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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WILLIAM RICHERT, an individual; MAUDE RETCHIN FEIL, an individual; ANN JAMISON, an individual, and on behalf of those similarly situated,

Plaintiffs,

vs.

WRITERS GUILD OF AMERICA WEST, INC.; and DOES 1 through 20, inclusive,

Defendants.

STEFAN AVALOS, an individual, and ART EISENSON, an individual,

Objectors.

Case No: BC339972

Hon. Carl J. West, Dept. CCW-311

NOTICE OF INTENTION TO OBJECT TO PROPOSED CLASS ACTION SETTLEMENT; OBJECTIONS TO PROPOSED CLASS ACTION SETTLEMENT; NOTICE OF INTENT TO APPEAR AT FINAL SETTLEMENT HEARING OF OBJECTORS STEFAN AVALOS AND ART EISENSON; AND NOTICE OF INTENTION TO INTERVENE

Settlement Hearing:
Date: Tuesday, March 9, 2010
Time: 9:00 a.m.
Dept.: CCW-311

Stefan Avalos and Art Eisenson ("Objectors"), through their retained counsel, hereby give the Court and parties notice of their intention to object to the proposed Settlement Agreement in this case, hereby object to such proposed Settlement Agreement for the reasons set forth in the attached Objections, give notice of their intention to appear at the Final Settlement Hearing on March 9, 2010 at 9:00 a.m. through legal counsel, and further give notice of their intention to intervene in the event the Court does not approve the Settlement Agreement:

Relevant information is below:

Stefan Avalos

1. Address and Phone:

[Deleted]

2. Written Works:

The works on which Mr. Avalos was a writer for which he believes WGA has received a portion of an Author's Share of a Video Levy or Video Rental Levy attributable to such work are:

(a) The Game (1994) (A&B Productions);

(b) The Last Broadcast (1999) (Wavelength Releasing); and

(c) The Ghosts of Edendale (2004) (Mixville II Productions).

Art Eisenson

1. Address and Phone:

[Deleted]

2. Written Works:

The works on which Mr. Eisenson was a writer for which he believes WGA has received a portion of an Author's Share of a Video Levy or Video Rental Levy attributable to such work are:

(a) What Really Happened to the Class of '65? (Universal);

(b) Kojak (various) (CBS);

(c) Eischied (Columbia TV for NBC);

(d) The Gangster Chronicles (Universal TV for NBC);

(e) The Mississippi (Warner Bros. TV for CBS);

(f) Beggarman, Thief (Universal TV for NBC);

(g) Shannon (Universal TV for CBS); and

(h) High Mountain Ranger (A. Shane Co. for CBS).

3. WGA Activities:

(a) Committee on Freedom of Expression & Censorship (member and co-chair);

(b) Women's Committee (member);

(c) Committee on Blacklisted Writers (member);

(d) Ad Hoc Committee on Compliance with the Minimum Basic Agreement (chair);

(e) Committee on Waivers to the Minimum Basic Agreement (member);

(f) Computer Bulletin Board Advisory Committee (member);

(g) Computer Bulletin Board Committee (vice chair, co-chair);

(h) Creative Media and Technology Committee (member); and

(i) New Media Committee (member).

4. Withdrawal of Opt-Out Notice:

By letter dated November 10, 2009, Mr. Eisenson notified the Court that he has opted out of the Settlement. Mr. Eisenson hereby withdraws his opt-out notice so that he can appear and object to the proposed Settlement Agreement.

Notice of Intention to Intervene

Objectors Avalos and Eisenson hereby advise the Court that, if the Settlement Agreement is rejected at the March 9, 2010 Final Settlement Hearing, they will move to intervene for the purpose of fairly, aggressively and meaningfully representing, respectively, non-covered and covered writers in this case.

DATE: February 8, 2010

LAW OFFICES OF STEVEN J. KAPLAN PC
LAW OFFICES OF JEFFREY WINIKOW

By: _____
Steven J. Kaplan

Attorneys for Objectors Stefan Avalos and Art Eisenson

OBJECTIONS OF
STEFAN AVALOS AND ART EISENSON

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A	June 1, 1990- May 31, 1995	WGA-MPA Foreign Levies Agreement
B	June 1, 1995- December 31, 1999	WGA-MPA Foreign Levies Agreement
C	January 1, 2005 - December 31, 2014	WGA-MPA Foreign Levies Agreement
D	April 15, 1994 - April 14, 1999	Foreign Levies Agreement between WGA and VEVAM (Netherlands collecting society)
E	January 1, 1999 - December 31, 2001	Foreign Levies Agreement between WGA and SGAE (Spanish collecting society)
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I	January 1, 2000 - December 31, 2004	Foreign Levies Agreement between WGA and GWFF (German collecting society)
J	2001 - December 31, 2004	Agreement between WGA and Fintage House
K	January 1, 2001 - December 31, 2005	Foreign Levies Agreement between WGA and Sogem (Mexican collecting society)
L	N/A	WGA's Frequently Asked Questions (FAQ)
M	N/A	The cover page, table of contents and pages 1 and 26-28 of WGA's Constitution and Bylaws
N	N/A	WGA's Working Rules
O	N/A	List of adult films posted on Directors Guild of America (DGA) website
P	May 29, 2009	WGA Annual Financial Report, cover page and pages 6, 10-11
Q	2005	List of writers WGA claims it could not locate. List published in Avalos "When the Levy Breaks," Fade in Online (on www.stefanavalos.com)
R	November 9, 2009	Minutes, WGA Board of Directors Meeting

