performers (musicians and vocalists combined) appearing on a recording. The largest number of non-featured performers appearing on a recording shall be M. The number of sound recordings upon which distributions shall be made for each year shall be the Distributable Amount for that year divided by 2M (or a higher multiplier if necessary to avoid an inordinate number of recordings allocated minimis amounts). The resulting number shall be the number of sound recordings upon which a distribution shall be made for that year, starting from the Frequency Report top-ranked sound recording on the sound recording list. For example, if Distributable Amount equals \$1million and M=50 then the number of sound recordings subject to a distribution

allocate Royalties and then the Fund makes adjustments as needed to avoid de minimis payments.

22. According to an internal document produced by the Trustees, **Redacted**

[REDACTED]

23. Once the Fund has identified the Covered Recordings to which it will allocate Royalties (the “Covered Recordings”), it allocates money to each Covered Recording pro-rata based on the number of times each Covered Recording was performed as compared to the total number of performances of Covered Recordings for which SoundExchange remitted Royalties. The Fund’s Guidelines provide that: “If a recording has no non-featured performers, its share will be distributed<sup>3</sup> to the remaining recordings on a pro-rata basis. The amount to be distributed to each non-featured performer on a sound recording shall be determined by dividing the amount distributable for that sound recording by the number of non-featured performers identified on the recording.”

*The Practical Obligation Placed on the Fund to Pay Royalties to Non-Featured Performers and What Would Constitute a Reasonable, Good Faith Effort by the Fund to Pay Royalties in Light of Those Practicalities*

24. In order to pay the Royalties, the Trustees have to ascertain the identities, addresses (or direct deposit information), and taxpayer identification numbers (the addresses or direct deposit information and taxpayer identification numbers are sometimes referred to herein

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would be  $1,000,000 / 100$  (2M) = 10,000. In other words, the distribution will be made to the top 10,000 ranked sound recordings on the Frequency Report recording list for that year.”

<sup>3</sup> In Orwellian fashion, the Fund describes money as “distributed” once it has been allocated to a Covered Recording regardless of whether the non-featured performers have actually been identified or located and, thus, paid. As a result, the Fund’s “distributions”, although woefully inadequate, appear much better than use of the term would indicate.

as the “necessary payment information”) of the non-featured performers who performed on the Covered Recordings. The Trustees have a vastly greater success rate in determining the identities of and obtaining the necessary payment information for union members entitled to receive Royalties than for non-union members because, among other things, they have made arrangements with the Unions to help make helpful information in the Unions’ databases available to them and to otherwise assist them in identification efforts, which is productive because the Unions systematically attempt to collect information on the recording work performed by their members and their members’ necessary payment information. However, the Unions are unable to provide the Fund the information necessary to identify or provide the necessary payment information for significant numbers of Union non-featured performers. For non-union non-featured performers, the Trustees have not attempted to make arrangements with entities that could systematically collect such information regarding non-union non-featured performers and provide it to the Fund.

25. A reasonable and good faith effort by the Trustees to obtain the identities of and necessary payment information for non-union non-featured performers and Union non-featured performers whom the Unions cannot identify or for whom they cannot provide the necessary payment information would consist of three (3) components. First, the Fund would research the Covered Recordings using various resources, including online resources, CD liner notes, and direct contact with various entities/persons involved in the record production and distribution process to ascertain the identities of the non-featured performers playing on Covered Recordings. They would use the same resources to attempt to obtain necessary payment information for them after they are identified. In many cases, those resources would be able to provide contact information for, but not full necessary payment information for, non-featured performers,

requiring the Fund to use that contact information to contact those performers to obtain directly from them the remaining necessary payment information.

26. Second, the Fund would conduct a marketing campaign aimed at the non-featured performers to make the non-featured performers aware of the existence of the Royalties and of the Fund for the purposes of (a) getting the non-featured performers to identify themselves to the Fund by filling out and submitting Participant Information Forms, which forms ask for the necessary payment information, (b) reviewing the Unclaimed Royalties List on the Fund's website and providing any missing necessary payment information, and (c) reviewing the Covered Recordings List on the Fund's website to make sure they are properly identified as having perform on the all of Covered Recordings on which they performed, and if they are not, making a claim to the Fund for same.

27. Third, the Trustees would try to make arrangements with various entities to systematically collect information as to which non-featured performers performed on recordings and those non-featured performers' necessary payment information and make that information available to the Fund. In addition, the Trustees would try to make arrangements with various entities to review the Unclaimed Royalties List to see if they have the missing necessary payment information for the non-featured performers listed thereon and to provide information they may already possess regarding the identity of the non-featured performers on Covered Recordings and/or to provide necessary payment information for identified non-featured performers entitled to Royalties as part of the Fund's research efforts.

28. The failure by the Fund to make a reasonable good faith effort as to any of these three components constitutes a failure to make a reasonable and good faith effort to pay the Royalties to the non-featured performers.

*The Trustees Have Not Made a Reasonable Good Faith Effort to Conduct the Research Necessary to Pay Plaintiffs and the Class (and, Thus, They Have Not Made a Reasonable, Good Faith Effort to Pay the Royalties to Plaintiffs and the Class)*

29. According to internal documents produced by the Fund, Redacted

Redacted

Redacted

Redacted

Redacted. As to non-union non-featured performers, this meant Redacted

Redacted. The same holds true for union non-featured performers the Unions could not identify for the Fund. The Fund could not do more from 2011 to 2013 because it only had Redacted

Redacted. Further, it had research budgets of only \$74,740 in 2011 and \$175,967 in 2012, both grossly inadequate numbers in years where the Fund was researching in excess of Redacted Covered Recordings.

30. Researching only those basic websites was grossly insufficient because the credit information contained in those websites is user-generated by fans who have no reason to provide complete information on the songs they report. Those websites did not employ professional researchers and made no effort to systematically collect or display non-featured performer credits. The Fund could not have reasonably believed that research of those sites would allow them to identify more than a modest percentage of the non-union non-featured performers and union non-featured performers not identified by the Unions.

31. The situation was so bad that the Fund was researching and distributing Royalties years behind. For example, internal documents reveal that Redacted

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Redacted . That meant that Redacted

32. The Fund's efforts to identify the non-union non-featured performers and the union non-featured performers not identified by the Unions who had played on Covered Recordings only improved marginally from 2013 to 2017. The Fund added another two researchers and expanded its online research from the core websites (Allmusic.com, Discogs.com, Wikipedia.com, etc.) to a number of secondary websites, such as band sites, reviews, and individual performer sites. This remained grossly insufficient because all of these websites contain user-generated information and in no way represented a systematic effort to collect credits for the majority, much less all, of the sound recordings released for play by digital music services.

33. Given the gross insufficiency of using only online, user-generated research, a reasonable and good faith effort to identify non-union non-featured performers and union non-featured performers not identified by the Unions that had played on Covered Recordings would include purchasing CDs or otherwise obtaining liner notes from CDs. This is because from the inception of the Fund through today, virtually every song released for performance by digital services is also released on CD, and CDs always contain a complete listing of the non-featured performers playing on them. Further, in the rare instance where a CD cannot be located or a CD does not identify all of the non-featured performers playing on it, a reasonable, good faith effort to identify such non-featured performers would include contacting the record label, producer,

featured artist, or featured artist's management, one or more of whom would be able to identify the non-featured performers playing on each song. This is because one of those persons hired the non-featured performers and paid them, such that they would have to maintain payroll and tax records.

34. Although the Trustees' interrogatory answers **Redacted** **Redacted** claim that the Fund has gone beyond internet research and has reviewed liner notes and contacted record labels or producers, an internal workflow document produced by the Fund **Redacted** **Redacted**. Accordingly, Plaintiffs contend that Fund does not engage in such activities, which activities are necessary for the Fund to make a reasonable, good faith effort to identify non-union non-featured performers and union non-featured performers not identified by the Unions.

35. Further, the number of recordings to be researched compared to the number of researchers demonstrates that the Fund could not possibly go beyond checking with the Unions and conducting minimal internet research. Above, Plaintiffs pled that the Fund's goal was to research **Redacted** **Redacted**

**Redacted**. Ten researchers could not possibly purchase or obtain and review that many CDs and follow up with individual inquiries where necessary to record labels, producers, featured artists, and featured artists' management.

36. As previously discussed, once the Fund has identified a non-featured performer entitled to receive Royalties by name, it still must obtain the necessary payment information for him/her, which typically will require obtaining contact information for the performer and then

contacting the performer to get the social security number or other taxpayer identification number. According to an internal work flow document, **Redacted**

**Redacted**

**Redacted**

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**Redacted**. This

method, as the Fund knows, and as elaborated on below, has a 0% chance of obtaining necessary payment information for more than a mere handful of unlocated non-featured performers, because virtually no non-featured performers know about the Royalties, the Fund, or the need to go to the website to review the Unclaimed Royalties List. Consistent with the internal research work flow document, **Redacted**

**Redacted**

**Redacted**. As a consequence, the current Unclaimed Royalties List contains the names of approximately 40,000 non-featured performers who the Fund has identified as entitled to Royalties but who have not been paid because of a lack of necessary payment information.

37. Perhaps most egregious, the Unclaimed Royalties List contains thousands of non-featured performers who the Fund lists as unpayable merely because it lacks social security number or taxpayer identification number. In other words, for thousands of non-featured performers, the Fund has contact information it can use to contact these non-featured performers and ask them for their taxpayer identification numbers. Yet, neither the internal research work

flow document nor any other document produced by the Fund shows **Redacted**

**Redacted**

**Redacted**. The failure **Redacted**  
**Redacted** cannot be considered anything other than a bad faith refusal to pay Royalties by the Trustees. And, not surprisingly, this refusal disproportionately effects non-union non-featured performers.

38. For the non-featured performers for whom the Fund had only a name or a name and geographic location, the easiest way to try to obtain necessary payment information is to use one of several database services which collect addresses, phone numbers, and even social security numbers on millions of people, such as the Lexis Accurint service. And, indeed, the Fund subscribes to the Lexis Accurint service, and it claims in its interrogatory answers to use such service. However, documentation the Fund obtained from Lexis and produced to Plaintiffs reveals that **Redacted**

**Redacted**

**Redacted**

**Redacted**. The Fund's failure **Redacted**  
**Redacted** constitutes a bad faith refusal by the Fund to pay Royalties to the non-union non-featured performers and the union non-featured performers for whom the Unions did not provide necessary payment information. Further, neither the internal workflow document nor any other document produced by the Trustees shows **Redacted**.

