EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEREDITH CORPORATION, et al.	:	
	:	
	:	
v.	:	Case No. 09 Civ. 9177 (PAE)
	:	
SESAC, LLC, et al.	:	
	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs are full-power local commercial television stations ("local stations") who filed this antitrust lawsuit on behalf of themselves and nearly all local stations. Beginning on January 1, 2008 and through the present, SESAC has forced all local stations to take a blanket license to the entire SESAC repertory in order to obtain the performance rights to any music in the SESAC repertory. Because of the anti-competitive practices challenged in this case, the SESAC blanket license was priced at supra-competitive levels. *Every* member of the class was forced to take the blanket license at those unlawfully inflated levels. Plaintiffs seek to certify the putative class—all owners of full-power local commercial television stations in the United States and its territories that obtained licenses for music performing rights from SESAC during the period from January 1, 2008 to date, excluding the owned and operated affiliated stations of the ABC, CBS, and NBC networks. Class certification will ensure that a verdict against SESAC efficiently provides the monetary and long-term injunctive relief the industry deserves.

Class certification is straightforward in this case. As this Court concluded in denying SESAC's summary judgment motion, "[t]he evidence would . . . comfortably sustain a finding that SESAC, once freed in 2008 from the duty to arbitrate its disputes with the stations, engaged in an *overall anti-competitive course of conduct* designed to eliminate meaningful competition to its blanket license." *Meredith Corp. v. SESAC LLC*, No. 09 Civ. 9177, 2014 WL 812795, at *10 (S.D.N.Y. Mar. 3, 2014).[1] The evidence showed that SESAC did not limit its "overall anti-competitive course of conduct" to the named plaintiff stations but, rather, dealt with *all* class member stations *similarly*.

Specifically, as this Court determined, there is "substantial evidence . . . by which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id.* at *30.

[1] Emphasis is added in italics herein unless otherwise noted.

SESAC did this by, among other things, entering into supplemental agreements with its top affiliates that "effectively eliminated direct licensing as a means by which stations could license these affiliates' music," and by deliberately changing the terms of its per-program license to make it, "in fact, illusory" so that "not a single local station chose the [per-program license]" during the class period. *Id*. at *10, *29, *30. With "the relevant market [being] fairly defined as that for performance licenses of the music in SESAC's repertory," it being "undisputed that SESAC possesses monopoly power in that market," and it "also appear[ing] undisputed that SESAC has the power to control prices over that market as currently structured," the Court recognized that Plaintiffs' merits expert economist, Professor Adam Jaffe, "convincingly articulates, since 2008, fewer licensing options are realistically available to stations, and stations must pay supra-competitive prices for the one license that is available—SESAC's blanket license." *Id*. at *10, *34, *36. The evidence also showed that, having insulated the SESAC blanket license from any competition whatsoever, SESAC has imposed on local stations *uniform across-the-board* price increases at artificially inflated levels, resulting in massive license fee overcharges since 2008 in the amount of nearly $50 million to date (before automatic trebling). As discussed below, the evidence is uncontroverted that SESAC took the industry-wide license fees for 2007 – that were set by an independent panel of arbitrators and allocated among the local stations by the Television Music License Committee ("TMLC") based on a plan that was approved by the arbitrators – and unilaterally raised those fees for 2008 and beyond without *any* legitimate justification based on increased use of SESAC music by local stations, market share growth, or otherwise.

History confirms that class certification is appropriate. SESAC has transacted with local stations on an *industry-wide basis since 1995*. SESAC's approach is entirely consistent with the

industry-wide manner in which the other two performance rights organizations ("PROs"), ASCAP and BMI, have dealt with local stations for over 50 years. Indeed, courts in this District and the Second Circuit have recognized that local stations are "similarly situated" to each other in their dealings with the PROs. *See Broad. Music Inc. v. Weigel Broad. Co.*, 488 F. Supp. 2d 411, 416-18 (S.D.N.Y. 2007), *aff'd*, 340 F. App'x 726, 727 (2d Cir. 2009). Not surprisingly, in *Buffalo Broadcasting Co., Inc. v. ASCAP, et al.*, Judge Gagliardi certified the *same* putative class of local stations in their antitrust lawsuit against ASCAP and BMI. 78 Civ. 5760 (S.D.N.Y. Dec. 5, 1980).[2]

The plaintiffs similarly satisfy Rule 23 here. The putative class meets the numerosity requirement of Rule 23(a)(1) because it consists of the owners of over 1,000 local stations. There is an abundance of common questions to satisfy Rule 23(a)(2), including: whether the performance rights to songs in the SESAC repertory is a relevant product market; whether SESAC has monopoly power in that market; whether the challenged SESAC business practices constitute exclusionary conduct by a monopolist; whether SESAC and its key affiliates restrained trade by agreeing that SESAC would be the exclusive source of a performance right license for local stations; whether local stations were harmed by this conduct; and the extent of that harm. The named plaintiffs' claims also are typical of the class members' claims under Rule 23(a)(3): like *every* member of the class, they were forced to take the same SESAC blanket license at unlawfully inflated fee levels. Finally, the named plaintiffs are adequate representatives for purposes of Rule 23(a)(4): they have actively participated in all aspects of this case and have no interests that are antagonistic to those of the class. Similarly, counsel for the named plaintiffs is

[2] A true and correct copy of Judge Gagliardi's decision is attached as Exhibit 24 to the Declaration of Eric S. Hochstadt in Support of Plaintiffs' Motion for Class Certification ("ESH Decl."), submitted contemporaneously herewith.

adequate to represent the class having overcome both SESAC's motion to dismiss this case and its motion for summary judgment.