I. INTRODUCTION

Stefan Avalos and Art Eisenson ("Objectors") object to the proposed Settlement Agreement because it is a settlement in name only. It makes no provision for the actual payment of Foreign Levies to class members and fails to address the central thrust of the Complaint: that WGA converted, misappropriated or otherwise refused to disgorge Foreign Levy money belonging to writers whose identities and locations are already known. At best, the proposed Settlement provides modest injunctive relief that neither fairly compensates class members for their release of claims nor accounts for the strength of plaintiffs' claims. The Settlement does not materially benefit the plaintiff class, and indeed confers no greater benefit on participating class members than on class members who opt out.[1] The Settlement was negotiated by class representatives who shared no interest with writers of non-union work, yet who also shared no commonality with the typical covered writer who is a member in good standing of WGA. Objectors thus request that the proposed Settlement be rejected, and that the parties be required either to continue litigating the case to conclusion or return to the Court with a more responsible settlement.[2]

One of the most serious defects in the Settlement is the effort to homogenize the different stakeholders in the foreign levy program by treating all writers alike, thereby ignoring the critical distinctions between the disparate groups of writers entitled to foreign levy monies. Plaintiffs' failure to address these important distinctions is the inevitable by-product of plaintiffs' unsupportable assertion that they are qualified representatives of the entire class. Plaintiffs are writers (or heirs of writers) of WGA-

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[1] As a shorthand, we use the term"participating class members" to describe those writers who do not opt out.

[2] If the Settlement is not approved, Objectors will move to intervene. They are not merely trying to criticize the proposed Settlement from the sidelines.

covered works,[3] but they purported to litigate the case on behalf of non-members and obtained certification only for writers of non-covered works. As a result, they had no intention, or responsibility even, to represent the interests of covered writers, and no ability to represent non-covered writers with whom they had nothing in common. Although the class representatives may not be members of WGA, ***all of their individual claims derive from works that were created pursuant to a WGA agreement***. And this sets them apart from thousands of individuals who should be entitled to Foreign Levy money who truly have nothing to do with WGA. These include writers of non-union motion pictures, most reality TV, books and other works adapted into screenplays, adult films/pornography and, finally, animation projects which are done pursuant to a ***different union's collective bargaining agreement***.

The greatest problem with the Settlement's handling of non-covered writers is that it does not address the central thrust of the FAC: that WGA converted Foreign Levy royalties and did not pay non-member writers (who are predominantly writers of non-covered works) all the Foreign Levies to which they are entitled.

WGA admits it has difficulty locating many non-covered writers because they are not listed in WGA's internal databases, yet the notice provision in the proposed Settlement made no special effort to bring these stakeholders into the process by which a decision will be made about how their own money is being collected, handled and distributed. We assume that the vast majority of these non-covered writers will not receive notice of the proposed Settlement.

Even within the body of writers who have produced work pursuant to a WGA agreement, the class representatives fail to reflect the most typical participant of the foreign levy fund: a dues paying member of WGA. When it comes to the payment of administrative fees, for example, there is no logic to treating covered writers the same as

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[3] Plaintiffs are also heirs of former members or, in the case of Mr. Richert, a member who has fallen from good standing by his failure to pay dues.

non-covered writers, because they are easy to locate and their dues already go to support the union's infrastructure. But named plaintiffs, not being active WGA members, seem oblivious to the legitimate objection that members should not have to subsidize the cost of locating non-covered writers through high administrative fees.

These objections do not seek to eviscerate WGA's role in distributing Foreign Levies – but they do seek to identify core issues which were not addressed in the litigation or proposed Settlement Agreement, and which should not be intertwined in the proposed broad release of claims. This litigation has morphed from being a lawsuit about non-member rights to Foreign Levies, to a lawsuit about member rights to Foreign Levies in non-covered projects, and ultimately to a broad lawsuit sweeping all writers into its reach. And if one were to compare the claims that prompted this lawsuit with the proposed settlement, one can see that the major "accomplishment" of this lawsuit is to secure for WGA a release of the claims allowing it to maintain the very same practices it engaged in before.

Here is a list of some of the key problems with the Settlement:

No.	Key Issues	Resolution
1	WGA is under a fiduciary duty to pay union and non-union writers their Foreign Levies but is not doing so.	No change. WGA will make "best efforts" to pay writers without any guaranteed payment.
2	The WGA is not doing anything to actually locate and/or distribute funds to individuals, and in particular, non-covered writers who may not be known to it.	WGA pledges to do a better job, but does not pledge to work with the myriad stakeholders who are entitled to Foreign Levies, including non-covered writers, PEN or the Authors Guild , the adult film industry, IATSE Local 839, or any other recognized entity that represents the interests of Foreign Levy stakeholders who claim rights from sources other than WGA covered works.
3	There has never been a comprehensive accounting of which writers have not been paid their Foreign Levy royalties.	There will not be a comprehensive accounting of which writers have not been paid their Foreign Levy royalties.

4	WGA does not have a viable system to collect and distribute Foreign Levy royalties.	Consultants will prepare a secret report for WGA (and plaintiffs' attorneys' eyes only) recommending improvements, but WGA will have no obligation to implement the recommendations.
5	WGA has authorized signatory production companies to take 50% of earnings of writers of non-union works even though those companies have nothing to do with non-union productions.	Settlement permits this apparent conversion to continue, and requires writers of non-union works to release WGA (and perhaps production companies also) from all claims.
6	WGA retains undistributed Foreign Levies indefinitely, circumventing California escheat law, and retaining all interest.	Nothing changes.
7	Writers have the right to assert claims for Foreign Levy royalties against foreign collecting societies.	Writers are obligated to release foreign collecting societies from all claims, even though the Settlement does not guarantee that foreign collecting societies have paid correct amount of royalties to WGA.
8	WGA takes a 5% administrative fee from Foreign Levy disbursements	The administrative fee charged to writers will increase to 10% of disbursements and WGA is authorized to retain interest earnings to use toward administrative expenses, without an auditor's accounting justification.
9	WGA fails to pay writers any interest on money owed, regardless of the amount of time it takes to pay that writer.	No change. WGA retains all interest on the foreign levy account.
10	WGA lacks any authorization from non-members to even collect foreign levy monies on their behalf.	The Court made no ruling on this subject, but the FAQs on WGA's website assert that the Court has "affirmed" WGA's right to do this.
11	Writers are entitled to Foreign Levy royalties from Latin American countries.	The release requires writers to relinquish claims for these royalties.
12	Writers retain the right to allege claims against production companies for misappropriating their foreign levy royalties.	Ambiguity in the release may be construed by production companies as requiring writers to relinquish claims against them without any consideration.