39. For non-featured performers for whom the Lexis Accurint service did not provide the necessary payment information, a simple, quick Google search would have obtained contact

information for a significant portion of such non-featured performers so that the Fund could then contact them and ask them for their social security numbers, as a simple test revealed. Counsel sampled the Covered Sound Recordings List for 2017 by reviewing the first song of the first and last featured artist for each letter of the alphabet and for each selected the first non-featured performer as to whom the Fund stated it did not have necessary payment information. This yielded a total of 54 unlocated non-featured performers. Counsel performed a quick Google search on each looking for some method of contact such as social media page or an address. For 25 of the 54, or 46%, counsel was able to locate a social media page or address for which they had a high degree of certainty that it belonged to the non-featured performer. As to another 18 of the 54, or 33%, counsel was able to locate a social media page or address as to which counsel did not have a high degree of certainty that it was the correct non-featured performer but a high enough degree of certainty to make a contact through the social media page or address worthwhile. Thus, this sample showed that simple Google searches would allow contact having a reasonable chance of success with 69% of the identified non-featured performers for whom the Fund does not have the necessary payment information. A reasonable good faith effort to pay non-featured performers the Royalties owed to them would include such simple, quick research and follow up contacts. Neither the internal workflow document nor any other document produced by the Fund shows **Redacted**.

40. For those non-featured performers for whom the Fund did not already possess contact information and for whom a Lexis Accurint search or other quick internet research did not produce contact information, a reasonable, good faith effort to locate them in order to pay them the Royalties they are owed would include contacting the record label, producer, featured artist, or featured artist's management. As previously indicated, one of those entities or persons

would have hired and paid the non-featured performer for their recording work and would have payroll and IRS records that would likely include not only contact information but also a social security number or other taxpayer identification number. Neither the internal research workflow document nor any other document produced by the Trustees evidences that the Fund contacted such entities in an attempt to obtain such necessary payment information.

41. A simple test performed by Plaintiffs' counsel demonstrates just how abysmal the Fund's research of non-featured performers has been, especially regarding non-union, non-featured performers. Counsel reviewed 23 Covered Recordings, one for each letter of the alphabet except Q and X, from the Covered Recordings list for 2013 and found that the Fund had identified 254 union non-featured performers and had not used any placeholders (ie, situations where the researchers could tell there were certain non-featured performers on the recording who could not be identified). Of these 254 union non-featured performers, 52 or 20.5% were listed by the Fund as having missing necessary payment information despite assistance by the Unions. Keeping in mind that there is no reason to believe that non-union recordings have on average less non-featured performers than union recordings, a comparison to the Fund's performance for non-union non-featured performers in 2013 is telling.

42. For 29 non-union Covered Recordings, the Fund was only able to identify 148 non-featured performers (this compared to 254 on 23 recordings for the Union recordings), including 42 placeholders, which means the Fund knew that at least 22% of the non-union non-featured performers could not even be identified by name. Significantly, of the 148 identified as non-union non-featured performers, the Fund did not have payment information for 91 of them or 61.5% (as compared to only 20.5% of the Union performers).

43. Finally, the research component of a reasonable, good faith effort to pay Royalties to non-featured performers, including the unpaid Plaintiffs and Class members, would include the hiring of temporary, special researchers just to work on obtaining the necessary payment information for the approximately 40,000 persons on the Unclaimed Royalties List given that the sole purpose for the existence of the Fund is to distribute Royalties to such persons and given that such persons on the Unclaimed Royalties List are owed at least \$54 million as evidenced by a chart prepared by the Trustees in response to interrogatories. However, no document produced by the Trustees indicates that **Redacted**

*The Trustees Have Failed to Engage in a Reasonable, Good Faith Marketing Campaign and, Thus, Have Failed to Make a Reasonable, Good Faith Effort to Distribute Royalties to Plaintiffs and the Class*

44. Any good faith, reasonable effort by the Trustees to pay Royalties to Plaintiffs and the Class must include a reasonable, good faith marketing campaign for two reasons. First, no matter how well performed, research will always leave a large number of non-featured performers who cannot be identified and/or for whom necessary payment information cannot be obtained. Second, once the marketing campaign has caused a significant percentage of the non-featured performer community to register with the Fund and to regularly check the Covered Recordings List and the Unclaimed Royalties lists and, thus, identify themselves to the Fund, the amount of research required will drastically decrease.

45. A reasonable, good faith marketing campaign would have the primary goal of (1) making a high percentage of eligible non-featured performers aware of the existence of the

Royalties and the Fund, and the Fund's role in distributing the Royalties, (2) causing a high percentage of eligible non-featured performers to provide their necessary payment information to the Fund in case they are ever eligible for payment of Royalties on a Covered Recording, and (3) causing a high percentage of eligible non-featured performers to check the Covered Recordings lists and the Unclaimed Royalties list on a regular basis to see if any recordings they performed on are listed but they are omitted as playing on them and to make sure they are not missing out on payment of Royalties because the Fund does not have their necessary payment information.

46. A secondary goal of a reasonable, good faith marketing campaign would be to motivate other industry participants to help the Fund with the payment of Royalties. This would take the form of record labels, producers, and recording engineers alerting non-featured performers at the time songs are recorded of the necessity of checking the Fund's website and providing necessary payment information to the Fund and perhaps even handing out forms to the non-featured performers to do so. It would also take the form of record labels, producers, featured artists, and featured artists' management cooperating in providing information when inquiries are made to them by the Fund regarding a Covered Recording or regarding a particular non-featured performer.

47. Such a reasonable, good faith marketing campaign would be designed to accomplish these goals by targeting the right persons using the right mediums a sufficient number of times with a clear and consistent message. It would include a coordinated effort across multiple marketing mediums, including print ads, digital ads, social media ads, email marketing, website, search engine optimization, public relations, and music industry outreach. It would need to be designed by and overseen by a marketing agency/consultant with significant experience in marketing to musicians and vocalists. Such a campaign would require the Fund to

employ an experienced marketing manager and a marketing team to handle basic marketing, website development, search engine optimization, and social media.

48. By far, the most important part of the campaign would be paid advertising because only with this could the Fund reach the very large number of non-featured performers with sufficient frequency to develop awareness and motivate action. Non-featured performers do not constitute a single community, so they are not sufficiently accessible by general music publications or by using a single medium. Instead advertisements to non-featured performers can best be targeted by targeting the specific groups to which they belong. Such a campaign would include specific efforts to target guitar players, drummers and percussionists, bass players, keyboardists, vocalists, string players, brass players, etc. The marketing campaign would start with these groups as a general targeting method and then use various tactics to narrow in on performers that have been involved in recording sessions. There is no publication, media outlet, or conference designed to reach wide swaths of the music industry that will effectively reach non-featured performers and attempts to achieve the goal of the campaign with only small efforts in such advertising mediums will have little or no impact.

49. Because the non-featured performers that the campaign will target are somewhat difficult to reach, and because the goal needs to be to generate not only awareness but also action, a reasonable, good faith marketing campaign will strive to achieve a significant number of impressions on the non-featured performers, which requires use of a combination of marketing tools that will have sufficient reach and frequency. This would require a minimum media purchase of \$5 per non-featured performer per year. If the group of non-featured performers currently on the Unclaimed Royalties List is 40,000, this translates into an annual minimum budget for paid advertising of \$200,000 per year. The messaging covered by the paid advertising

and other marketing efforts must be creative, clear, and consistent, and designed to achieve the goals of achieving awareness by non-featured performers and motivating them to take action. Vague advertisements that merely convey the existence of the Fund and that it pays some vague unspecified royalty are grossly insufficient and inconsistent with a reasonable, good faith marketing campaign.

50. While the Fund from inception to date has never come remotely close to conducting a reasonable, good faith marketing campaign, it is useful to divide the discussion of the Fund's minimal efforts between the time period prior to 2016 and 2016 and 2017. The reason for doing so is that Plaintiffs' co-counsel on behalf of certain non-featured performers began discussions with the Fund regarding its failure to deliver Royalties in the first quarter of 2016, and initially filed suit against the Trustees in August of 2016 in Texas (this suit was dismissed by the plaintiffs in that action in October of 2016 after it was discovered that the Fund was established as a New York trust). As a result of these contacts and later the lawsuit, the Fund increased its marketing efforts somewhat in 2016 and even more in 2017. However, as described below, even the greater efforts made in 2017 do not come close to constituting a reasonable, good faith marketing campaign.

51. The sum total of the paid advertising engaged in by the Fund prior to 2016 was:

- *Music Connection*: From 2002 to 2011, the Fund placed advertisements in print versions of *Music Connection* at least 6 times per year (bi-monthly) increasing to monthly in 2012. At some point during that time, the advertisements also began to appear in the online digital magazine version of *Music Connection*, and the Fund began running banner advertisements on *Music Connection*'s website. These advertisements consisted only of a statement of an amount of royalties paid to session musicians and background vocalists, the question "Do We Have Royalties For You?," the Fund's logo (which contains its name), and the Fund's website address.
- *Union Publications*: From approximately 2012 through 2015, the Fund periodically published advertisements similar to those contained in *Music*

*Connection* for the purpose of reminding union non-featured performers who had previously received Royalties to provide the Fund with updated address information if they had moved. Those publications were: AFM Local 802's *Allegro* (New York), AFM Local 257's *The Nashville Musician*, AFM Local 47's *Overture* (Los Angeles), and the AFM's *International Musician*.

- *GRAMMY AWARDS*. In 2014 and 2015, the Fund placed advertisements in the GRAMMY program similar to the advertisements run in *Music Connection*.

52. The gross insufficiency of the pre-2016 paid advertising is manifest. Given *Music Connection*'s small readership during this time period (approximately 110,000), its status as a general music industry publication not aimed directly at performing session musicians and its low website rate of 100,000 visitors per month, it could only reach a tiny fraction of the target non-featured performers. By comparison, *Guitar Player* magazine, which is aimed much more directly at a significant group of non-featured performers, has a monthly subscription base of 385,000, while *Modern Drummer*, also aimed at a specific group of non-featured performers, has a monthly subscription base of 105,000. And for internet advertising aimed at a variety of musicians, the Sound on Sound.com website has a million unique visits per month, as compared to the 100,000 of *Music Connection*. The GRAMMYS have about 20,000 attendees, only a minute fraction of which constitute target non-featured performers (most are featured artists or affiliated with featured artists), making purchase of that advertisement virtually useless. And, the very infrequent publications in union magazines made for the purpose of reminding union musicians already receiving royalties to update their addresses had no chance of achieving the goals of the campaign of creating awareness and action on the part of non-featured performers not already receiving Royalties. In short, the Fund's paid advertising efforts prior to 2016 were little better than nothing.