In addition to easily meeting the requirements of Rule 23(a), the plaintiffs also meet the requirements under Rule 23(b). First, the class is readily certifiable under Rule 23(b)(2) because SESAC has unquestionably acted in a manner generally applicable to the class that makes injunctive relief to stop SESAC's ongoing anti-competitive licensing practices appropriate on a class-wide basis. With respect to all class member local stations, SESAC set the price of its "all-or-nothing" blanket license at a supra-competitive level, offered no viable per-program or other form of alternative license, restricted its key affiliates from engaging in direct and source licensing, and intentionally failed to disclose the full contents of the music in its repertory. Second, a damages class under Rule 23(b)(3) is appropriate because common questions will easily predominate over any individual ones at trial. Both plaintiffs' proof for their case in chief and SESAC's proof for any of its defenses will apply to all members of class. As confirmed by Dr. Russell Lamb, an economic expert, common questions concerning antitrust injury and damages will overwhelm any individual questions.[3] Finally, a class action is superior to individual actions by absent class members given SESAC's long history of dealing with the local stations on an industry-wide basis and the significant length and expense of a complex antitrust case.

In sum, this is a clear, straightforward case for class certification.

[3] Dr. Lamb is a Ph.D. economist with decades of experience evaluating, among other things, the class-wide impact and damages from alleged anti-competitive activity. His expert opinions have been cited favorably by numerous courts. *See, e.g., In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, 347 (D. Md. 2012) (granting class certification: "Dr. Lamb's … analysis accurately reflects the characteristics of the titanium dioxide industry, and the facts in this case.").

BACKGROUND

A. Procedural History

On November 4, 2009, plaintiffs filed this lawsuit on behalf of themselves and all owners of full-power local commercial television stations in the United States and its territories that obtained licenses for music performing rights from SESAC during the period from January 1, 2008 to date, excluding the owned and operated affiliated stations of the ABC, CBS, and NBC networks."[4] On March 9, 2011, Judge Buchwald denied SESAC's motion to dismiss and concluded that plaintiffs stated plausible claims for an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, monopolization in violation of Section 2 of the Sherman Act, and conspiracy to monopolize in violation of Section 2 of the Sherman Act. *See Meredith Corp. v. SESAC LLC*, No. 09 Civ. 9177, 2011 WL 856266, at *1 (S.D.N.Y. Mar. 9, 2011).

Following Judge Buchwald's ruling, the parties engaged in extensive fact and expert discovery. That discovery encompassed both class and merits issues and involved both named plaintiffs and absent class members. *See* Dkt. No. 60. On March 3, 2014, this Court denied SESAC's motion for summary judgment and held, "on all three claims, that the record evidence is sufficient to support a verdict in plaintiffs' favor." *Meredith*, 2014 WL 812795, at *10.[5] By agreement reached with SESAC and endorsed by this Court, class certification was sequenced to follow the summary judgment stage. *See* Dkt. No. 89.

B. SESAC Has Dealt with Local Stations on an Industry-Wide Basis for Years

As this Court concluded, the record evidence "supplies an ample factual basis on which the finder of fact could conclude that the relevant product market is bounded, or defined, by SESAC's repertory." *Meredith*, 2014 WL 812795, at *31. That is because "virtually all

[4] In *Buffalo Broadcasting Co., Inc. v. ASCAP*, the certified class similarly excluded the owned and operated affiliated stations of the ABC, CBS, and NBC networks. 78 Civ. 5760 (S.D.N.Y. Dec. 5, 1980).

[5] The Court did "reject[] as a matter of law plaintiffs' theories of liability *per se* and of a conspiracy so broad as to embrace all SESAC affiliates." *Meredith*, 2014 WL 812795, at *10.

composers affiliate with only one of the three PROs" and "almost all local stations have licenses from all three PROs," including SESAC. *Id.* Thus, the commercial reality for local stations is that they need a license from SESAC to do business.

From 1995 until 2007, when, as the Court stated, "SESAC's latitude to set the terms of music licenses was otherwise limited," *id.* at *1, SESAC dealt with local stations on an industry-wide basis through direct negotiations or arbitrations with the TMLC. *Id.* at *6. *See also* ESH Decl. Ex. 23 (SESAC LLC's Statement of Undisputed Facts Pursuant to Local Rule 56.1 ("SESAC 56.1 Stmt."), at ¶¶ 26, 90-95). During those twelve years, SESAC *never* dealt with local stations on an individual basis. *Id.* Indeed, as one of SESAC's then-owners, Freddie Gershon, admitted during the last arbitration with the TMLC for the 2005-2007 license period, "[i]t's more convenient" and "costs [SESAC] less" to "license the TV industry on a collective basis as opposed to individually." ESH Decl. Ex. 19 (TMLC0000215, -272).

Since 2008, when there was no longer "a contractual duty that bound SESAC to arbitrate its disputes with licensee stations," *Meredith*, 2014 WL 812795, at *1, SESAC continued to deal with local stations on an industry-wide basis, albeit not via the TMLC. *Id.* at *6. On November 27, 2007, SESAC sent the *same* form blanket license and per-program license agreements to *every* station for the 2008-2012 license period. *See id.*[6] As one of SESAC's licensing representatives, Steve Counce, wrote to a Hoak representative, this approach was consistent with

[6] *See also* ESH Decl. Ex. 23 (SESAC 56.1 Stmt. at ¶¶ 99-100); *SESAC TV License 2008-2012*, SESAC Website, http://www.sesac.com/Licensing/tv.aspx (last visited July 10, 2014) (linking to all of SESAC's form "TV License Agreements" for the 2008-2012 period and form "Correspondence" to local stations in October-November 2007); ESH Decl. Ex. 13 (SESAC-0679849) (containing Nov. 27, 2007 letter from SESAC to "Local Television Broadcaster" with the following handwritten note at the top: "Sample Industrywide Form Letter"); ESH Decl. Ex. 4 (Counce Dep. Tr. 125:2-126:8) ("standardized licensing is more favorable across an entire industry . . . than individually licensed agreements," due to administrative cost savings and assurance to stations that everyone was being charged the same); ESH Decl. Ex. 12 (HOAK00000531) (showing a Hoak station was sent the form SESAC transmittal letter and licenses dated November 30, 2012).