WGA should act in a responsible manner as a fiduciary to all beneficiaries, but the proposed Settlement is a far cry from the type of re-tooling that is necessary to protect and

secure the rights of both those writers who work outside WGA's jurisdiction and those who operate within it. Instead, the proposed Settlement, promoted by fringe participants, does little more than to treat the fringes of the problem, requiring a sweeping release in exchange for token reforms.

II. PROCEDURAL BACKGROUND

The original Complaint was filed in 2005 on behalf of William Richert. The case was removed to federal court in November 2005. A First Amended Complaint ("FAC") adding two more plaintiffs was filed on August 22, 2006. The matter was remanded to state court on April 12, 2007.

According to the FAC, various foreign countries have enacted laws imposing levies on home video rentals, cable transmissions, and blank cassette / DVD sales, to compensate motion picture Authors for the enjoyment and copying of their work.[4] The FAC alleges that WGA collected these "Foreign Levies" on behalf of both members and non-members, but had no authority to collect on behalf of non-members. It also alleged that WGA converted non-member money. (FAC, ¶¶ 7-14; 23-30.)

In September 2007, plaintiffs filed a motion seeking certification of a class of writers who are not WGA members. On January 30, 2008, the Court certified three subclasses of writers who are entitled to Foreign Levies: (i) those who are not and have never been WGA members; (ii) those who are heirs or beneficiaries of WGA members; and (iii) WGA members. The Court ***limited the three classes to writers of "non-covered work,***" *i.e.*, to motion pictures that were not created pursuant to any WGA collective bargaining agreement, commonly referred to as a Minimum Basic Agreement or "MBA." (Court's January 30, 2008 Order, pp. 2-3.)

The Court expressly reserved judgment, as it must, as to whether WGA was legally

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[4] For Foreign Levy purposes, the term "Authors" includes directors and writers. The term "motion pictures" includes television.

entitled to collect Foreign Levy payments from foreign collecting societies: "[W]ithout making a merits determination one way or the other as to the legality of the conduct alleged, the Court determines that the claims can generally be handled on a class-wide basis as to each of the identified subclasses." (*Id*., p. 9:7-9.)

On September 21, 2009, plaintiffs filed a Motion for Preliminary Approval of Class Action Settlement. Although plaintiffs' claims until that point had been limited to writers of non-covered work, the proposed Settlement ***greatly expanded the class*** to include the much larger group of writers of covered work.[5] On October 1, 2009, the Court granted preliminary approval to the proposed Settlement.

III. BACKGROUND: DIFFERENT STAKEHOLDERS AND THE DIFFERENCE BETWEEN COVERED AND NON-COVERED WRITERS

A. Stakeholders in Foreign Levy Funds.

To understand the inadequacy of the Settlement, and of plaintiffs' failure to safeguard the diverse interests of the class, we begin by describing the various categories of stakeholders who participate in the WGA Foreign Levy program (in which WGA serves as a fiduciary for writers' Foreign Levy royalties). Although plaintiffs' counsel bundled all these groups of writers into a single class, recognition of the different categories of writers within this "class" is critical because the Court must assess the interests of all writer categories, and determine whether the proposed Settlement is fair, reasonable and adequate as to each of them. *In re General Motors Corp. Pick Up Truck Fuel Tank Litigation* (3rd Cir. 1995) 55 F.3d 768.

1. Members of WGA Whose Claims Derive From Covered Work:

The most typical claimant of foreign levy royalties is probably a WGA member who has written a movie or television show pursuant to a MBA. There are at least three

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[5] It is apparently undisputed that 85% of works earning Foreign Levies are WGA-covered projects. (See WGA's Supplemental Opposition to Motion for Class Certification filed September 28, 2007, p. 3:15-19 [and evidence cited therein].)

unique issues affecting this category of writers that do not apply to others. First, because these writers already pay dues and should be easily identified and located because they are already in WGA's database, they should not have to pay additional "administrative" assessments on their foreign levy monies. Second, these "covered writers" may wish to challenge WGA's claim to be their "collective bargaining representative" for Foreign Levy purposes; an issue never litigated in this case because covered writers were swept into the class at the last minute. Third, there is a substantial legal question whether WGA was required to obtain member ratification of its Foreign Levy agreements with producers, and members should not be required to release claims regarding ratification rights as a condition of receipt of Foreign Levies under the Settlement.

2. Writers Whose Claims Derive from Non-Covered Work:

There are many motion picture writers whose works are not covered by a MBA. These include writers of many documentaries and reality television, as well as writers of motion pictures produced on a non-union basis.[6] These writers share at least two issues that are unique to them. First, by treating these non-WGA Foreign Levies the same way they are treating the WGA writers (whose Foreign Levies are split 50-50 with signatory production companies), WGA ends up giving half of their Foreign Levy royalties to production companies who are not entitled to that money. Second, unlike WGA, there is no system to establish who gets "credit" for writing a motion picture if there is a dispute between writers, and the Settlement Agreement leaves this important question unsettled.

3. Adult Film/Pornography Are Atypical Non-Covered Projects:

Pornographic films are probably the largest sub-category of non-WGA motion pictures that are entitled to Foreign Levies. While writers of these films share the interests of all non-covered writers, they have an additional beef with the proposed

[6] For example, the Los Angeles Times reported that Quentin Tarantino's *Inglourious Basterds* and Tom Ford's *A Single Man* were not written under a WGA MBA. (http://latimesblogs.latimes.com/the_big_picture/2010/01/the-writers-guild-snubs-inglorious-basterds-and-a-single-man-.html.)