53. As reflected in the Fund's tax returns, and consistent with the description above of the minimal paid advertising efforts of the Fund prior to 2016, the Fund's advertising expenses

for 2010 through 2015 constitute fractions of the minimum adequate budget of \$200,000 and less than 1% of the Royalties collected by SoundExchange in each of those years:

<u>Year</u>	<u>Receipts</u>	<u>Advertising Expense</u>
2010	\$17,578,249	\$30,531
2011	\$23,920,316	\$25,595
2012	\$27,561,164	\$129,534
2013	\$41,699,519	\$26,154
2014	\$49,322,128	\$24,178
2015	\$46,051,587	\$38,341

54. The Fund's marketing efforts other than paid advertising prior to 2016 were likewise grossly insufficient. They consisted only of:

- *afmsagaftfund.org*. Maintaining a website without making any effort to provide attractive content or otherwise drive traffic to it.
- *Social Media*. Starting a Facebook page in 2015.
- *ASCAP "I Create Music" Expo*. Attending since the mid 2000's and becoming a sponsor in 2015.
- *GRAMMY AWARDS*. Attending the awards.
- *South by Southwest ("SXSW")*. Attending the conference.
- *SAG-AFTRA Singer's Caucus Education Committee Meeting*. Presenting a panel discussion about the Fund in 2015.

55. Maintenance of a website is a bare minimum requirement of any marketing campaign, and prior to 2016, the Fund had no employee responsible for making the Fund's website one that would be visited by significant numbers of non-featured performers to review the Covered Recordings List and make claims and review the Unclaimed Royalties List and provide necessary payment information. Indeed, **Redacted**

Redacted

[REDACTED], a pathetic performance by applicable standards. Starting a Facebook page in 2015 was years late and not calculated to reach a significant number of non-featured performers. Attendance at ASCAP, GRAMMY, and SXSW events was not calculated to reach any significant number of non-featured performers, and adding a sponsorship in 2015 only marginally increased the almost negligible effectiveness of attendance. Finally, presenting at the SAG-AFTRA Singers' Caucus Committee meeting in 2015 reached only a small number of non-featured vocalists, all of whom would have been Union members, which meant that if they sang on a Covered Recording they were already likely to be identified by their Union and have the Union provide their necessary payment information. In short, the Fund's pre-2016 marketing efforts other than paid advertising were likewise little better than nothing.

56. The Fund's paid advertising effort only improved marginally after 2016. [REDACTED]

Redacted

[REDACTED]. In 2017, after Plaintiffs had filed a lawsuit in August of 2016, [REDACTED]

[REDACTED]. To the paid advertising described above undertaken prior to 2016, the Fund added the following:

- In 2016, the Fund hired a PR & Marketing Manager and Social Media Coordinator.
- *Facebook Advertising.* In or around March 2017, the Fund initiated a paid advertising campaign through Facebook, targeted at non-featured musicians and vocalists (by looking at particular interests listed on their profiles) in the Pop, R&B, and Hip Hop genres which tried to direct them to the Fund's website, including the Unclaimed Royalties List. In the spring and early summer of 2017, on an ad-hoc basis, the Fund paid to promote its Facebook posts that were receiving traction within its network.

- *Advertising in Union Publications.* In 2016, the Fund started running advertisements in these publications twice per year before each distribution. The ads remained the same.
- *GRAMMY AWARDS.* In 2017, in addition to running an advertisement in the GRAMMY program, it ran an advertisement in the Latin GRAMMY program
- *ASCAP "I Create Music Expo".* In 2017, The Fund ran a full-page advertisement in the program guide and included advertising postcards in 1,800 "swag" give-away bags. The program advertisements were similar to the ones run in *Music Connection* and the Union publications.
- *Urban Network. Digital Business of Music Conference.* In 2017, the Fund placed an advertisement in the conference program similar to the advertisements placed in *Music Connection* and other programs.
- *OzzFest.* In September of 2016, the Fund ran an advertisement in the 40,000 or so program guides given away at OzzFest, an annual festival and tour featuring performances by heavy metal and hard rock music groups. The ads were the same type used by the Fund everywhere else. The Fund also placed an online advertisement of the same type on the Ozzfest website.

57. This additional advertising was not calculated to reach any significant percentage of the target non-featured performers. Targeted Facebook advertising can only reach a limited audience (a) given the limited number of users who list interests to be used in targeting, (b) given the number of people that do not have Facebook pages, (c) given the large number of Facebook users who do not regularly use the site, and (d) given the great percentage of Facebook users who pay no attention to Facebook advertisements. Placement of advertisements in various conference and festival programs is likely to reach an incredibly small percentage of non-featured performers, and they do not create any real awareness or generate any real traction, because such advertisements are typically viewed very quickly as festival or conference attendees leaf through the program guides, if they even view the advertisements at all.

58. All of the paid advertising in 2016 and 2017 – the little bit that had already occurred and the additional advertising – could not possibly be viewed multiple times by a

significant percentage of the target non-featured performers as would be necessary to generate the required awareness by non-featured performers and motivate them to take the desired action of visiting the Fund's website to review the Unclaimed Royalties List and Covered Recordings List and make contact with the Fund based thereon. In short, the paid advertising in 2016 and 2017 had so little ability to achieve the goals of an effective marketing campaign, the Fund's overall marketing campaign cannot be considered a reasonable, good faith marketing effort given the status of paid advertising as the most important component of such a marketing plan.

59. Even if the Fund's advertisements had the potential to be viewed by a significant percentage of non-featured performers multiple times, it would still not constitute a reasonable, good faith paid advertising campaign because of the deficiencies in the advertisements themselves. They were all variations on statements of dollar amounts of royalties paid to session musicians and vocalists, the question "Do We Have Royalties For You", and the Fund's logo and website address. Such ads could not possibly create the necessary awareness and cause the necessary action for several reasons:

- The advertisements do not point out that these are digital performance royalties which federal law created for non-featured performers.
- The name of the Fund (always set forth in the advertisements), the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, itself tends to discourage interest by non-union non-featured performers. Including the names of the Unions in the Fund name suggests that only union members would be eligible, and the advertisements nowhere make clear that the Royalties are available to both union and non-union non-featured performers.
- The name "AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund" does not at all convey that the fund disburses royalties, much less royalties to session musicians and vocalists for digital performance of sound recordings. Compare that name to the "Session Musicians' and Back-Up Vocalists' Digital Performance Royalty Distribution Fund."

- The advertisements do not convey the need, importance, and urgency of the non-featured performers to visit the website and review specified lists in order to collect significant amounts of money.

60. While the Fund responded to contacts and the filing of a lawsuit by Plaintiffs' co-counsel by increasing the number of non-paid advertising marketing activities it engaged in 2016 and 2017 after doing virtually nothing for most of its existence, those activities do not, in the absence of a sufficient paid advertising campaign, constitute a reasonable, good faith marketing campaign. Further, they don't even constitute a reasonable, good faith non-paid advertising component of a marketing campaign.

- *Fund Website.* The Fund in late 2016 and 2017 increased the website content and engaged in search engine optimization for the first time.
- *Social Media Presence.* In November 2016, Fund opened a YouTube account and in March 2017 it opened Instagram and Twitter accounts.
- *The Reprise.* In April 2016, the Fund launched a quarterly newsletter entitled *The Reprise*, which is digitally distributed to non-featured performers that have previously received a distribution and for whom it had valid email addresses. In addition, print copies of the first two additions of *The Reprise* were mailed to active participants who were due Royalties.
- *The Urban Network Digital Annual Business Music Conference.* The Fund presented at this conference in June 2017 and hosted an informational booth.
- *2016 and 2017 ASCAP "I Create Music Expose".* The Fund presented at a panel in 2017 and the executive director was featured in a lunch round table event attending by roughly 200 persons. The Fund also gave away over 1,000 memory sticks with the Fund's logo on them to attendees.
- *Tune Registry Presentation.* In 2016, the Fund's executive director spoke on a panel about performance rights at the Musicians Institute hosted by Tune Registry.
- *Attendance at the ASCAP Soul Awards.* Fund representatives attended the June 22, 2017 awards, including its reception and after-party.
- *Presentation at SXSW.* In 2017, in addition to attending, the Fund's executive director presented on a panel regarding royalties from a variety of sources.

- *Attendance in the 2016 Grammy's in my District Day.* Along with 100 other music industry insiders, Fund representatives met with congressman Brad Sherman to advocate for passage of Fair Play Fair Pay Act.
- *Attendance at the 2016 Music Business Association Convention in Nashville.*
- *Press.* In May and November 2016, *Music Connection* published articles discussing the Fund and what it does, and *Billboard Magazine* published a similar article in April 2017.

61. These post-lawsuit additional marketing efforts other than paid advertising did little to move the Fund closer to a good faith, reasonable marketing campaign. A well-done and highly trafficked website is just one small piece of a good faith, reasonable marketing campaign. And the work on the website in 2016 and 2017 did not result in it being highly trafficked. Redacted

**Redacted**

[REDACTED], which is considered a low-performing website in the marketing industry. The Fund's addition of a YouTube account in November 2016 was years late, as was its opening of a Twitter account in March 2017. Collectively, the Fund's social media activities constitute a nice component of a marketing campaign, but they are incapable of reaching the many thousands of non-featured performers who need to be reached and getting them to take action, so that they do not serve to make the Fund's marketing efforts a reasonable, good-faith campaign.

62. Of course, the sending of the Fund newsletter to persons who have already been paid Royalties is not calculated to result in payment of any new non-featured performers. Further, the presentations and attendance at various music industry conferences, like purchase of advertisements in their programs, is calculated to only reach a very small number of the many thousands of non-featured performers who need to be reached. And, the fact that they are one-time contacts means they are not calculated to generate action on the part of the very few non-

featured performers who actually view them. Finally, three press articles in two different general music industry publications is likewise not calculated to reach any significant number of non-featured performers and the one-time nature of the contact is not calculated to generate action on their part.

63. A reasonable good-faith marketing campaign would be expected to obtain measurable results in the form of (a) large numbers of non-featured performers making claims to the Fund for payment on Covered Recordings for which they were omitted, and (b) large numbers of non-featured performers listed on Unclaimed Royalty List submitting their necessary payment information to the Fund. Yet, the Fund does not claim that this has occurred in its interrogatory answers **Redacted**. In fact, in its interrogatory answers, the Fund stated that it does not even track the number of claims and Participant Information Forms (the form for providing necessary payment information) it receives, a strong indication that it is not receiving many. Consistent with this, **Redacted**

**Redacted**  
**Redacted**  
**Redacted**.

*The Trustees Failed to Make Reasonable, Good-Faith Attempts to Arrange with Third Parties to Obtain Non-Featured Performer Information and, Thus, Failed to Make a Reasonable Good Faith Effort to Pay Royalties to Plaintiffs and Class*

64. As illustrated by the Fund's arrangements with the Unions, the single best way to obtain the information necessary to pay the Royalties is to make arrangements with third parties to systematically collect and provide such information to the Fund. The Unions collect session reports from all Union recording sessions. They also collect the Union contracts applicable to recording sessions. The Fund pays the Unions for the right to check centralized and local Union

databases for contracts and session reports. Further, they email Union locals about Covered Recordings and the necessary payment information for identified non-featured union performers.