SESAC's effort to "license each *similarly situated station* in a *like manner*."[7]

SESAC's initial demand for 2008 was the same to all stations: a 10% increase in the blanket license fee over the rate for 2007. *See* ESH Decl. Ex. 25 (Expert Report of Adam B. Jaffe ("Jaffe Report") at 49). SESAC even sought to justify the increase it demanded based upon the arbitration panel's industry-wide fee determination for the 2005-2007 license period. As Pat Collins, SESAC's President testified, "[t]he current rates were set using the results of a previous arbitration for the three years prior to 2008" and "SESAC . . . used the same 10 percent that the arbitrators ordered, increased the 2008 license fees, and then for subsequent years we lowered the increase to 6.95." ESH Decl. Ex. 6 (7/31/12 Collins Dep. Tr. at 93:14-94:10; 120:17-121:5). *See also* ESH Decl. Ex. 5 (Lee Dep. Tr. at 55:3-10) (explaining that the basis for the 2008 licenses fees to local stations was the arbitration result and the TMLC's allocation of same); ESH Decl. Ex. 8 (Swid Dep. Tr. at 62:15-23) (stating that one of the reasons for SESAC's decision to adopt a 10% increase across-the-board for each television station or group was "the arbitrators' decision . . . that [SESAC] brought forward"); ESH Decl. Ex. 4 (Counce Dep. Tr. at 28:8-29:9) (testifying that SESAC's fee increases to local stations were calculated by adding 10 percent to the license fee that had been decided by the arbitrators and allocated by the TMLC in 2007); ESH Decl. Ex. 9 (Edwards Dep. Tr. at 44:5-14) ("Q: In the postarbitration period, how was the amount of the blanket license fee determined? A: The blanket license fee was the 2007 TMLC allocated amount, increased by 10 percent for 2008 and 6.95 for each year thereafter for '9 through '12. Q: Where those year-over-year increases of 10 percent for the first year and 6.95

[7] ESH Decl. Ex. 14 (SESAC-0482153, -156). *See also* ESH Decl. Ex. 15 (SESAC-0479685) (internal SESAC e-mail stating how local stations are licensed: "All of the licenses and rates proffered to the industry are calculated in a similar fashion, thus allowing for an administrative economy of scale. Should we even consider licensing stations with specific individually negotiated fees and terms, it is our contention that rates would actually increase."); ESH Decl. Ex. 16 (SESAC-0959072) (responding to a station's request for fee negotiation, SESAC wrote that "[t]here are no other 'olive branches' to be offered that could maintain consistent licensing throughout the industry, and as you know, *we license all like entities in a similar fashion*").

percent for the second year, did those apply to all stations? A: Yes."). *Cf.* ESH Decl. Ex. 4 (Counce Dep. Tr. at 26:5-27:2) (explaining that when determining the license fee for a brand-new television station, SESAC used "the average of existing license fees for similarly situated stations"). Only because of the pendency of this litigation has SESAC kept its blanket license fees *constant* for 2013 (and now 2014) based on the already artificially inflated 2012 blanket license fee levels.[8] SESAC's massive, long-term, blanket license fee increases imposed on the industry were not supported by any legitimate business justification. *See* ESH Decl. Ex. 25 (Jaffe Report at 43-44) (explaining that the arbitrators had actual music use information for only 2005 when setting license fees for the entire 2005-2007 license period and that, despite SESAC's projections of 10% year-over-year increases in use of SESAC music by local stations during that period, the data shows that performances of SESAC music on local television, in fact, declined from 2005 to 2007). Incredibly, the record evidence further shows that SESAC has undertaken no ordinary course calculation of its market share or music usage since the arbitration for the 2005-2007 license period.[9]

SESAC's across-the-board price increases in 2008 were subject to some minor, one-time, adjustments off their increased blanket license rates. *See* ESH Decl. Ex. 25 (Jaffe Report at 49-

[8] *See, e.g.*, ESH Decl. Ex. 21 (Letter from SESAC representative W. Lee to Meredith representative D. Lowe, dated Nov. 30, 2012) ("Because of the pendency of [this] litigation, we are maintaining the status quo with respect to license fees, keeping your 2012 license fees in effect for 2013 as shown on the enclosed schedule(s)."); ESH Decl. Ex. 3 (Sennet Dep. Tr. at 297:4-25) (representative of Tribune Media Services stations testified that for the 2013 license period, SESAC offered the stations "a one-year extension of our existing deal, which is blanket [license] only . . . ."). Notably, SESAC kept blanket license fee levels the same for both the named plaintiffs and the absent class members. SESAC did not distinguish between them and raise the fees of absent class members while holding the fees of the named plaintiffs constant, thereby confirming again that SESAC itself views local stations similarly.

[9] *See, e.g.*, ESH Decl. Ex. 7 (12/18/12 Collins Dep. Tr. at 146:13-147:11) ("Q: What is SESAC's share of the market as between ASCAP and BMI? It's less than 10 percent, right? . . . A: I don't know what the arbitrators found for the periods '05, '-6, or '-7. Q: I'm asking you for your sense of the market share as you sit here today. A: *The only analysis we've done has been at the direction of counsel*. Q: You're aware of no market information that puts your market share in comparison to that of ASCAP and BMI at about 10 percent? . . . A: The only analysis we have done has been at the request of counsel for this litigation."), 194:22-195:6 ("Q: [H]as SESAC, since the arbitration, employed any methodology to calculate market share or music usage? . . . A: *The only work that we've done with regard to calculating usage was as a result of a request from counsel in this litigation*.").

51); ESH Decl. Ex. 23 (SESAC 56.1 Stmt. at ¶¶ 112-14). Those discounts were equally available to all local stations and made on the same conditions; the discounts were all made off the supra-competitively priced blanket license. For example, as one of SESAC's licensing representatives confirmed to one of the named plaintiff stations, the group discounts were offered in lock-step fashion to the industry:

> We . . . have offered the *same group discount schedule to all groups*, and are unable to accept a further reduction to that schedule in an effort to license all groups similarly and in consideration of potential favored nations clauses. *All of the licenses and rates proffered to the industry are calculated in a similar fashion, thus allowing for an administrative economy of scale.* Should we even consider licensing stations with specific individually negotiated fees and terms, it is our contention that rates would actually increase.