Settlement Agreement, which is that they are treated as if they don't exist. Unlike the Directors Guild, WGA has never posted adult films or adult film writers on its website as it has other non-covered writers (Hughes Decl., ¶ 6, Exh. O),[7] the parties were not required to publicize the proposed Settlement in any adult film industry news magazines, and writers of adult films reasonably will have a legitimate concern that they will not be paid their Foreign Levies. Because writers in this industry often do not receive "credit" for their work, administration problems unique to this industry exist.

4. Animation Work Covered By IATSE Local 839 Labor Agreements:

WGA is not the only union representing writers of motion pictures that generate Foreign Levy funds. International Alliance of Theatrical Stage Employees ("IATSE"), Local 839, represents writers of animation, as well as animators, layout artists, storyboard artists, all of whom are entitled to the Author's Share of Foreign Levy monies, and WGA collects money on their behalf. The proposed Settlement is silent about how WGA will collect, assign "credit" and then distribute Foreign Levy royalties to these writers who perform union-covered work, but work that is covered by a different union's collective bargaining agreement. (See, http://animationguildblog.blogspot.com/2009/08/wga-animation-levies.html.)

5. Authors of Original Source Material:

Another set of stakeholders with unique interests are authors whose books or other material (*e.g.*, comics, video games) are adopted into motion pictures. Under foreign law, writers of original source material have national treatment rights that are assimilated into the rights of the screenwriter. The proposed Settlement Agreement is altogether silent about this important group of writers.

[7] Each exhibit referenced in these objections is authenticated in and attached to the Declaration of Eric Hughes ("Hughes Decl.") filed concurrently herewith.

B. Writers of Covered vs. Non-Covered Works.

From the case's inception, plaintiffs conflated the concepts of (i) union membership and (ii) covered work. Moreover, it seems as if plaintiffs were never sure how these classifications impacted class certification issues. They first requested class certification based on the member/non-member distinction (FAC, ¶ 15), then later shifted to a class based on the covered/non-covered categorization (Court's January 30, 2008 Certification Order), and ultimately sought to consolidate all writers into a single class for Settlement. Because these are distinctions that make a difference, and there has been inadequate if any consideration for the disparate interests of covered and various non-covered writers, we start with a short background discussion about these categories.

A qualified labor union such as WGA is required, by law, to represent all members of the bargaining unit, whether or not a particular worker (writer) becomes a member of the union. 29 U.S.C. § 159(a) ("[union] shall be the exclusive representative[] of all the employees in such unit"); see generally, Higgens, Jr., *The Developing Labor Law* (BNA 2006) 5th ed., chapt. 25.I.A (hereafter, "*DDL*"); see also, District Judge Morrow's Remand Order, p. 15, fn.22. A union does not represent covered employees for every conceivable matter; only with respect to "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a); see also *14 Penn Plaza LLC v. Pyett* (2009) 129 S.Ct. 1456, 1461.

Most workers who are represented by unions become members because they support their union or because of the existence of a so-called union security ("union shop") clause. But union membership itself is at all times voluntary, and even under a union security clause, a covered employee is, at most, compelled to pay his or her portion of union dues to avoid becoming a "free rider."[8]

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[8] *DDL* explains that the "statutory mandate [permitting a union security clause] does not compel full union membership, but merely dues-paying membership." *DLL*, Chapt. 26.II.A. See also, *NLRB v. General Motors Corp.* (1963) 373 U.S. 734, 742

WGA apparently has four categories of membership, including both "Current Membership" for writers who are employed by or sell writing to a company that is signatory to a MBA, and other categories including retired members. (WGA's Supplemental Opp. to Motion for Class Cert. [filed September 28, 2007], p. 4:11-25.)

Under the WGA's Working Rule No. 8, a member who engages in non-covered work violates the terms of union membership, and is subject to discipline. (Exh. N.)[9]

IV. PERTINENT FACTS

A. Foreign Levy Revenues for Writers of Covered Works.

1. General Background.

Beginning in the 1980s, some European and Latin American countries began enacting statutes levying charges on blank video and DVD sales ("Video Levies") and video rentals ("Video Rental Levies") (collectively, "Foreign Levies"). A portion of the money, called the "Author's Share," is the amount designated by these statutes for directors and writers. (See, Declaration of Charles Slocum filed September 28, 2007 ["Slocum Decl."]., ¶ 3, Exh. A [¶ 1(f)]. The same exhibit is attached to Hughes Decl. as Exh. C [¶ 1(f)].)

Foreign Levy funds are collected by "collecting societies" based in these foreign countries. The collecting societies are responsible, in turn, for paying Authors of U.S.-originated motion pictures their portion of the Foreign Levies. (See Slocum Decl., ¶ 3.)

("'[m]embership' as a condition of employment is whittled down to its financial core").

[9] Given this background, the third sub-class for which Richert was named class representative in the Court's January 30, 2008 Order was, curiously, composed exclusively of members who had betrayed their membership duties to WGA by working non-union - *i.e.*, a sub-class of persons colloquially referred to as "scabs." This is an unusual representative for covered writers who are overwhelmingly loyal union members. More on that later.

2. Dispute Between WGA and Production Companies.

In the late 1980s, a dispute arose between WGA and the Directors Guild of America ("DGA") on the one hand, and signatory production companies on the other, over who was entitled to Foreign Levy money. According to the Guilds, the Authors' Share of Foreign Levies was payable to writers and directors, but the production companies claimed that, under so-called "work-for-hire" principles, they were entitled to all the money. (See, Motion for Preliminary Approval, p. 2:14-27; Slocum Decl., ¶ 3; see also Exhs. A-C.)