65. According to their interrogatory answers, the Trustees have not only not made arrangements for any third parties to attempt to systematically collect and then provide the Fund with identification and necessary payment information on non-union performers, they have never even attempted to make such arrangements. This failure represents a failure to make a reasonable good faith attempt to distribute Royalties by one of the best possible methods given the potential number of entities which could collect and provide such information.

66. For example, the Gracenote database is a repository of information regarding sound recordings that is accessed by digital media players in order to provide individual users information regarding sound recordings. The information contained in the Gracenote database is typically provided by the record label, artist or artist management, and/or producer of a sound recording, all of whom have information regarding the non-featured performers performing on a particular recording. Gracenote (a Nielsen company) has indicated that its sources sometimes provide Gracenote the names of the non-featured performers, indicating that the Trustees could have made arrangements (including by paying compensation for same, if necessary) with Gracenote for it to systematically attempt to collect from record labels, producers, artists, and artists' management the names and necessary information regarding non-featured performers and include it in this repository in order to be accessed by the Fund. The Trustees have never done so, as evidenced by the omission of such effort from the Fund's interrogatory answers. Significantly, contacts with Gracenote personnel indicate Gracenote would have been and would still be interested in doing this for the Fund.

67. Furthermore, several digital audio workstations (“DAWs”), namely Apple Logic, Pro-Tools, and Nuendo, are used in nearly every recording project resulting in digitally-performed sound recordings. These DAWs contain fields for the user to input information stored as metadata in relation to each sound recording. The Trustees could have arranged (including by paying compensation for same, if necessary) for one or more of the fields to include names and necessary payment information of non-featured performers, allowing this information to be passed on, but they have not done so, as evidenced by the omission of such an effort from the Fund’s interrogatory responses. After making such a tool available, through their industry trade organizations and marketing, the Fund could have attempted to get producers and recording engineers to use it. There is every reason to believe producers and engineers would cooperate in such an effort, as the Trustees state in their interrogatory answers that the Fund has already been collaborating with the Producers and Engineers Wing of the Recording Academy.

68. In addition, several record distributors distribute the vast majority of recordings resulting in digital performances. These include the remaining major label distributors as well as Tunecore, CD Baby, The Orchard, Loudr, Distrokid, Ditto, Reverb Nation, and other independent distributors that distribute the vast majority of independent releases. The Trustees easily could have, but have not, attempted to make arrangements (including by paying compensation for same, if necessary) with these distributors to collect non-featured performers’ names and necessary information relating to the recordings that are submitted for distribution, which information could then be gathered and utilized by the Trustees to identify and pay Plaintiffs and the Class. Inquiries to some of these labels and to the trade group for independent labels indicated interest on their part of talking to the Fund about such arrangements.

69. Still another possible information collection procedure would be asking SoundExchange, which requires sound recording owners and featured artists to submit to it repertoire spreadsheets containing data regarding their sound recordings, to include fields in those spreadsheets submitted to it that identify the non-featured performers. The Trustees, one of which is on the Board of Directors of SoundExchange, could have easily made arrangements with SoundExchange to add such fields for the non-featured performers, which information could then be passed on to them by SoundExchange to help identify the non-featured performers entitled to Royalties, but they have not done so, as indicated by their failure to include such efforts in their interrogatory answers.

70. Although not nearly as good as arranging for the systematic collection of information, a reasonable, good faith effort by the Trustees to pay Royalties to the Plaintiffs and Class would include making arrangements with third parties to provide information in response to requests made by the Fund during the Fund's research process and to examine the Unclaimed Royalties List of the Fund to attempt to provide necessary payment information for persons identified on the list. According to their interrogatory answers, the Fund has only made the following arrangements of that type: (a) an agreement with ASCAP, a membership association of songwriters, composers and music publishers, for it to attempt to match its membership to the Unclaimed Royalties List, (b) an agreement with Sound Royalties to help the Fund to identify performers on the Unclaimed Royalties List from among Sound Royalties' clients and the network of its employees, and (c) an "informal agreement" with MusiCares to review the Unclaimed Royalties List to see if it could identify any individuals on the list.

71. These attempts are of no real significance because the numbers of non-featured performers that are members of ASCAP,<sup>4</sup> or clients or employees of SoundRoyalties, or who are known to MusiCares (which provides assistance to indigent musicians) is going to be exceedingly small. In contrast, record labels and distributors will certainly have access to information regarding far more non-featured performers than ASCAP, SoundRoyalties, and MusiCares. Despite this, the Fund has failed to make such arrangements, as evidenced by its failure to identify such measures in its responses to interrogatories.

72. Had the Trustees undertaken the arrangements indicated above, they would have been far more successful in paying Plaintiffs and the Class members the Royalties to which they are entitled. If the Trustees do so in the future, their success in distributing Royalties will approach 100%.

*The Trustees' Counter-Productive and Unreasonable Guidelines and Policies and Procedures Demonstrate Their Bad Faith Refusal to Pay Royalties to Plaintiffs and the Class.*

73. The Trustees have formally adopted Guidelines that they claim constitute reasonable, good faith policies and procedures for paying the Royalties to non-featured performers, and they publish those Guidelines on the Fund's website. The Trustees' failure to comply with the minimal requirements of the Guidelines demonstrates bad faith. Further, the adoption of Guidelines and other policies and procedures which are counter-productive to the goal of distributing the Royalties further demonstrates the Trustees' bad faith.

74. Specifically, the Fund's Guidelines provide, in pertinent part, in paragraph 6 that:

There will be two lists posted on the website – one for musicians and one for vocalists – containing the covered sound recordings as defined in Paragraph 9 herein for non-featured musicians and non-featured vocalists.

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<sup>4</sup> ASCAP, the American Society of Composers, Authors, and Publishers, is a collective that represents songwriters and music publishers. ASCAP has approximately 45% to 50% of the catalogue of compositions governed by U.S. copyright law. The Fund has not provided any evidence that it has contacted BMI, the other major songwriter and publisher collective.

Each record list posted on the Fund website shall identify all the non-featured musicians and non-featured vocalists, respectively, known to have participated on each covered sound recording. It shall also identify the sound recordings for which it believes all non-featured musicians and/or non-featured vocalists have been identified. The website shall provide a method for non-featured performers to claim that they performed on a record and/or provide personal or contact information.

Further, the Fund's Guidelines provide in paragraph 5 that the "Fund shall publish a notice in various trade publications no less than twice each calendar year directing non-featured performers to the website and informing them of the possible payments from the Fund. At least one such notice must be placed no less than 60 days prior to a disbursement."

75. The Trustees have not followed even these minimal steps required by the Guidelines they adopted for the Fund. For example, they do not post separate lists for vocalists and for musicians on the Fund's website. Further, the Fund website does not provide a method for non-featured performers to claim that they performed on a Covered Recording and/or provide personal or contact information. Instead, non-featured performers have to email that information to the Fund. Even more significantly, prior to 2016, the Fund did not publish notices in various trade publications at least twice per calendar year directing non-featured performers to the website and informing non-featured performers of the possible payments from the Fund with at least one such notice published at least 60 days prior to distributions. Moreover, when the Fund finally started meeting those minimal publication requirements in 2016, it only did so in union publications, guaranteeing that non-union non-featured performers would not receive the notice required by the Trustees' own Guidelines and demonstrating the Trustees' intentional discrimination against non-union non-featured performers.

76. Tellingly, Congress itself noted at the beginning how important it would be for the entities ultimately responsible for distributing the Royalties to adopt proper guidelines: "[t]he

Committee [on the Judiciary] believes that it will be especially important for these independent administrators to identify and pay those vocalists and musicians who are not members of the union. They must establish procedures designed to enable all eligible parties to receive royalties, including nonunion members.” H.R.Rep. 104-274, 104<sup>th</sup> Con., 1<sup>st</sup> Sess., (1995 WL 606862). Unfortunately, the Trustees have woefully breached their duties in this regard to both union and non-union members.

77. Indeed, the Trustees have adopted Guidelines which actually serve to discourage non-featured performers from claiming their Royalties. Once a year, the Fund publishes the list of Covered Recordings for which it will pay Royalties. The title of each Covered Recording is a hyperlink to the names of all non-featured performers who the Trustees have identified as eligible to receive Royalties in connection with that particular Covered Recording. The Covered Recordings page also contains links to a limited number of previous years’ lists of Covered Recordings. However, the Fund’s Guidelines provide that “[a]ny monies unclaimed after six months . . . shall revert to the Fund.” This, of course, is at odds with the indication that Royalties will still be paid to non-featured performers who find themselves on previous years’ list. Accordingly, it is designed to chill non-featured performers from seeking to claim such Royalties.

78. The Guidelines’ chilling effect is even worse for non-featured performers who find a title on the Covered Recordings list on which they performed but do not find their names listed. Specifically, the Fund’s Guidelines provide that “[a] non-featured performer who has been omitted from the Fund’s list of performers for a record shall have forty-five days from the publication on the Fund’s website of the titles ready for distribution to make a claim to the Fund. The Fund, in its sole discretion, may process claims received after forty-five days but prior to

disbursement.” Class members who discover the covered sound recordings after the forty-five days would be likely not to make a claim under the belief they were too late and that the Fund would likely not exercise its discretion to waive the claim deadline. Further, if the Class member made the discovery after the April 30 disbursement date for that year, there would be no chance of payment.

79. Because the Royalties belong to Plaintiffs and the Class and the Fund exists for the sole purpose of distributing the Royalties to them, there is no justification for publishing and/or enforcing any time limits on making claims or for the Royalties to ever revert to the Fund. Accordingly, enforcing or even publishing these Guidelines is unreasonable and constitutes bad faith and an abuse of discretion. And, telling non-featured performers they can solve the timeliness problem by checking the Covered Recordings List every forty-four days represents an abdication by the Trustees of their fiduciary obligations. Such checking would be an unrealistic and unreasonable burden to put on busy working musicians, the vast majority of whom are unaware of the existence of the Royalties and of the list. Such a position by the Trustees represents them trying to shift the burden of distributing the Royalties to the non-featured performers from themselves and the highly compensated staff of the Fund in violation of their fiduciary duties.