ESH Decl. Ex. 17 (SESAC-0496759) (March 6, 2008 e-mail from SESAC's Mike Few to a Hoak station representative). Even with those discounts, the class member local stations were forced to pay artificially inflated licenses fees. *See* ESH Decl. Ex. 1 (Reynolds Dep. Tr. at 152:15-156:2) ("Q: Do you recall if SESAC offered Gannett any kind of discount from its initial offer? . . . A: SESAC's first offer was insanely high, and then they came back and offered a slight discount from a number that was astronomical. So the answer to your question is *they offered a discount off an outrageous fee*."); ESH Decl. Ex. 2 (Whalen Dep. Tr. at 121:9-122:7) ("Q: So SESAC was proposing a credit for stations that dropped Stephen Arnold's music; is that correct? A: A de minimus credit . . . .").

ARGUMENT

A. Legal Standards for Class Certification

Under Rule 23, the party seeking certification must first satisfy the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. The party seeking certification must then qualify under at least one of the three criteria set forth in Rule

23(b). Plaintiffs seek certification under Rule 23(b)(2), which requires the Court to find that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). In addition, plaintiffs seek certification under Rule 23(b)(3), which requires the Court to find "the questions of law or fact common to class members predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Although the Court must conduct a "rigorous analysis" of each of these requirements, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011), the "'Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction' and has demonstrated a 'general preference . . . for granting rather than denying class certification.'" *Enea v. Bloomberg, L.P.*, No. 12-cv-4656, 2014 WL 1044027, at *2 (S.D.N.Y. Mar. 17, 2014) (citations omitted).[10] "Moreover, courts should resolve all doubts about whether a class should be created in favor of certification." *Thompson v. Linvatec Corp*., No. 6:06-cv-0404, 2007 WL 1526418, at *4 (N.D.N.Y. May 22, 2007) (citing *In re Indus. Diamonds Antitrust Litig*. 167 F.R.D. 374, 378 (S.D.N.Y. 1996) (internal quotation marks omitted)).

[10] *Accord, e.g.*, *Marisol A. v. Guiliani*, 126 F.3d 372, 377 (2d Cir. 1997); *Butto v. Collecto Inc.*, 290 F.R.D. 372, 380 (E.D.N.Y. 2013) ("[C]ourts have implicitly harmonized the idea of a liberal approach and a rigorous analysis."); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 98-99 (E.D.N.Y. 2012) ("Despite this Court's obligation to carefully analyze each prong of Rule 23 before granting class certification, the Second Circuit has emphasized that Rule 23 should be given liberal rather than restrictive construction and has shown a general preference for granting rather than denying class certification.") (citations and internal quotation marks omitted).

B. The Class Satisfies the Rule 23(a) Requirements

1. With More Than 1,000 Local Stations, Plaintiffs Meet the Numerosity Requirement

The proposed class is so "numerous that joinder of all members is impracticable." Fed R. Civ. P. 23(a)(1). No minimum number of class members is required to maintain a class action, but courts generally find that classes with over 40 members satisfy the numerosity requirement. *See Marisol A.*, 126 F.3d at 376. *See also In re Elec. Books Antitrust Litig.*, No. 11-md-2293, 2014 WL 1282293, at *11 (S.D.N.Y. Mar. 28, 2014) (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). As defined, the proposed class here includes the owners of more than 1,000 local stations located throughout the United States and its territories. *See Weigel*, 488 F. Supp. 2d at 413. *See also* ESH Decl. Ex. 20 (JAFFE_SESAC-00001196). Plaintiffs plainly satisfy the numerosity requirement.

2. Proof of SESAC's Anticompetitive Conduct and the Resulting Harm Is Common to the Class

Rule 23(a)(2) requires "questions of law or fact common to the class." The class members' "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, Inc.*, 131 S. Ct. at 2551. In antitrust cases, where "each class member allegedly suffered the same type of injury, the legal question of whether such an injury is of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful is a common one." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107 (2d Cir. 2007) (citation and internal quotation marks omitted). *See also In re Buspirone Patent & Antitrust Litig.*, 210 F.R.D. 43, 57 (S.D.N.Y. 2002) ("[M]onopolization claims are contingent upon a showing of monopoly power and an examination of the manner in which such power was

acquired or maintained. These issues, along with others, are questions that are undoubtedly common to all the members of the putative class.") (citation omitted); *Marisol A.*, 126 F.3d at 377 (where plaintiffs' injuries derive from a "unitary course of conduct by a single system," issues of fact are deemed common.); *Buffalo Broad. Co., Inc.*, No. 78 Civ. 5670, slip op. at 6 ("The common issue asserted by plaintiffs is whether the members of the plaintiff class have suffered injury due to the allegedly anti-competitive blanket licensing . . . of ASCAP and BMI. These common aspects satisfy the minimal requirements of 23(a)(2).").

There are ample common questions for purposes of Rule 23(a)(2), including *inter alia*:

- whether the performance rights for music in the SESAC repertory on local television is relevant product market;
- whether SESAC has monopoly power in that market;
- whether SESAC's licensing practices constitute exclusionary conduct by a monopolist in violation of Section 2 of the Sherman Act;
- whether SESAC and its top affiliates engaged in an unlawful contract, combination or conspiracy to fix, raise, maintain or stabilize prices;
- whether plaintiffs and other members of the class are entitled to an injunction to enjoin the unlawful conduct of SESAC;
- whether the conduct of SESAC caused injury to the business or property of plaintiffs and other members of the putative class; and
- the appropriate measure of damages sustained.