This dispute was ostensibly resolved through a two-step process. First, beginning in about 1990, the Guilds and signatory production companies entered into a series of agreements to divide the Foreign Levies amongst themselves (see Exhs. A-C). The original 1990 Agreement provided that the WGA and DGA would share 15% of the Author's Share, and the production companies would take the rest. (Exh. A.) A successor Agreement was entered into for 1995-1999 (Exh. B), and the current Agreement expires in 2014 (Exh. C.) Under the current Agreement, WGA and DGA split 50% of the Author's Share, and the production companies take the other 50% so that, in essence, WGA receives 25% of the Author's Share of Foreign Levies from each participating country, what we call the "Writers' Share." We refer to WGA's agreements with the signatory production companies [Exhs. A-C] as the WGA-MPA Agreements. We do this because WGA has, on occasion, referred to the signatory companies as being Motion Picture Association of America ("MPA") companies. (*E.g.*, Exh. E, Preface ¶ V; Exh. I.)[10]

Second, WGA entered into agreements with various foreign collecting societies (collectively, "Collecting Society Agreements"), which referenced and/or incorporated

[10] We have no evidence that the MPA actually negotiated these Agreements. As a general rule, signatory production companies combine to bargain with WGA (and all the other Hollywood unions) through the Alliance of Motion Picture and Television Producers ("AMPTP"). See, *e.g.*, www.amptp.org.

the WGA-MPA Agreements. The Collecting Society Agreements, as a general rule, authorized the foreign collecting societies to pay Foreign Levy funds to both WGA and the MPA companies in accordance with the allocation established in the WGA-MPA Agreements (*E.g.*, Exh. D, Art. III; Exh. E, Preface, ¶ V and Art. IV; Exh. F, ¶ 4.) Under these Collecting Society Agreements, WGA agreed to transmit applicable Foreign Levies to covered writers. (*E.g.*, Exh. E, Art. III.) The Collecting Society Agreements also purport to give the MPA companies themselves the right to make direct Foreign Levy claims against the collecting societies as the assignees of WGA.[11]

B. WGA Agrees to Distribute Foreign Levy Revenues to Non-Covered Writers Even Though it Does Not Represent Them.

The WGA-MPA Agreements, at least on their face, apply only to writings covered by MBAs. (Exh. C, ¶ 1(f) [Author's Share defined as applying only to *covered* works].) The Collecting Society Agreements, in sharp contrast, apply to the payment of foreign levies for ***both covered and non-covered writings***.

Specifically, the collecting societies did not want to parcel out Foreign Levy royalties as between covered and non-covered works, and therefore, as a condition of payment of Foreign Levies to covered writers, the collective societies all ***required WGA***

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[11] It bears emphasis that, under the foreign levy statutes, only writers and their representatives, and not the production companies, possess an original or direct right to claim Foreign Levy revenue. The right of the MPA companies to assert a claim for Foreign Levy funds, *if any*, derives from WGA's or writers' consent. Thus, "Author's Share" is defined in the WGA-MPA Agreements as levies "specifically designated by statute . . . for distribution to a class designated as authors." (Exh. C, ¶ 1(f).) The WGA-MPA Agreements also provide that any claims made by the production companies for Foreign Levy money are made "on their own behalf and on behalf of [WGA] *as representatives of Covered . . . Writers*." (Exh. C, ¶ 3, emphasis added) The Agreements also contain "non-derogation" clauses providing that no writer shall be deemed to have waived his/her claim(s) to Foreign Levies (Exh. C, ¶ 10), presumably because WGA's rights (and any derivative right of the production companies) originate in the right of writers themselves to claim these Foreign Levy funds.

to accept Foreign Levy funds attributable to non-covered motion pictures, and to distribute those funds to non-covered writers. (*E.g.*, Exh. D, Art. II; Exh. E, Art. III; Exh. I, ¶ 9.)[12]

Because WGA has no contractual or representative relationship with writers of non-covered works, WGA was careful in the Collecting Society Agreements to expressly disclaim any "right" or "representative status" with respect to these writers. The following language, found in WGA's agreement with LATGA-A (the Lithuanian collecting society), is typical of most Collecting Society Agreements:

> With respect to those US originated Audiovisual Works ***not covered*** by WGA agreements, the WGA has been advised that LATGA-A ***requires that the WGA also receive royalties therefore*** (sic), and the WGA has agreed to distribute such royalties to the appropriate writers. ***The WGA makes no representation herein with respect to the representation status of WGA regarding such writers***."

(Exh. F, ¶ 10, emphasis added. For other collecting societies saying the same thing, see Exh. D, Art. II; Exh. E, Art. III; Exh. I, ¶ 9.)[13]

C. WGA's Failure to Pay Foreign Levies to Qualifying Writers.

The FAC alleges that WGA failed to distribute millions of dollars in foreign levy money to writers who were not WGA members. Although WGA professed to be unable

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[12] This critical point is not in dispute. The Motion for Preliminary Approval, p. 3:1-4, asserts: "The Guilds and the Companies also agreed, based upon a condition initially imposed by the German patent office, that the Guilds would distribute levies collected for all U.S. writers and directors regardless of whether a writer or director was a member of the Guilds and regardless of whether the motion picture was covered by a collective bargaining agreement."

[13] The FAC incorrectly accuses WGA of "falsely inform[ing] third party payors that it has the ***right*** to collect such monies on behalf of non-members." (FAC, ¶ 26, p. 8:4-5, emphasis added.) To the contrary, as shown above, WGA disclaimed any "right" to represent the writers of non-covered works. (As we shall see, WGA recently changed its tune and posted on its website that the Court has confirmed its "right" to collect this money. This misrepresentation is discussed below.)

to find many of these writers, its excuse is simply implausible. Among the writers whom it allegedly could not locate in 2005 included: (1) Bruce Lee of martial arts movie fame whose foundation is located in West Los Angeles; (2) Gene Kelly (*Singing in the Rain; Pal Joey*); (3) Charles Bukowski (poet and screenwriter for autobio pic *Barfly*); (4) Terry Jones of the Monty Python team; and (5) famed French filmmaker Jean Renoir (*Rules of the Game*, *The Grand Illusion*). (Hughes Decl., ¶ 6, Exh. Q.)