80. The Trustees have also adopted the counter-productive policy and procedure of only accepting necessary payment information (in the form of a Participant Information Form) from non-featured performers who have previously been eligible to receive Royalties on a Covered Recording. In order to always have necessary payment information for eligible non-featured performers, the Fund should accept necessary payment information from anyone who thinks he or she may now or in the future be eligible to receive Royalties. Indeed, one of the

goals of a reasonable, good faith marketing campaign should be to get as many non-featured performers to register as possible, regardless of whether they have ever been eligible in the past to receive Royalties. There is no downside to the Fund accepting necessary payment information from all such persons because the cost of data storage is so miniscule. On the other hand, the upside is that the chances that the Fund will have necessary payment information in the future for eligible non-featured performers is greatly enhanced by collecting as much information on as many people as possible. The Trustees' refusal to accept that information constitutes a counter-productive policy that further evidences their bad faith.

*The Abysmal Performance of the Trustees in Paying Royalties is Consistent with and Further Evidences Their Bad Faith*

81. According to a chart produced by the Trustees in answer to an interrogatory, Redacted

**Redacted**

[Redacted]

82. **Redacted**

[Redacted]

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<sup>5</sup> This analysis of the Fund's performance looks at allocation and payment from 2014 to 2017 of Royalties collected from 2011 to 2016 because in 2013 the Fund only allocated and paid Royalties from 2009 and 2010 and the Fund's practice is to allocate and pay Royalties the year following their collection.

Redacted

[REDACTED]

[REDACTED]. Simply put, the Trustee's abysmal performance in paying the Royalties to non-featured performers, both results from and strongly evidences their failure to make a good faith, reasonable effort to pay the Royalties, which constitutes a bad faith refusal by them to pay Royalties to Plaintiffs and the Class.

83. Had the Trustees made a reasonable, good faith effort to pay the Royalties, the Fund would have been far more successful in doing so. And, if the Trustees make a reasonable, good faith effort in the future, the percentage of currently unpaid Royalties and future Royalties paid to Plaintiffs and the Class could be brought close to 100%.

*The Trustees Are Operating Under Significant Conflicts of Interest*

84. 17 U.S.C. §114(g)(2)(B) & (C) requires that the Royalties shall be "deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the [AFM/SAG-AFTRA] (or any successor entity) to be distributed to non-featured [performers] (whether or not members of the American Federation of Musicians/American Federation of Radio and Television Artists) who have performed on sound

recordings.” The independence of the administrator is crucial given the congressional mandate that the royalties be distributed regardless of union status. Unfortunately, the Trustees are anything but independent because they are all officers and employees and members of the AFM and SAG-AFTRA. To make matters worse, the Trustees are not compensated by the Fund, but rather by their employers—the AFM and SAG-AFTRA. As a natural result, the Trustees have significant conflicts of interest for which they have not taken adequate protective measures, as had the previous administrator of the Fund, and as has the current administrator.

85. More specifically, the Chairmen of the Board of Trustees are Raymond Hair and Duncan Crabtree-Ireland. Raymond Hair is the president of the AFM and serves on the Board of Directors of SoundExchange. Duncan Crabtree-Ireland is the CEO and general counsel of AFTRA. Trustee Augustino Gagliardi is on the Executive Board of the AFM. Trustee Stefanie Taub is the National Manager of Sound Recordings for SAG-AFTRA. Trustee Jon Joyce is on the Board of the SAG-AFTRA Foundation. Trustee Bruce Bouton is on the Electronic Media Oversight Committee of the AFM and is the Intellectual Property Rights Committee Chair of the Recording Musicians Association, which, upon information and belief, is an affiliated entity of the AFM. The former Administrator of the Fund from the Fund’s inception until his recent retirement, Dennis Dreith, was a member of the AFM Negotiating Committee. Mr. Dreith was the President of the Recording Musicians Association for over 15 years (again, believed to be an affiliated entity of the AFM). Mr. Dreith was the Administrator of the Film Musicians Secondary Marketing Fund formed by a collective bargaining agreement between the AFM and the Alliance of Motion Picture and Television Producers. The current Administrator of the Fund, Robert DiPaola, was and possibly still is the administrator of the AFM’s Sound Recording

Special Payments Fund. The Chief Operating Officer of the Fund, Shari Hoffman, was previously the Supervisor of Electronic Media (Symphonic Services) for the AFM.

86. Reflecting their conflicts of interest, the Trustees have used the Royalties to improperly benefit the Unions. According to the Fund's 2014 Form 990, key upper level employees of the Fund, including the Fund Administrator, the IT Director and the HR and Legal Affairs Director, only work half time for the Fund despite receiving salaries commensurate with full time work: \$273,646 for working 20 hours per week for the Fund Administrator, \$98,675 for working 20 hours for the IT Director, and \$42,781 for working 24 hours for the HR and Legal Affairs Director. The Form 990 also shows that these key employees do not spend the other 20 hours a week on unrelated activities; rather, they also work for "related organizations;" namely the AFM and SAG-AFTRA or their affiliated entities, which benefit by having work performed for them by these personnel who are paid, at least in part, from the Royalties. In other words, the Fund was subsidizing the salaries of Union employees.

87. In sum, these facts make clear that the Trustees and the Fund's key personnel are not independent and have as their primary goal the benefit of the Unions, the dual employees of the Fund and the Unions, and the Unions' members.

*The Trustees' Motives*

88. Of course, the motives of the Trustees, high-ranking employees of the Unions, for effectively refusing to distribute the Royalties to Plaintiffs and the Class by not making a reasonable, good faith effort to locate and pay them and adopting policies which make it very difficult for Plaintiffs and Class members to identify themselves can only be inferred, but they are reasonably clear—to benefit the Unions and their members and the dual employees of the Fund and the Unions. The non-payment of Plaintiffs and other non-union Class members allows

the Trustees to funnel monetary benefits indirectly to the Unions. It also provides an incentive to musicians to become Union members and stay members in order to receive the Royalties they would not receive as non-members, which greatly benefits the Unions. From the Trustees' perspective, not paying Plaintiffs and other non-union members is not only not a bad thing, it is a good thing because it serves to benefit the Unions. And, it allows them to only donate, on average, one uncompensated hour per week to their duties as Trustees.

*Plaintiffs and the Class*

89. Plaintiffs and the other members of the Class are both union and non-union non-featured performers that have played on sound recordings performed on satellite radio, the web, cable TV music channels, and other digital services and that have not received the Royalties to which they are legally entitled. Because SoundExchange collects Royalties for the digital performance of sound recordings on an annual basis and remits them to the Fund on an annual basis, and because sound recordings are often digitally performed in multiple years, and because Plaintiffs and the other Class members very often perform on new sound recordings each year which are then digitally performed, Plaintiffs and the other members of the Class reasonably expect that they will be entitled to receive Royalties collected by SoundExchange and remitted to the Fund in the future. Plaintiffs and the other members of the Class are among the persons granted a right to receive the Royalties by 17 U.S.C. §§ 114(g)(2)(B) & (C).

Jon Blondell

90. Plaintiff and Class Representative Jon Blondell<sup>6</sup> is a session musician that performed trombone on "Wrong Way" by Sublime, which was released in 1996 and is listed on

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<sup>6</sup> "The Austin trombonist that somehow recorded the greatest trombone solo in rock history."  
<http://www.trombonealex.com/blog/2017/2/22/wrong-way-sublime>

the Fund's website as a Covered Recording.<sup>7</sup> Prior to and as of the date that this lawsuit was filed, the Fund had not paid Plaintiff Jon Blondell any of the Royalties it owed to him for "Wrong Way" from the time it was released to the date that this lawsuit was filed. Because Plaintiff Blondell was not listed on the Fund's Unclaimed Royalties list as of 1/24/16, it appears that he was not paid the Royalties by the Fund because the Fund failed to identify him as having performed on "Wrong Way," as opposed to the Fund not possessing his necessary payment information.

91. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Mr. Blondell because they easily could have identified him as having performed on "Wrong Way" by several methods. First, basic online research would have revealed it. Second, the Fund could simply have purchased the CD containing it, the liner notes to which contained credits identifying the non-featured performers by name and role. Third, if necessary, the Fund could easily have contacted the record label that released "Wrong Way", which likely would have been able to identify him as having played on the song and provide his necessary information, because record labels frequently maintain records identifying the non-featured performers and, in many cases, their contact information and social security numbers, since they often pay the non-featured performers for the applicable session. Fourth, if necessary, the Fund could have contacted the producer, Sublime or Sublime's management, all of whom, again, would likely have identifying information for session musicians and vocalists that participated in the recordings along with their contact information. In short, had a reasonable

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<sup>7</sup> Jon Blondell also played trombone or bass on recordings by Willie Nelson, Dale Watson, Ani DiFranco, David Byrne, Denny Freeman, Doug Sahm, the Sir Douglas Quintet, Albert Collins, James McMurtry, and many others. However, the Fund only includes the Covered Recordings lists for the years 2013 through 2017 on its website so Mr. Blondell cannot determine if he performed on Covered Recordings for which Royalties are owed for years other than 2013 through 2017.

good faith effort by the Fund been made, it would have identified Plaintiff Blondell as having played on “Wrong Way”. Obviously, the Fund did not make that effort.

92. Once the Fund identified Plaintiff Blondell, if the source which identified him did not have contact information for him, it easily could have found a way to contact him to obtain his necessary payment information. Initially, a Lexis Accurint search for him would easily have provided the Fund with his contact information and possibly even his social security number. Further, a simple Google search for “Jon Blondell Trombone” could have been initiated and completed in approximately 60 seconds or less, which would have revealed his artist page at his record label which includes contact information for the label, which certainly would have his contact information given the given the tax reporting obligations it owes to him and the IRS. In addition, the Google search would have revealed his website, his Facebook page, his YouTube channel, and his performance calendar, all of which would have provided ways for the Fund to contact him to obtain from him the necessary payment information. Thus, the Fund could and should have undertaken these quick and minimal steps to contact Mr. Blondell regarding “Wrong Way” after identifying him, but it did not do so. Mr. Blondell is not currently a member of the AFM.

93. Further, Plaintiff Jon Blondell was a member of the AFM at times in the past, including without limitation at some time during or around 2013, when he was a member of the Austin, Texas chapter, Local 433. So, once the Fund had identified him, it easily could and should have checked AFM databases and contacted the Austin chapter for Mr. Blondell’s location and payment information, but it apparently did not do so.

94. Given the Fund’s acts and omissions, including without limitation those noted above, Plaintiff Jon Blondell was not aware until after he retained counsel (shortly before the

filing of this lawsuit) of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund's website of the Covered Recordings ready for distribution of Royalties, which included "Wrong Way." After becoming aware of the existence of the Fund, Mr. Blondell did not make a claim to the Fund for the Royalties owed to him from "Wrong Way" because he reasonably believed that the Fund would not pay him such Royalties based on the Guidelines published on the Fund's website at the time this lawsuit was filed, which provided (and still do so today) both that if a session musicians was not identified as playing on a Covered Recording, such musician would have only 45 days after the publication of the list to make a claim for payment, and that Royalties unclaimed after six months revert to the Fund, which he reasonably believed meant the Fund regarded the Royalties as no longer belonging to him. Both the 45-day and the six-month deadlines had passed by the time Mr. Blondell became aware of the Royalties and the Fund, which was shortly before this lawsuit was commenced.