As the Supreme Court made clear in *Dukes*, "what matters to class certification . . . [is] the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." 131 S. Ct. at 2551 (citations omitted). Because the answers to the questions above would resolve the key legal and factual issues common to the claims of every member of the proposed class, plaintiffs easily satisfy the commonality requirement.

3. Plaintiffs' Claims Are Typical of the Class

Rule 23(a) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). This is not a demanding standard. *Shapiro v. JP Morgan Chase & Co.*, No. 11-cv-7961, 11-cv-8331, 2014 WL 1224666, at *14 (S.D.N.Y. Mar. 24, 2014). The test is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (citation omitted).

"[T]ypicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998) (citation omitted). "As long as plaintiffs assert, as they do here, that defendants committed the same wrongful acts in the same manner, against all members of the class, they establish [the] necessary typicality." *Thompson*, 2007 WL 1526418, at *6. It is well-settled that the typicality standard does not require that the claims of the representative party be identical to those of all the class members. *See In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. at 378-79 ("The claims asserted by the representative plaintiffs and the absent class members need not be identical, as a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences . . . .") (citation and internal quotation marks omitted); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D. Pa. 1999) ("[T]he various products purchased and the different amount of damage sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong.").

Courts in this District and the Second Circuit have recognized that local stations are similarly situated in their dealings with performance rights organizations. In *Broadcast Music, Inc. v. Weigel Broadcasting Co.*, Judge Stanton ordered Weigel Broadcasting Company's two

local stations to pay BMI at the rates established by an industry-wide license agreement negotiated between BMI and the TMLC. 488 F. Supp. 2d at 416-18. Judge Stanton concluded that Weigel was "similarly situated" to all 1300 other local television stations and, thus, the Court need not determine a separate, reasonable rate for Weigel. *Id.* at 415. The Second Circuit affirmed that Judge Stanton "properly found that [Weigel] was not different from other local broadcast stations in a way that required the benchmark [of the industry-wide license fee negotiated between BMI and the TMLC] to be adjusted." *Weigel*, 340 F. App'x at 727. *See also Buffalo Broad. Co., Inc.*, No. 78 Civ. 5670, slip op. at 6-7.

Here, the claims of plaintiffs and the class members clearly arise from identical illegal conduct: SESAC's scheme to eliminate all alternatives to its supra-competitively priced blanket license. By entering into supplemental agreements with its top affiliates, SESAC "effectively eliminated direct licensing as a means by which stations could license these affiliates' music," and, in parallel, changed the terms of its per-program license to render it "in fact, illusory." *Meredith*, 2014 WL 812795, at *10, *30. *See also id.* at *7, *10 (Because "[t]he music of the affiliates subject to these supplemental agreements is, characteristically, in high demand by television stations, including because it is embedded in popular programs," those supplemental agreements "effectively eliminated direct licensing as a means by which stations could license these affiliates' music."). Similarly, by rendering the per-program license "illusory," "in the years since SESAC's post-2007 [per-program license] formula took effect, *not a single* local station chose the [per-program license]." *See id.* at *29; ESH Decl. Ex. 25 (Jaffe Report at 82). *See also* ESH Decl. Ex. 18 (MRI00000857) (letter from Music Reports, Inc. to local stations explaining that it did not recommend SESAC's 2008-2012 per-program license). As articulated by Professor Jaffe, "since 2008, fewer licensing options [were] realistically available to stations,

and stations [had to] pay supra-competitive prices for the one license that [was] available—SESAC's blanket license." *Meredith*, 2014 WL 812795, at *34. Because the claims of each member of the class arise from this same set of core facts and each member would make the same or virtually the same arguments to prove SESAC's liability, the typicality test is easily satisfied.

4. Plaintiffs Will Fairly and Adequately Represent the Interests of the Class

The final requirement of Rule 23(a) is adequacy of representation. The named plaintiffs must show that (1) their interests are not antagonistic to the interest of other members of the class and (2) their attorneys are "qualified, experienced and able to conduct the litigation." *Cordes*, 502 F.3d at 99 (citation omitted). This requirement is aimed at "uncovering 'conflicts of interest between named parties and the class they seek to represent.'" *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009) (citation omitted). Certification will be defeated only by "fundamental" conflicts, not "the possibility of hypothetical conflicts or antagonisms among class members" that are not "apparent, imminent, and on an issue at the very heart of the suit." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 513, 514 (S.D.N.Y. 1996) (citation omitted).

The named plaintiff stations readily satisfy the requirements of Rule 23(a)(4). Their interests are not antagonistic to those of the unnamed class members; rather, they share the very same interest in proving that SESAC's licensing practices are unlawful, obtaining long-term, meaningful, injunctive relief to stop SESAC's ongoing anti-competitive behavior, and recovering damages from SESAC for the amounts they were overcharged for artificially inflated blanket license fees. The named plaintiff stations have demonstrated the ability and intention to prosecute this action vigorously. These plaintiffs collected, reviewed and produced more than 450,000 pages in response to SESAC's discovery requests, sought discovery from myriad third

parties, participated in numerous depositions, and have actively overseen this litigation since its inception, including settlement efforts.

Weil, Gotshal & Manges LLP ("Weil"), as counsel for the class, would fairly and adequately represent the interests of plaintiffs and the class in this litigation.[11] Weil investigated and drafted the class action complaint, successfully opposed SESAC's motion to dismiss, uncovered and developed ample fact and expert evidence in a voluminous discovery process, and successfully opposed SESAC's motion for summary judgment. The Court has previously commended both sides for the lawyering in this case. *See, e.g.,* Dkt. No. 140, at 2:14-21 ("one thing that is beyond dispute is just the sheer caliber of the lawyering").