V. LEGAL ARGUMENT.

A. Summary of Legal Contentions.

The Settlement Agreement does not confer any material benefit on either covered or non-covered writers. Despite the FAC's allegations of conversion and the virtually undisputed strength of plaintiffs' claims to Foreign Levy funds, there is no promise of payment from WGA, just a promise to make "best efforts;" a duty that is virtually indistinguishable from WGA's current fiduciary duty to distribute the writers' money and make an accounting. The WGA's new "reporting and disclosure" obligations are tepid at best, lack necessary transparency, and fail entirely to include a report on the central question posed by the Complaint: Why didn't WGA distribute money to writers whose identities and locations were known or easily discovered?

The release is way too broad for the procedural and largely illusory "benefits" conferred in the proposed Settlement. The release will require relinquishment of claims that fall far afield from the scope of the litigation, such as the right to make direct claims against the collecting societies for unpaid Foreign Levy royalties, and potential claims against MPA Companies for wrongfully taking Foreign Levy money. That many details about the Foreign Levy program were not disclosed in the Motion for Preliminary Approval underscores the scant evidentiary record on which the Court is expected to decide the complex questions presented by the proposed Settlement.

The Settlement also completely fails to account for the right of non-covered

writers, who had no similarly-situated representatives looking after their interests, to 100% of their Foreign Levies; and worse, fails to explain why WGA is either keeping or giving away the other half of their Foreign Levy royalties.

Finally - and of equal if not more importance than some of these other issues - WGA is permitted to continue to retain indefinitely undelivered Foreign Levy royalties, thus circumventing California escheat law which requires undelivered funds to be turned over to the State of California after three (3) years.

The great irony of this proposed Settlement is that writers who opt out will likely be better off than those who don't. They will receive the so-called "benefits" of the Settlement, such as WGA's "best efforts" and reporting obligations which apply to *all writers,* but they will not be subject to a release, and may not be subject to the Settlement's increased administrative fees.

For five years, plaintiffs equivocated about their targeted class, took the depositions of only two witnesses, and appear to have done almost no other discovery. By virtual sleight-of-hand they have increased the size of the class by a factor of five without any evidentiary support or legal justification. They utterly failed to sustain their burden of introducing *evidence* and *legal arguments* to the Court to support their contention that the Settlement "benefits" are a fair trade for the release.

To compound matters, the Settlement is being sold by a materially false representation on the WGA website to the effect that the Court has confirmed WGA's "right" to collect Foreign Levies for covered and non-covered writers, when in fact the Court has never made any such legal determination, and necessarily avoided doing so by giving preliminary approval to the Settlement.

Any one of these myriad defects warrants disapproval of the Settlement. The cumulative weight of these deficiencies makes the case for rejection overwhelming.

B. The Proposed Settlement Agreement Does Not Confer a Meaningful Benefit on Class Members.

The Court is obliged to determine the adequacy of a class settlement by "independently satisfying itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 129, quoted in *Clark v. American Residential Services* (2009) 175 Cal.App.4th 785, 799-800. The Court must consider all relevant factors, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement." *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801. The factors are not given equal shrift. "The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." *Kullar*, 168 Cal.App.4th at 130.

1. There Is No Monetary Consideration and No Discussion of the *Dunk* Factors in the Motion for Approval.

The consideration offered to class members in the proposed Settlement is procedural at best, and most importantly, there is no monetary "recovery" guaranteed to class members. Thus, under the *Kullar* test, the Court cannot realistically "ensure that the recovery represents a reasonable compromise." *Id.*, 168 Cal.App.4th at 129.

The proposed Settlement requires WGA to make "best efforts" to pay Foreign Levies, an obligation indistinguishable from its existing fiduciary duties. *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272-73 (fiduciary duty similar to "best efforts" obligation.") The Settlement could just as easily read "WGA will make no changes in its distribution systems."

The absence of a monetary recovery is particularly troubling because the gravamen

of the FAC is monetary conversion. Are plaintiffs' counsel now suggesting that their claims lack merit? For what reasons? They deposed only two witnesses and never obtained a formal accounting of what happened to the millions of dollars received by WGA? The Motion for Approval all but avoids the *Dunk* factors and makes no real effort to explain the strength or weaknesses of the claims, the extent of discovery conducted, or any other relevant information that would enable the Court to decide whether this is a *fair deal* or a *faux deal*.

Examination of the record proves that it is the latter. Plaintiffs engaged in scant discovery and apparently never asked any questions regarding the distinct interests of non-covered writers. The terms of the Settlement proves they never even obtained the most basic information regarding what WGA has collected, whose money it has failed to disgorge, and why it allegedly could not find hundreds of writers. Quite simply, Objectors question whether sufficient discovery or investigation was completed to enable either class counsel or the Court to act intelligently in evaluating this proposed Settlement.[14]

2. The Paragraph 6 Report Is Not a Material Benefit Because it Does Not Include Information about Known Writers Who Have Not Been Paid Their Foreign Levy Royalties.

The report required by Paragraph 6 of the Settlement Agreement is not a material benefit to the class. It requires WGA to publicize: (i) a list of titles for which it has collected money but not identified the eligible writer(s) and (ii) a list of eligible writers whose locations are unknown. (Settlement, ¶¶ 6.b.iii & 6.b.iv.)

Glaringly absent is any obligation to publicize a list of eligible writers whose identities and locations are known. ***It is this group, after all, that was the focus of the***

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[14] Also, while the use of an experienced mediator usually augers well for settlement, in this case the mediator was Joel Grossman, one of the signatories to the WGA-MPA Agreement. While Mr. Grossman is deservedly considered to be one of the region's most accomplished mediators, his role in this case at the very least causes an appearance that the mediator was not an impartial broker. (E.g., Exh. B, p. 10.)

lawsuit in the first instance. Without it, many eligible writers who do not fall within the ¶¶ 6.b.iii & 6.b.iv categories will not be advised of their eligibility for Foreign Levy money, and in the end, WGA may seek to declare their money "undeliverable" even though it is not.