95. On or about November of 2017, after this lawsuit was commenced, the Fund paid Plaintiff Blondell \$25,612.01, which it identified as the Royalties owed to Mr. Blondell on "Wrong Way" for the years 2003 and 2015 – 2016. Mr. Blondell does not concede that the amount paid him is correct or complete, as this can only be established through discovery. Further, Mr. Blondell is still owed Royalties for "Wrong Way" for the years 2000 through 2002, 2004 and 2017. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid him but did not, which Mr. Blondell is entitled to recover in this lawsuit, or the incentive award which he might recover for acting as a class representative.

96. Finally, Mr. Blondell is a regularly recording musician who is likely to be owed Royalties on Covered Recordings in the future but be unable to recover payment of them, given the likelihood the Fund would once again fail to identify him as a performer on those Covered

Recordings and the unlikelihood that he would review the Fund's publication of the Covered Recordings list on its website within 45 days of its publication in order to timely make a claim.

Paul Harrington

97. Plaintiff and Class Representative Paul Harrington is a session musician that played the harmonica on "Timber" by Pitbull featuring Ke\$ha, which was released in 2013 and is listed on the Fund's website as a Covered Recording. Because Plaintiff Harrington was not listed on the Fund's Unclaimed Royalties list as of 1/24/16, it appears that he was not paid the Royalties by the Fund because the Fund failed to identify him as having performed on "Timber," as opposed to the Fund not possessing his necessary payment information.

98. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Mr. Harrington because they easily could have identified him as having performed on "Timber" by several methods. First, basic online research would have revealed it. Second, the Fund could simply have purchased the CD containing it, the liner notes to which typically contain credits identifying the non-featured performers by name and role. Third, if necessary, the Fund could easily have contacted the record label that released "Timber", which likely would have been able to identify him as having played on the song. Fourth, if necessary, the Fund could have contacted the producer or Pitbull's management, both of whom, again, would likely have identifying information for session musicians and vocalists that participated in the recordings along with their contact information. In short, had a reasonable good faith effort by the Fund been made, it would have identified Plaintiff Harrington as having played on "Timber". Obviously, the Fund did not make that effort.

99. Further, Plaintiff Paul Harrington was a member of the AFM at times in the past. So, once the Fund had identified him, it easily could and should have checked AFM databases

for Mr. Harrington's location and payment information. Further, Plaintiff Paul Harrington was informed by the Fund that he must join the AFM to receive royalties from international collectives (including royalties on domestic releases by domestic artists that are performed digitally overseas). Accordingly, Plaintiff Paul Harrington is currently a member of the AFM.

100. Given the Fund's acts and omissions, including without limitation those noted above, Plaintiff Paul Harrington was not aware until after he retained counsel of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund's website of the Covered Recordings ready for distribution of Royalties, which included "Timber." On or about April of 2016, after counsel had begun discussions with the Fund, and again in April of 2017, after this lawsuit had been filed, the Fund paid Plaintiff Harrington \$55,857.08 and \$15,628.68, which it identified as the Royalties owed to Mr. Harrington on "Timber" for the years 2012-2016. Mr. Harrington does not concede that the amount paid him is correct or complete, as this can only be established through discovery. Further, Mr. Harrington is still owed Royalties for "Timber" for the year 2017. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid him but did not, which Mr. Harrington is entitled to recover in this lawsuit, or the incentive award which he might recover for acting as a class representative.

101. Finally, Mr. Harrington is a regularly recording musician who is likely to be owed Royalties on Covered Recordings in the future but be unable to recover payment of them, given the likelihood the Fund would once again fail to identify him as a performer on those Covered Recordings and the unlikelihood that he would review the Fund's publication of the Covered Recordings list on its website within 45 days of its publication in order to timely make a claim.

Timothy Johnson

102. Plaintiff and Class Representative Timothy Johnson is a session musician that performed keyboards and organ on “Glorious” by Martha Munizzi, which was released in 2003 and is listed on the Fund’s website as a Covered Recording. Prior to and as of the date that this lawsuit was filed, the Fund had not paid Plaintiff Timothy Johnson any of the Royalties it owed to him for “Glorious” from the time it was released to the date that this lawsuit was filed. Timothy Johnson was listed on the Fund’s Unclaimed Royalties list as of 1/24/16, so it appears that he was not paid the Royalties by the Fund because the Fund made no effort to obtain his necessary payment information

103. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Mr. Johnson because they easily could have found a way to contact him to obtain his necessary payment information. Initially, a Lexis Accurint search for him would easily have provided the Fund with his contact information and possibly even his social security number. Further, a simple Google search for “Timothy Johnson + Martha Munizzi” could have been initiated and completed in approximately 60 seconds or less and would have revealed both that Dan Munizzi was the producer and contact information for Martha and/or Dan Munizzi, who possessed contact information for Mr. Johnson. The Fund could and should have undertaken these quick and minimal steps to contact Mr. Johnson regarding “Glorious” after identifying him, but it did not do so.

104. Given the Fund’s acts and omissions, including without limitation those noted above, Plaintiff Timothy Johnson was not aware until after he retained counsel (shortly before the filing of this lawsuit) of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund’s website of the Covered Recordings ready for

distribution of Royalties, which included “Glorious.” After becoming aware of the existence of the Fund, Mr. Johnson did not make a claim to the Fund for the Royalties owed to him from “Glorious” because he reasonably believed that the Fund would not pay him such Royalties based on the Guidelines published on the Fund’s website at the time this lawsuit was filed, which provided (and still do so today) both that if a session musician was not identified as playing on a Covered Recording, such musician would have only 45 days after the publication of the list to make a claim for payment, and that Royalties unclaimed after six months revert to the Fund, which he reasonably believed meant the Fund regarded the Royalties as no longer belonging to him. Both the 45-day and the six-month deadlines had passed by the time Mr. Johnson became aware of the Royalties and the Fund, which was shortly before this lawsuit was commenced.

105. On or about November of 2017, after this lawsuit was commenced, the Fund paid Plaintiff Johnson \$281.88, which it identified as the Royalties owed to Mr. Johnson on “Glorious” for the years 2010-2013 and 2015. Mr. Johnson does not concede that the amount paid him is correct or complete, as this can only be established through discovery. Further, Mr. Johnson is still owed Royalties for “Glorious” for the years 2003-2009, 2014, and 2016-2017. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid him but did not, which Mr. Johnson is entitled to recover in this lawsuit, or the incentive award which he might recover for acting as a class representative.

106. Finally, Mr. Johnson is a regularly recording musician who is likely to be owed Royalties on Covered Recordings in the future but be unable to recover payment of them, given that he is not an AFM member and the likelihood the Fund would fail to identify him as a performer on those Covered Recordings and the unlikelihood that he would review the Fund’s

publication of the Covered Recordings list on its website within 45 days of its publication in order to timely make a claim.

Chastity Marie

107. Plaintiff and Class Representative Chastity Marie is a session musician that is credited with having performed backing vocals on “All the Lovin’ and Hurtin”, “Commitment”, “Looking Through Your Eyes”, “Nothin’ New Under the Moon”, “Sittin’ on Top of the World”, “Surrender”, “These Arms of Mine”, and “Undeniable”, which were all by LeAnn Rimes and released in 1998, and she performed backing vocals on “I Believe in You”, “I Need You”, and “You Are”, which were also by LeAnn Rimes and released in 2001, all of which are listed on the Fund’s website as Covered Recordings. Prior to and as of the date that this lawsuit was filed, the Fund had not paid Plaintiff Chastity Marie any of the Royalties it owed to her for the above-referenced recordings by LeAnn Rimes from the time they were released to the date that this lawsuit was filed. Because Plaintiff Chastity Marie was listed on the Fund’s Unclaimed Royalties list as of 1/24/16, it appears that she was not paid the Royalties by the Fund because the Fund failed to obtain her necessary payment information

108. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Chastity Marie because they easily could have found a way to contact her to obtain her necessary payment information. Initially, a Lexis Accurint search for her would easily have provided the Fund with her contact information and possibly even her social security number. Further, a simple Google search for “Marie Sisters Vocals”, which could have been initiated and completed in approximately 60 seconds or less, reveals that she performs under the profession name “Chaz Marie”. A Google search of “Chaz Marie” reveals her Facebook page, Twitter page, band page, and other sites which contain her contact

information. The Fund could and should have undertaken these quick and minimal steps to contact Chastity Marie regarding the songs after identifying her, but it did not do so.

109. Further, Plaintiff Chastity Marie was a member of SAG-AFTRA at times in the past, including without limitation at some time during or around 2002 and 2003 when she recorded for Universal. So, once the Fund had identified her, it easily could and should have checked SAG-AFTRA databases for location and payment information, but it apparently did not do so. She is not, however, currently a member of SAG-AFTRA.

110. Given the Fund's acts and omissions, including without limitation those noted above, Plaintiff Chastity Marie was not aware until after she retained counsel (shortly before the filing of this lawsuit) of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund's website of the Covered Recordings ready for distribution of Royalties, which included the above-referenced songs by LeAnn Rimes. After becoming aware of the existence of the Fund, Chastity Marie did not make a claim to the Fund for the Royalties owed to her from the songs because she reasonably believed that the Fund would not pay her such Royalties based on the Guidelines published on the Fund's website at the time this lawsuit was filed, which provided (and still do so today) both that if a session musician was not identified as playing on a Covered Recording, such musician would have only 45 days after the publication of the list to make a claim for payment, and that Royalties unclaimed after six months revert to the Fund, which she reasonably believed meant the Fund regarded the Royalties as no longer belonging to her. Both the 45-day and the six-month deadlines had passed by the time Chastity Marie became aware of the Royalties and the Fund, which was shortly before this lawsuit was commenced.

111. On or about November of 2017, after this lawsuit was commenced, the Fund paid Plaintiff Chastity Marie \$368.59, which it identified as the Royalties owed to her. Chastity Marie does not concede that the amount paid her is correct or complete, as this can only be established through discovery. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid her but did not, which Chastity Marie is entitled to recover in this lawsuit, or the incentive award which she might recover for acting as a class representative.

112. Finally, Chastity Marie is a regularly recording musician who is likely to be owed Royalties on Covered Recordings in the future but be unable to recover payment of them, given the likelihood the Fund would fail to identify her as a performer on those Covered Recordings and the unlikelihood that she would review the Fund's publication of the Covered Recordings list on its website within 45 days of its publication in order to timely make a claim.