Weil is very familiar with the music licensing industry and particularly SESAC, both in its currently unrestrained form and when its "latitude to set the terms of music licenses was otherwise limited." *Meredith*, 2014 WL 812795, at *1. Weil represented the TMLC during arbitration proceedings to set terms of industry-wide licenses and rates with SESAC in 2002 (which settled) and again in 2006 (in which an award was issued).[12] Beyond SESAC, Weil has represented local stations and other music users, like DMX, in rate court proceedings with the other two PROs, ASCAP and BMI, for decades.[13] Weil also represented plaintiffs in *Buffalo Broadcasting Co., Inc. v. ASCAP*, No. 78 Civ. 5670 (S.D.N.Y. Dec. 5, 1980). Weil's work in this litigation, combined with its long history in music licensing and antitrust matters, establishes that it is capable of fairly and adequately representing the interests of the putative class.

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[11] An order certifying a class must also appoint class counsel that will fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(c)(1)(B), 23(g)(1), 23(g)(4). Courts consider the work counsel has done in identifying or investigating potential claims in the action, counsel's experience in handling class actions, complex litigation, and the types of claims asserted in the action, counsel's knowledge of the applicable law, the resources that counsel will commit to representing the class, and any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(A), 23(g)(1)(C).

[12] *SESAC, Inc. v. Television Music License Comm.*, No. 13-133-01583-05 (Am. Arbitration Ass'n).

[13] *See, e.g., WPIX, Inc., et al. v. Broad. Music, Inc.*, No. 09-10366-LLS (S.D.N.Y.); *Duhamel Broad. Enters, et al. v. Am. Soc'y of Composers, Authors and Publishers*, No. 11-9311-DLC (S.D.N.Y.); *Broad. Music Inc. v. DMX Inc.*, 683 F.3d 32 (2d. Cir. 2012).

C. The Class Satisfies Rule 23(b)(2) Because Class-Wide Injunctive Relief Is Appropriate to Stop SESAC's Ongoing Anti-Competitive Conduct

Rule 23(b)(2) permits class certification when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).[14] Specifically, when "a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident." *Dukes,* 131 S. Ct. at 2558. Plaintiffs easily meet this standard.

SESAC's anti-competitive conduct has been directed at both the named plaintiffs and the absent class member stations. Although plaintiffs also seek monetary recovery for SESAC's unlawful overcharges to local stations since 2008, injunctive relief is necessary to stop, or at a minimum meaningfully restrain, SESAC's anti-competitive licensing practices vis-à-vis the named plaintiff stations and the absent class member local stations. *See, e.g.*, ESH Decl. Ex. 8 (Swid Dep. Tr. at 57:6-58:12) ("[W]e decided that the litigation is on and we decided not to raise fees. We could always raise fees at the end of the litigation when we win.").

As Professor Jaffe opined, "given that SESAC's licensing activities provide no efficiencies additional to those provided by ASCAP and BMI, the mitigation of the anti-competitive effects of SESAC's licensing practices would, at a minimum, require that SESAC abide by the same core restrictions that ASCAP and BMI operate under." ESH Decl. Ex. 25

[14] *NASDAQ*, 169 F.R.D. at 516 ("Certification is appropriate under Rule 23(b)(2) where declaratory or injunctive relief is an important aspect of the overall relief sought."). *See also All Star Carts and Vehicles, Inc. v. BFI Canada Income Fund*, 280 F.R.D. 78, 81-82, 85-86 (E.D.N.Y. 2012) (certifying both a Rule 23(b)(2) class and a Rule 23(b)(3) class having found that injunctive relief barring defendants' use of anti-competitive clauses in their contracts with customers would apply equally to all class members); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 116-17 (certifying both a Rule 23(b)(2) class and a Rule 23(b)(3) class even where defendants' conduct was alleged to have caused all class members to pay an artificially increased price).

(Jaffe Report at 97). Those core restrictions of the consent decrees, as amended[15], that constrain ASCAP and BMI are provisions: (i) barring those PROs from obtaining exclusive rights to license their affiliated copyright owners' works; (ii) requiring ASCAP and BMI to grant licenses to any user upon written request; (iii) providing users with recourse to a rate court that is tasked with setting "reasonable" fees in the event that the parties cannot come to an agreement; and (iv) requiring that local stations be afforded economically viable alternatives to the blanket license, such as a per program license and an adjustable-fee blanket license. *Id.*[16] As this Court remarked, those consent decrees impose "significant restrictions" on ASCAP and BMI, *Meredith*, 2014 WL 812795, at *1, and SESAC currently abides by *none* of those restrictions.[17]

Accordingly, certification of the class under Rule 23(b)(2) is appropriate because the requested injunctive relief is necessary to protect the entire class.

D. The Class Satisfies Rule 23(b)(3) To Allow The Industry To Recover Almost $50 Million to Date In License Fee Overcharges

Rule 23(b)(3) permits certification if "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." Fed. R. Civ. P. 23(b)(3); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013) (citation omitted). In order to prevail at trial, plaintiffs must prove three things: (1) a violation

[15] *United States v. Broad. Music, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,379 (S.D.N.Y. Nov. 18, 1994); *United States v. ASCAP,* 2001-1 Trade Cas. (CCH) ¶ 73,474 (S.D.N.Y. June 11, 2001).

[16] Federal rate court proceedings have regularly established reasonable license fees for local stations – on an industry-wide basis – at dramatically *lower* levels than sought by those PROs. *See, e.g.*, *United States v. ASCAP (In re Application of Buffalo Broad. Co.*), Civ. No. 13-95 (WCC) (MHD), 1993 WL 60687, at *19 (S.D.N.Y. Mar. 1, 1993) (rejecting ASCAP's fee proposal as being unreasonable); *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 565 (2d Cir. 1990) (setting fees at 60% of those sought by ASCAP); *ASCAP v. MobiTV Inc.*, 681 F.3d 76, 82 (2d Cir. 2012) (rejecting ASCAP's fee proposal that amounted to some $15.8 million over a 6-plus year period, and instead setting fees at $405,000 for that period – 2.5% of those sought by ASCAP); *BMI v. DMX, Inc.*, 683 F.3d 32, 40-42 (2d Cir. 2012) (setting fees at 33% of those sought by ASCAP and 45% of those sought by BMI).