3. The Consultant Report Lacks Transparency.

Paragraph 5 of the Settlement provides that WGA shall engage consultants, selected by WGA and plaintiffs' counsel, to prepare a report that includes recommendations on how WGA can improve the processing and distribution of Foreign Levy royalties. This provision is not a material benefit for class members because it lacks transparency.

The consultants' report(s) cannot be disclosed to plaintiffs; just to their lawyers. At this point, institutional secrecy is the ***last*** thing that would benefit class members. It will be impossible for plaintiffs to confer with their counsel to decide whether WGA failed to implement reasonable recommendations, or whether such a failure should be challenged. In addition, the arrangement seems to constitute an improper requirement that counsel withhold relevant information from their clients.

4. There Is No Mechanism To Enforce The Consultant Agreement.

Even if WGA had a duty to implement some or all of the recommendations under Paragraph 5, there is no effective mechanism to enforce it. For one thing, as noted, the decision is entirely up to legal counsel. The standard that plaintiffs' counsel would have to satisfy is unrealistic and virtually meaningless: whether WGA decided, in "good faith" that implementation of a particular recommendation was not "appropriate." "Good faith," while definable, *Ohton v. California State University of San Diego* (2010) 180 Cal.App.4th 1401, is completely subjective. Moreover, there is no legal definition of "appropriate," and it is hard to imagine how plaintiffs could prevail on such a prohibitively difficult standard.

More importantly, even if plaintiffs' counsel were inclined to challenge WGA

inaction, there is no incentive for them to do so because the Settlement does not contain a mechanism for plaintiffs' counsel to recover additional attorneys' fees to arbitrate this issue. (See Settlement, ¶ 15.) The Settlement thus structurally nudges plaintiffs' counsel to leave WGA to its own devices regarding implementation.

5. The Payment Provisions Are Not a Benefit and Disproportionately Hurt Covered Writers.

Almost the entire cost of the Settlement falls on the shoulders of the plaintiff class, as if writers, rather than WGA, had engaged in wrongdoing.

The entire cost of the weak remedial measures, such as costs for consultants, annual reviews, notices and publicity, will be paid from two sources: (i) interest earned on writers' withheld foreign levies; and (ii) an administrative fee that may now be doubled from 5% to 10% of Foreign Levies paid.[15] Even the Foreign Levies portion of WGA's annual report, which will be prepared by WGA's regularly retained accountant (Settlement, ¶ 4), will be paid for by writers rather than WGA. Nothing in the record, including the Motion for Preliminary Approval, offers any justification for the increase in administrative fees, let alone for foisting on writers the obligation to pay all costs for consultants, notice and future administration of the Foreign Levies program.

But even if this allocation of costs could be justified, there is no possible justification for the disproportionate burden placed on covered writers, who already pay dues to the WGA for its services, and whose administrative expenses are less.

One of the largest costs of administration will be the cost of locating and "assigning credit" to non-covered writers. Covered writers are already in WGA's database, and the WGA already has a sophisticated and well-oiled system for assigning credit to motion pictures and resolving credit disputes. *Cf.*, *Vidal v. WGA* (1988) 245 Cal.Rptr. 827 (unpublished, cited for factual background only). In contrast, WGA will

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[15] The Settlement does not say whether opt-out writers will also be subject to these administrative cost increases. If opt out writers will be subject to these higher costs, they should be told.

presumably need to spend considerable funds locating writers who wrote non-covered pictures. And WGA will need to figure out how to handle disputes between different writers both claiming credit for a non-covered work.

Yet, under the Settlement Agreement, covered writers pay the same fees as non-covered writers for administrative services that are disproportionately weighted toward non-covered writers. And they already pay union dues based on royalties from their covered writings.

The record, including the Settlement Agreement itself and the Motion for Preliminary Approval, is silent about this glaring inequity. Neither plaintiffs nor WGA offer any justification for *requiring writers of covered works to subsidize writers of non-covered works.*

Class settlements are subject to a heightened and "more careful [] level of scrutiny if there has been no adversary certification." *Dunk*, 48 Cal.App.4th at 1803, fn.9. "This reflects concerns that the absent class members, whose rights may not have been considered by the negotiating parties, be adequately protected against fraud and collusion." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 244, 240. ***There was never any adversary certification with respect to the "covered writer" group*** when they were blended into the giant all-writer class. The ***Court must therefore give heightened scrutiny*** to the Settlement, and to the disproportionate impact it has on writers of covered works.

6. <u>There Should Be No Cy Pres, Which Undercuts the Interests of the Class and Circumvents California Escheat Law</u>.

In a typical class action settlement, a defendant will agree to pay a sum of money, which will be distributed to the class members. To the extent that there is money left unclaimed, the remainder will go to one or more charities (*cy pres*). The proposed Settlement here makes a vague reference to *cy pres* (Settlement, ¶¶ 12.d.vii; 15), but this is not a typical class action settlement.

In this case, the defendant WGA is not paying any money to the class. The entirety

of the settlement payments is being funded from Foreign Levy royalties themselves, ***money that belongs exclusively to the writers who are entitled to it.*** In other words, the plaintiff class, and not the defense, is funding the *cy pres* payment, which is certainly a unique arrangement. If anything, the fact that the class representatives, who presumably have all of the Foreign Levy money to which they are entitled, consented to a *cy pres* payment from Foreign Levies shows the lax manner in which they are treating the rights of other stakeholders – whose money is being given away.

At bottom, the WGA is a fiduciary over the foreign levy funds. As a fiduciary, the WGA has a duty to maintain these funds for the benefit of stakeholders, not for the benefit of some charitable institution, however noble the sentiment.

More importantly, however, under applicable law, to the extent any money cannot be distributed, ***it must escheat*** to the State of California under the Unclaimed Property Law, which actually serves the interests of class members whom the WGA cannot locate. See Unclaimed Property Law ("UPL"), C.C.P. § 1500-1582.