Stephanie Lowe, f/k/a Stephanie Marie

113. Plaintiff and Class Representative Stephanie Lowe, f/k/a Stephanie Marie, is a session musician that is credited with having performed backing vocals on "All the Lovin' and Hurtin'", "Commitment", "Looking Through Your Eyes", "Nothin' New Under the Moon", "Sittin' on Top of the World", "Surrender", "These Arms of Mine", and "Undeniable", which were all by LeAnn Rimes and released in 1998, and she performed backing vocals on "I Believe in You", "I Need You", and "You Are", which were also by LeAnn Rimes and released in 2001, all of which are listed on the Fund's website as Covered Recordings. Prior to and as of the date that this lawsuit was filed, the Fund had not paid Plaintiff Stephanie Lowe any of the Royalties it owed to her for the above-referenced recordings by LeAnn Rimes from the time they were released to the date that this lawsuit was filed. Because Plaintiff Stephanie Lowe was listed on

the Fund's Unclaimed Royalties list as of 1/24/16, it appears that she was not paid the Royalties by the Fund because the Fund failed to obtain her necessary payment information

114. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Ms. Lowe because once the Fund identified Plaintiff Stephanie Lowe, it made no effort to obtain her necessary payment information. Initially, a Lexis Accurint search for her would easily have provided the Fund with her contact information and possibly even his social security number. Further, a simple Google search for "Marie Sisters Vocals" reveals that she performs professionally as "Kessie Marie", which leads to her Facebook page and other sites with contact information. Her sister Chastity Marie also has her contact information. The Fund could and should have undertaken these quick and minimal steps to contact Ms. Lowe regarding the songs after identifying her, but it did not do so.

115. Further, Plaintiff Stephanie Lowe was a member of SAG-AFTRA at times in the past, including without limitation at some time during or around 2002-2003 when she recorded for Universal. So, once the Fund had identified her, it easily could and should have checked SAG-AFTRA databases for Ms. Lowe's location and payment information, but it apparently did not do so. She is not, however, currently a member of SAG-AFTRA.

116. Given the Fund's acts and omissions, including without limitation those noted above, Plaintiff Stephanie Lowe was not aware until after she retained counsel (shortly before the filing of this lawsuit) of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund's website of the Covered Recordings ready for distribution of Royalties, which included the above-referenced songs by LeAnn Rimes. After becoming aware of the existence of the Fund, Ms. Lowe did not make a claim to the Fund for the Royalties owed to her from the songs because she reasonably believed that the Fund would not

pay her such Royalties based on the Guidelines published on the Fund's website, at the time this lawsuit was filed, which provided (and still do so today) both that if a session musician was not identified as playing on a Covered Recording, such musician would have only 45 days after the publication of the list to make a claim for payment, and that Royalties unclaimed after six months revert to the Fund, which she reasonably believed meant the Fund regarded the Royalties as no longer belonging to her. Both the 45-day and the six-month deadlines had passed by the time Ms. Lowe became aware of the Royalties and the Fund, which was shortly before this lawsuit was commenced.

117. On or about November of 2017, after this lawsuit was commenced, the Fund paid Plaintiff Stephanie Marie n/k/a Stephanie Lowe, \$368.59, which it identified as the Royalties owed to her. Ms. Lowe does not concede that the amount paid her is correct or complete, as this can only be established through discovery. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid her but did not, which Ms. Lowe is entitled to recover in this lawsuit, or the incentive award which she might recover for acting as a class representative.

Clayton Pritchard

118. Plaintiff and Class Representative Clayton Pritchard is a session musician that performed saxophone on "GDFR" by Flo Rida, which was released in 2014 and is listed on the Fund's website as a Covered Recording. Prior to and as of the date that this lawsuit was filed, the Fund had not paid Plaintiff Clayton Pritchard any of the Royalties it owed to him for "GDFR" from the time it was released to the date that this lawsuit was filed. Because Plaintiff Pritchard was not listed on the Fund's Unclaimed Royalties list as of 1/24/16, it appears that he was not

paid the Royalties by the Fund because the Fund failed to identify him as having performed on “GDFR,” as opposed to the Fund not possessing his necessary payment information

119. The Trustees breached their fiduciary duties of prudence, diligence, undivided loyalty, and non-discrimination owed to Mr. Pritchard because they easily could have identified him as having performed on “GDFR” by several methods. First, basic online research would have revealed it. Second, the Fund could simply have purchased the CD containing it, the liner notes to which typically contain credits identifying the non-featured performers by name and role. Third, if necessary, the Fund could easily have contacted the record label that released “GDFR,” which likely would have been able to identify him as having played on the song and provide his necessary information, because record labels frequently maintain records identifying the non-featured performers and, in many cases, their contact information and social security numbers, since they often pay the non-featured performers for the applicable session. Fourth, if necessary, the Fund could have contacted the producer, Flo Rida or Flo Rida’s management, all of whom, again, would likely have identifying information for session musicians and vocalists that participated in the recordings along with their contact information. In short, had a reasonable good faith effort by the Fund been made, it would have identified Plaintiff Pritchard as having played on “GDFR.” Obviously, the Fund did not make that effort.

120. Once the Fund identified Plaintiff Pritchard, if the source which identified him did not have contact information for him, it easily could have found a way to contact him to obtain his necessary payment information. Initially, a Lexis Accurint search for him would easily have provided the Fund with his contact information and possibly even his social security number. Further, a simple Google search for “Clay Pritchard + saxophone” could have been initiated and completed in approximately 60 seconds or less, which would have revealed his current band and

its contact information. The Fund could and should have undertaken these quick and minimal steps to contact Mr. Pritchard regarding “GDFR” after identifying him, but it did not do so.

121. Plaintiff Clayton Pritchard was informed by the Fund that he must join the AFM to receive royalties from international collectives (including royalties on domestic releases by domestic artists that are performed digitally overseas). Plaintiff Clayton Pritchard is accordingly currently a member of the AFM.

122. Given the Fund’s acts and omissions, including without limitation those noted above, Plaintiff Clayton Pritchard was not aware until after he retained counsel (shortly before the filing of this lawsuit) of the existence of the Fund and the necessity of making a claim, let alone aware of the publication on the Fund’s website of the Covered Recordings ready for distribution of Royalties, which included “GDFR.” After becoming aware of the existence of the Fund, Mr. Pritchard did not make a claim to the Fund for the Royalties owed to him from “GDFR” because he reasonably believed that the Fund would not pay him such Royalties based on the Guidelines published on the Fund’s website, at the time this lawsuit was filed, which provided (and still do so today) both that if a session musician was not identified as playing on a Covered Recording, such musician would have only 45 days after the publication of the list to make a claim for payment, and that Royalties unclaimed after six months revert to the Fund, which he reasonably believed meant the Fund regarded the Royalties as no longer belonging to him. Both the 45-day and the six-month deadlines had passed by the time Mr. Pritchard became aware of the Royalties and the Fund, which was shortly before this lawsuit was commenced.

123. On or about November of 2017, after this lawsuit was commenced, the Fund paid Plaintiff Pritchard \$39,883.58, which it identified as the Royalties owed to Mr. Pritchard on “GDFR” for the years 2015-2016. Mr. Pritchard does not concede that the amount paid him is

correct or complete, as this can only be established through discovery. Further, Mr. Pritchard is still owed Royalties for “GDFR” for the year 2017. Further, the amount the Fund paid does not include interest on the amount that the Fund should have paid him but did not, which Mr. Pritchard is entitled to recover in this lawsuit, or the incentive award which he might recover for acting as a class representative.

124. Finally, Mr. Pritchard is a regularly recording musician who is likely to be owed Royalties on Covered Recordings in the future but be unable to recover payment of them, given the likelihood the Fund would once again fail to identify him as a performer on those Covered Recordings and the unlikelihood that he would review the Fund’s publication of the Covered Recordings list on its website within 45 days of its publication in order to timely make a claim.

#### **CLASS ALLEGATIONS**

125. Plaintiffs seek to represent the following Class:

All persons residing in the United States of America who contributed as non-featured artists to sound recordings for which SoundExchange has collected Royalties and remitted them to the Fund and which the Fund designated as Covered Recordings who have not, in turn, received from the Fund the Royalties to which they are entitled under 17 U.S.C. § 114(g)(2)(B) & (C), regardless of whether they are union members.

126. The Class Period will run from the date the Fund was originally formed on September 16, 1998, to the date the Class is certified if it is determined that no statute of limitations ever began to run on the breach of fiduciary duty claims of Plaintiffs and the Class or that the statute of limitations was tolled that entire time pursuant to the continuing wrong doctrine. Alternatively, the Class Period will run from January 1, 2011, to the date the Class is certified.

127. There are tens of thousands of members of the Class, such that joinder of all Class members is impracticable. This is evidenced by the fact that the Unclaimed Royalties List of names posted by the Fund on its website contains approximately forty thousand names.

128. There are questions of law and fact that are common to all of the members of the Class, including whether the Trustees owe fiduciary duties to the Class, whether the Trustees have breached their fiduciary duties by failing to pay Royalties to the Class and whether the Royalties ought, in equity and good conscience, to be paid to the Class.

129. Plaintiffs' claims are typical of the claims of the Class. They all arise under the same legal theories and out of the same pattern of conduct by the Trustees.

130. Plaintiffs will fairly and adequately represent and protect the interests of the Class because they have no conflicts of interest with the other members of the Class and because they have hired well-qualified counsel to represent the Class.

131. This case is properly maintainable as a class action under Rule 23(b)(1), (2) & (3) of the Federal Rules of Civil Procedure because: (1) the prosecution of separate actions by individual Class members would create a risk of incompatible standards of conduct for the Trustees; (2) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that, as a practical matter, would be dispositive of the interest of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interest; (3) the Trustees have acted or refused to act on grounds that apply generally to the Class, so that final injunctive relief or corresponding declaratory relief is appropriate with respect to the Class as a whole; and (4) the questions of law or fact common to Class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently

adjudicating the controversy. There will be no unusual difficulties in managing the Class. A well-designed notice plan can give effective notice to all members of the Class. And, the very equitable/declaratory/injunctive relief sought by Plaintiffs and the Class against the Trustees, if granted by the Court, will make identification of and payments to the members of the Class possible. Significantly, the amounts owed to each Class member can be mechanically and ministerially calculated based upon information already in the possession of the Trustees.

**FIRST CLAIM FOR RELIEF - BREACH OF FIDUCIARY DUTY FOR FAILURE TO  
DISTRIBUTE ROYALTIES TO PLAINTIFFS AND THE CLASS**

132. Plaintiffs incorporate the preceding and subsequent allegations as if fully set forth here verbatim, including without limitation the factual allegations contained in paragraphs 14 through 131 above.