[17] In addition, as Professor Jaffe opined, "if SESAC were enjoined from issuing licenses with respect to the music embedded in non-locally-produced programming, then the marketplace for such rights would become substantially more competitive and more economically efficient." ESH Decl. Ex. 25 (Jaffe Report at 97). Professor Jaffe explained that such a market could include, among other features, meaningful use of source licensing. *Id.* at 34-38.

of antitrust law; (2) causal injury; and (3) damages. *See Cordes*, 502 F.3d at 104-105; *NASDAQ*, 169 F.R.D. at 517.

The first prong of Rule 23(b)(3) – the predominance test – "is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Cordes*, 502 F.3d at 108 (2d Cir. 2007) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (internal quotation marks omitted)). "[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues." 6 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 18.25 (4th ed. 2002). That is because "[i]n antitrust suits, the issues of conspiracy, monopolization, and conspiracy to monopolize have been viewed as central issues which satisfy the predominance requirement." *Id.* at § 18.26

1. Common Issues Predominate Over Individual Issues

Violation. Plaintiffs will present evidence at trial that SESAC, "once freed in 2008 from the duty to arbitrate its disputes with the stations, engaged in an overall anti-competitive course of conduct designed to eliminate meaningful competition to its blanket license." *Meredith*, 2014 WL 812795, at *10. This evidence was marshalled at the summary judgment stage and plainly demonstrates that:

- SESAC has monopoly power in the relevant market – the market for performance rights of music in the SESAC repertory on local television;
- SESAC has eliminated competition between and among its affiliated composers and publishers by effectively offering only one licensing option – an all-or-nothing blanket license;
- SESAC has entered into *de facto* exclusive licensing arrangements with its key affiliates, thereby preventing those affiliates from competing with SESAC for the licensing of their performance rights;
- SESAC has modified the terms of the only alternative license it had offered – the per program license – making that alternative license illusory; and

- SESAC effectively prevented local stations from having complete and up-to-date access to the list of the works in SESAC's repertory, thereby preventing stations from being able to determine whether they were performing SESAC-affiliated works.

Thus, the relevant proof of SESAC's anti-competitive conduct is central and common to every putative class member's claims, satisfying the predominance requirement for proving a violation of the antitrust laws by SESAC. *See In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *13; *NASDAQ*, 169 F.R.D. at 518 (collecting cases).

Injury and Damages. If plaintiffs offer a formula that "can be employed to make a valid comparison between the but-for fee and the actual fee paid" because of SESAC's anti-competitive conduct, then "the injury-in-fact question is common to the class." *Cordes*, 502 F.3d at 107. Here, a common formula can easily be applied to demonstrate that SESAC's antitrust violations raised the prices plaintiffs and the class members paid SESAC and by how much.

As demonstrated by Dr. Lamb, "common evidence and methods establish that the alleged anticompetitive conduct artificially inflated the prices paid by all, or nearly all, proposed Class members for a SESAC license above the level that would have prevailed but for the alleged anticompetitive conduct. That is, there is common evidence available that demonstrates that all, or nearly all, proposed Class members were overcharged as a result of the alleged anticompetitive conduct." ESH Decl. Ex. 26 (Lamb Report at ¶ 10). According to Dr. Lamb, the damages suffered by the class member stations can easily be ascertained and quantified using a reliable and common methodology – comparing the actual supra-competitive license fees paid by the class members to a reasonable approximation of the fees that the class member stations would have paid but-for SESAC's anti-competitive actions. ESH Decl. Ex. 26 (Lamb Report at ¶¶ 13, 79-95). Specifically, by "[u]sing the arbitration period as a but-for world," Dr. Lamb estimates that "the damages suffered by proposed Class members as a result of the artificially elevated blanket license fees . . . during the period January, 2008 – June, 2014 range from $37.2

million to $39.8 million," and "the damages related to the lack of an economically viable per-program license . . . range from $7.3 million to $7.6 million during the same period." *Id.* (Lamb Report at ¶ 14). Moreover, Dr. Lamb concludes that this common methodology allows a calculation of "damages suffered by proposed Class members . . . on a class-wide basis without resorting to individualized inquiry." *Id.* (Lamb Report at ¶ 13).

Tellingly, this analysis is far more straightforward and transparent than it is in most antitrust cases. Many antitrust cases require statistical formulas and regression analyses to recreate a hypothetical "but for" world free of the alleged anti-competitive conduct as a basis for comparison. In this case, however, the arbitration period from 2005-2007, during which "SESAC's latitude to set the terms of music licenses was otherwise limited," *Meredith*, 2014 WL 812795, at *1, provides a real world, readily established "but for" world. ESH Decl. Ex. 26 (Lamb Report at ¶¶ 13-14, 50, 82).

It is of no moment that SESAC gave some named plaintiffs and class members discounts. First, those discounts were made off a class-wide inflated fee level for the blanket license. Second, the discounts were common and not unique to any particular station. Courts routinely certify antitrust class actions where defendants have engaged in some "discounting," even where the impacted products are far more varied, and the level of individual negotiation is far greater, than present in this record. *See, e.g., In re Elec. Books Antitrust Litig.*, 2014 WL 1282293, at *13-14 (finding that the question of whether consumers suffered common injury from defendants' conspiracy to fix e-book prices would be based on class-wide proof and rejecting Apple's argument that the "unique" character of each of 150 million e-book purchases presented individual issues eclipsing those common to the class); *In re Auction House Antitrust Litig.*, 193 F.R.D. 162, 166, 168 (S.D.N.Y. 2000) ("The [alleged conspiracy] probably raised the base from

which the negotiations began and may well have resulted in individually negotiated [prices], to the extent they existed, higher than would have been agreed upon in the absence of the conspiracy."; "[T]here is no evidence before the Court to suggest that there are so many customers who individually negotiated rates . . . as to render the damages issue predominantly individual, even if determination of damages for such customers required substantial individual attention."); *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. at 383 ("In a number of price-fixing cases concerning industries where discounts and individually negotiated prices are common, courts have certified classes where the plaintiffs have alleged that the defendants conspired to set an artificially inflated base price from which negotiations for discounts began."); *NASDAQ*, 169 F.R.D. at 523 ("Neither a variety of prices nor negotiated prices is an impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . . the price range was affected generally.").[18]

Thus, common questions of injury and damages to plaintiffs and the class caused by SESAC's anti-competitive conduct will easily predominate over any individual questions.