133. The Trustees are fiduciaries in regard to the Fund pursuant to, among other authorities, N.Y. Est. Powers & Trusts Law § 1-2.7, 17 U.S.C. §114(g)(2)(B) & (C), and the Trust Agreement. Plaintiff and the Class are beneficiaries of the Fund. As fiduciaries, the Trustees owe to Plaintiffs and the Class, as beneficiaries, fiduciary duties of loyalty, reasonableness and good faith, diligence and prudence, to act solely in the interest of Plaintiffs and the Class and to treat the union and non-union members of the Class impartially, all of which duties cannot be disclaimed by private agreement between the Trustees, including by the provisions of the Trust Agreement.

134. The Trustees control substantial Royalties (likely in excess of \$100 million) that are owed by statute, implementing regulations, the Trust Agreement, and applicable law to Plaintiffs and the Class. This money belongs to Plaintiffs and the Class, not to the Fund or the Trustees. Furthermore, Plaintiffs and the Class reasonably expect that the Trustees will in the

future collect additional Royalties owed to them and that the Trustees will likewise fail to distribute those Royalties to them.

135. As set forth above in detail, by failing to make a reasonable, good faith effort to pay the Royalties to Plaintiffs and the Class, the Trustees have effectively refused to pay to Plaintiffs and the Class the Royalties owed to them, including the \$100 million plus in Royalties currently held in the Fund's accounts. As also set forth above, the Trustees have done so in order to benefit the Unions, dual employees of the Fund and the Union, and the members of the Unions.

136. This refusal of the Trustees to pay the Royalties to Plaintiffs and the Class constitutes breach by the Trustees of their fiduciary duties of loyalty, reasonableness and good faith, diligence and prudence, and to act solely in the interests of Plaintiffs and the Class, who are the beneficiaries of the Fund. The Trustees' conduct of their duties under significant conflicts of interest without taking appropriate measures to protect the interests of the non-union non-featured performers also constitutes a breach of the duty of loyalty. In addition, the Trustees' refusal to pay the Royalties to the non-union Plaintiffs and members of the Class constitutes a breach of their fiduciary duty to treat the beneficiaries of the Fund impartially. The Trustees' breaches of their fiduciary duties have proximately caused damages to Plaintiffs and the Class in the amount of the Royalties owed to but not paid to them, which exceeds \$100 million.

137. To the extent that any of the provisions of the Trust Agreement could be interpreted as providing discretion to the Trustees not to engage in the activities reasonably required to distribute the Royalties to Plaintiffs and the Class, such provisions are not enforceable under New York law. Alternatively, to the extent that such provisions may grant discretion to the Trustees, the Trustees have nevertheless breached their fiduciary duties owed to

Plaintiffs and the Class because their failure to make a reasonable, good faith effort to identify Plaintiffs and the Class and deliver the Royalties to them constitutes willful misconduct, bad faith and abuse of such discretion.

138. As a remedy, Plaintiffs and the Class seek several layers of equitable/declaratory/injunctive relief. First, they seek an accounting from the Trustees of all Royalties they have ever received from SoundExchange and of all expenditures they have ever made out of those Royalties, including all payments made to non-featured performers. Second, Plaintiffs and the Class seek a judgment from the Court requiring the Trustees to engage in specified activities designed to identify as many of the Class members as possible and obtain their necessary payment information and pay to them the Royalties they are owed. Those specified activities will be the subject of evidence presented to this Court, but likely will include, as set forth above in detail: (1) paying for the necessary manpower to conduct and then conducting the necessary research regarding the identities and necessary payment information of the members of the Class, (2) hiring a marketing agency/consultant to design and implement a national multi-media campaign designed to reach as many of members of the Class as possible and make known to them the availability of the Royalties, the Fund's publication of lists of covered recordings and non-featured performers eligible for payment of Royalties, and the necessity of and procedures for non-featured performers to review those lists and make claims for the Royalties owed to them, and (3) requesting third parties to review the Unclaimed Royalties List and provide necessary payment information for non-featured performers on the list they recognize and to respond to inquiries by the Fund regarding Covered Recordings and non-featured performers. Those activities will also include rescinding existing policies and setting new policies regarding the publication of the lists and the time periods and methods for making

claims by non-featured performers that do not unreasonably prevent or discourage them from successfully making claims or identifying themselves to the Fund, as discussed above.

139. The third layer of equitable relief sought by Plaintiffs and the Class is a judgment by the Court requiring the Trustees to pay pre-judgment interest and to make additional pro rata distributions to those Plaintiffs and Class members who have been successfully paid out of any funds that cannot be distributed despite full compliance by the Trustees with the Court's judgment regarding distribution of the Royalties currently held by the Trustees. The ultimate goal of this relief is that the Trustees will distribute 100% of the Royalties that they currently hold for Plaintiffs and the Class. Fourth, and finally, Plaintiffs and the Class seek a judgment requiring the Trustees in connection with their future collection of Royalties from SoundExchange and payment of them to Plaintiffs and the Class to continue the same practices used to distribute the currently held Royalties and to engage in additional activities designed to ensure identification of eligible Plaintiffs and Class members and payment of Royalties to them. Those additional requirements will also be the subject of evidence presented to the Court. Those additional activities will likely include, as described in detail above, the Trustees arranging with Gracenote, SoundExchange, recording studios, record labels, engineers, producers, and software distributors to make it possible to actually collect the identities of and the necessary payment information regarding non-featured performers at the time of their participation in the creation of sound recordings and/or at the time of distribution and to make such information easily available to the Trustees.

140. To be clear, Plaintiffs and the Class seek a single judgment from the Court setting forth the obligations of the Trustees going forward, after which the Trustees will be obligated to follow the judgment. Plaintiffs and the Class do not request the Court to be involved in

supervising the Trustees. The Court's involvement with the case will cease after entry of the judgment unless the Trustees fail to comply with it and Plaintiffs are forced to seek its enforcement by the Court.

141. As an alternative to the equitable/declaratory/injunctive relief sought in order to cause the distribution of the unpaid Royalties currently held by the Trustees in the Fund, Plaintiffs and the Class seek a judgment requiring the Trustees to pay out of the Fund as damages all of the unpaid Royalties currently held by the Trustees in the Fund to a special master for distribution to Plaintiffs and the Class.

142. All of the relief requested above from the Trustees is sought from them in their official, not individual, capacities. However, if the Trustees are found to have breached their fiduciary duties, they are individually liable under New York law to reimburse the Fund for their attorneys' fees and expenses and costs of court if they paid for same out of the assets of the Fund, and Plaintiffs and the Class seek such relief if such is the case.

143. The Trustees have not clearly and openly repudiated their obligations as Trustees. Accordingly, no statute of limitations has ever begun to run on the breach of fiduciary duty claims of Plaintiffs and the Class.

144. Alternatively, the Trustees' breaches of their fiduciary duties as described above constitute continuing wrongs that are not referable exclusively to the day the original wrongs were committed since the Trustees have had an ongoing duty to distribute all of the Royalties collected by the Fund. Accordingly, the statute of limitations on these breach of fiduciary duty claims of Plaintiffs and the Class has been tolled and will not begin to run until the commission of the last wrongful act of the Trustees.

**SECOND CLAIM FOR RELIEF - MONEY HAD AND RECEIVED**

145. Plaintiffs incorporate the preceding and subsequent allegations as if fully set forth here verbatim, including without limitation the factual allegations contained in paragraphs 14 through 131 above.

146. As set forth above, in their official capacities, the Trustees have received and currently retain Royalties belonging to Plaintiffs and the Class in excess of \$100 million. In their official capacities, the Trustees have benefited from receipt of that money because it allowed for the continuation of the operations of the Fund which, in turn, benefitted those beneficiaries of the Fund who received Royalties. The receipt of the money also benefited the Trustees in their official capacities because it benefitted their employers, the AFM and SAG-AFTRA, by providing a benefit to their members and allowing the subsidization of the work performed for the Unions by the employees of the Fund the Unions.

147. Because the Royalties belong to Plaintiffs and the Class and because the Trustees have not made a reasonable, good faith effort to pay the Royalties to Plaintiffs and the Class, equity and good conscience require payment of the undistributed Royalties currently residing in the Fund's accounts and controlled by the Trustees to Plaintiffs and the Class. This should be accomplished by payment of the Royalties out of the Fund to a special master for distribution to Plaintiffs and the Class.

148. No contract exists between the Trustees and Plaintiffs and the Class. The Trust Agreement does not constitute such a contract. Accordingly, there is no bar to recovery in quasi-contract by Plaintiffs and the Class.

149. The Trustees collected Royalties on an annual basis that they were obligated to distribute to Plaintiffs and the Class and other Fund beneficiaries. On an annual basis, the Trustees disbursed Royalties from previous years to some beneficiaries, but not to Plaintiffs and

the Class. Under New York law, the statute of limitations for money had and received as to the Royalties collected in a given year began to run on the date the Trustees disbursed Royalties to other beneficiaries from that year but not to Plaintiffs and the Class.

**DEMAND FOR JURY**

Plaintiffs request trial by jury of all issues in the case which can be tried to a jury, and they paid any required jury fee at the same time they paid the fee for filing the Original Complaint.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs Jon Blondell, Paul Harrington, Timothy Johnson, Stephanie Lowe, f/k/a Stephanie Marie, Chastity Marie, and Clayton Pritchard, individually and on behalf of the Class described above, respectfully request the following relief against the Trustees:

1. An order certifying this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23, appointing Plaintiffs as Class Representatives and appointing Plaintiffs' counsel as Class Counsel;
2. A judgment against the Trustees in their official capacities awarding the equitable/declaratory/injunctive relief set forth above, including pre-judgment interest;
3. A judgment against the Trustees in their official capacities awarding the damages set forth above, including pre-judgment interest;
4. A judgment against the Trustees in their individual capacities requiring them to reimburse the Fund for any of its assets they used in unsuccessfully defending the breach of fiduciary duty claims against them;

5. A judgment awarding Plaintiffs' counsel reimbursement of their costs and expenses and reasonable attorneys' fees out of the Royalties held by the Trustees for Plaintiffs and the Class pursuant to the common fund/benefit doctrine;

6. A judgment against the Trustees in their official capacities awarding Plaintiffs and the Class post-judgment interest at the maximum rate permitted at law or in equity; and

7. A judgment awarding Plaintiffs and the Class all such other and further relief, general or special, legal or equitable, to which they are justly entitled.

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Respectfully submitted,

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BEHALF OF A CLASS OF SIMILARLY  
SITUATED PERSONS

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of February, 2018, a true and correct copy of the above and foregoing pleading was served via electronic mail and first class mail and a redacted version was served via ECF upon the following:

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