2. Class Treatment Is Superior to Any Alternative Method of Adjudication

The second requirement of Rule 23(b)(3) is a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[19] The

[18] *See also In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. at 346 (concluding that antitrust impact was capable of proof at trial through common evidence despite defendants' argument that prices were the result of extensive negotiations between the parties); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187-90 (D.N.J. 2003) (finding predominance of common issues with respect to impact despite the fact that the "automobile market [is] notorious for haggling and negotiations in purchasing") (citation and internal quotation marks omitted); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 486 (W.D. Pa. 1999) (finding the predominance test was satisfied in part because "even though some plaintiffs negotiated prices, if plaintiffs can establish that the base price from which these negotiations occurred was inflated, this would establish at least the fact of damage, even if the extent of the damage by each plaintiff varied"); *In re Carbon Black Antitrust Litig.*, No. 03-cv-10191, 2005 WL 102966, at *16 (D. Mass. Jan. 18, 2005) (finding that the common issue of impact predominated because if plaintiffs proved "that the alleged conspiracy resulted in artificially inflated list prices, a jury could reasonably conclude that each purchaser who negotiated an individual price suffered some injury") (citation omitted).

[19] The Rule 23(b)(3) superiority factors are: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy

superiority requirement ensures that "the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Cordes*, 502 F.3d at 104 (citation omitted); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. at 109-101 (finding a class action was superior where prospect of further antitrust litigation was exceedingly expensive and class members had varying degrees of resources to litigate individual actions).

Here, there is no question that class-wide resolution of the plaintiffs' claims is superior to any other method. SESAC has long-recognized the efficiency of dealing with local stations as a group. *See supra* 6-9. The management of individual suits from myriad local stations would present far more challenges – and far greater inefficiencies – than simply moving to trial as a class. No class member has demonstrated any interest in litigating individually, nor does any class member have special circumstances or unique damages that provide it with an interest in controlling the litigation. Given the extraordinary time and expense of prosecuting antitrust actions, efficiency favors resolution of the plaintiffs' claims in a consolidated action. Indeed, the local stations are well-accustomed to engaging with SESAC on an industry-wide basis. Finally, judicial efficiency counsels strongly in favor of maintaining the litigation in this forum given the Court's in-depth familiarity with the applicable law and the record evidence in this case.

E. Class Notice Is Easily Provided by the TMLC

For any class certified under Rule 23(b)(3),[20] the Federal Rules require the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B).[21] Notice must enable

already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

[20] Notice of a Rule 23(b)(2) class may also be provided, but is not required, by Fed. R. Civ. P. 23(c)(2)(A).

potential class members to "make an informed decision about their participation [in the litigation]." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2012). Those requirements are easily met here.

The TMLC is ideally situated to ensure that all putative class members receive individual notice via direct e-mail, the TMLC website, and where necessary, regular mail. The TMLC has a long history of representing the local stations in their dealings with PROs. Specifically, the TMLC has represented full-power local commercial television stations in the negotiation of industry-wide licenses with all three PROs. *See Meredith*, 2014 WL 812795, at *4, *6. The TMLC also handles the allocation of those license fees to individual stations on behalf of ASCAP, BMI, and, at one time, SESAC. *See* ESH Decl. Ex. 10 (Steier Dep. Tr. at 27:7-18, 32:9-17, 33:5-20). As a result, the TMLC regularly communicates with the local stations. *See* ESH Decl. Ex. 11 (Hoyt Dep. Tr. at 53:20-25). The TMLC also regularly posts relevant developments to its website, including about this litigation. *See* http://www.tvmlc.com. Using the TMLC's well-developed contacts with local stations, the best notice practicable can be made via direct e-mail, the TMLC's website, and where necessary, regular mail.[22]

Plaintiffs' proposed class notice satisfies the requirements of Rule 23 and Due Process.[23] *See* ESH Decl. Ex. 24. In clear and concise language, it provides the objective information class

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[21] In evaluating whether notice is adequate, "the district court has virtually complete discretion as to the manner of giving notice to class members." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). *See also Masters v. Wilhelmina Model Agency*, 473 F.3d 423, 438 (2d Cir. 2007) ("[A] district court's decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion.").

[22] Where e-mails are returned as undeliverable, notice will be resent via direct mail. Courts in this District and elsewhere have approved notice plans that employed a combination of direct mail, e-mail, and publication notice via website. *See, e.g.*, *In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06 Civ. 5173, 2008 WL 1956267, at *4 (S.D.N.Y., May 1, 2008) (permitting notice program that utilized a website and e-mail); *Browning v. Yahoo!, Inc.*, No. C04-01463-HRL, 2006 WL 3826714, at *8 (N.D. Cal. Dec. 27, 2006) (same); *Todd v. Retail Concepts, Inc.*, No. 3:07-0788, 2008 WL 3981593, at *2-3 (M.D. Tenn. Aug. 22, 2008) (permitting notice that involved mass e-mailing a customer list and publication via website and store postings).

[23] A class notice "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any

members need to make an informed decision about proceeding in this litigation, including whether to opt out from the class. Within five days of a ruling on this motion, plaintiffs propose to have the TMLC post the notice on its website and send the notice directly to local stations via e-mail and, where necessary, regular mail. The deadline for postmarking an opt-out letter would be thirty days thereafter.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant this motion and enter the accompanying [Proposed] Order Granting Plaintiffs' Motion for Class Certification and Approving Class Notice.

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member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B).

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New York, NY

Respectfully submitted,

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