From a legal standpoint, the issue of escheat regarding this type of money is hardly unique. In *Screen Actors Guild v. Cory* (1979) 91 Cal.App.3d 111, the Court held that SAG, which placed actors' residual monies into a trust fund, must escheat those funds to the State of California. The Court rendered void a union bylaw which purported to assign the union the right to keep any unclaimed funds, and rejected the notion that a fund for residuals was a type of employee benefit trust fund exempt from the UPL. (Certain employee benefit trusts are expressly exempt from California's escheat laws pursuant to C.C.P. § 1521; the type of fund at issue in *Cory*, as well as the Foreign Levy royalties here, do not qualify.)

At first blush, one might question why having money escheat to the State of California would be in the interests of the class. The reason why escheat furthers class interests is because California does not merely transfer those monies into its general fund; it holds the funds as Unclaimed Property indefinitely in a centralized system where

anyone who wishes to discover whether they are owed money from forgotten bank accounts, mis-delivered dividend checks – or WGA Foreign Levy money – can make a claim. (See, *e.g.*, C.C.P. §§ 1530 [Required Reports], 1531 [Notice and Publication of Lists] and 1540 [Claim Filing Procedures].) And unlike WGA, the state does not charge any administrative fee.

To the extent WGA correctly represents the practical difficulties in locating Foreign Levy payees, this only underscores the need to place so-called undistributable funds into the State's Unclaimed Property scheme. Heirs and other claimants may not even know to go to the WGA to see if money is owed to them, especially when the individual generating the Foreign Levy income was not a member of the WGA. But it is commonly understood that people can check the State's Unclaimed Property database. See, http://www.sco.ca.gov/upd.html.

C. The Release Is Overbroad, Requiring Class Members to Relinquish Legal Rights Far Outside the Scope of the Litigation and Settlement.

Under the Settlement Agreement, participating class members must release WGA and its "affiliated companies" and "assigns" from any and all "Released Claims." "Released Claims" are broadly defined to include those claims "based upon and/or arising out of the facts and circumstances alleged in the Action." The release is overbroad and deprives covered and non-covered writers alike of rights that are not resolved or even addressed by the proposed Settlement Agreement.

1. Waiver of Right to Make Direct Demands to Collecting Societies.

First, the Settlement prevents writers from making claims for Foreign Levies directly against collecting societies, because those entities are "assigns" of WGA. (*E.g.*, Exh. F, ¶ 1 [Lithuania] ["WGA grants LATGA-A the exclusive authorization to administer the rights/claims of WGA . . ."]; Exh. I, ¶ 1 [Germany] ["WGA grants to GWFF the exclusive authorization to administer the rights/claims of WGA . . ."].)

Currently, a writer who is frustrated by WGA's non-payment of Foreign Levies

may assert a claim directly against the appropriate foreign collecting society. (See, *e.g.*, Exh. E, ¶ 1 [Spain] ["In cases where screenwriters . . . register claims (against SGAE) asserting the failure of the WGA to make a proper distribution . . ."].)

This additional remedy is necessary - even if this case should otherwise settle along the current terms - because the proposed Settlement contains no guarantee that WGA will pay Foreign Levy royalties. For example, the release will wrongfully deprive writers of this alternative remedy should WGA not collect the full and correct amount of money from the collecting society, or should WGA, despite "best efforts," nevertheless fail to pay Foreign Levies which are due and owing.

This point is not of mere academic interest. The Settlement Agreement does not require WGA to ascertain whether it recovered the right amount of money from the foreign collecting societies; rather it is premised on blind trust that WGA did receive all it was owed.

It did not have to be that way. WGA has the right to audit the collecting societies under each of the Collecting Society Agreements (*E.g.*, Exh. E, Art. XVII; Exh. K, ¶ 11; Exh. D, Art. VI(2)), and it could have included a requirement that WGA pursue periodic audits of the foreign collecting societies. But by remaining silent about this, the Settlement Agreement and the publicity surrounding it likely will mislead writers into thinking that WGA has received all their money, and is disbursing the right amount. It is certainly ***unfair to require writers to release their claims*** against both WGA and the foreign collecting societies ***without some assurance*** that WGA is receiving all that the writers are owed.

2. Relinquishment of Rights to Other Foreign Funds.

The Settlement Agreement deals only with Video Levies, Video Rental Levies and "recording equipment" levies. (Proposed Settlement, 5th unnumbered paragraph in preface.) But some of the Collecting Society Agreements cover other kinds of levies, such as levies for primary use (*i.e.*, original theatrical release of motion pictures) or cable

retransmission. (See, Exh. G, ¶ 1[Poland]; Exh. F, ¶ 1 [Lithuania].)

Because a collecting society's obligations to pay these additional levies are "based upon and/or arise[] out of the facts and circumstances as alleged in the Action" (inasmuch as they are based on the same Collecting Society Agreements), the blanket release, whether by design or inadvertence, requires writers to relinquish their rights to these other revenues even though they were not a subject of this litigation.

3. Release of Claims Against Production Companies.

As Objectors explained in Section IV.A.2 above, WGA and DGA agreed to split the Author's Share of Foreign Levies with the MPA signatory production companies (originally 85-15% and now 50-50%). WGA and the production companies never litigated the question whether the production companies may lawfully take any part of the Author's Share; indeed the purpose of the WGA-MPA Agreements was to avoid a legal determination of this issue by compromising the parties' respective claims.

This lawsuit, similarly, did not litigate the lawfulness of WGA's agreement to let production companies get 50% of the Writer's Share of Foreign Levies. The release, however, may be considered by some to require writers to relinquish potential claims against the production companies to the effect that the latter are not entitled to capture Foreign Levy funds for themselves; at the very least the broad language of the Settlement's release allows production companies to try to manufacture such a defense. This is because the production companies may be deemed either "affiliated companies" or "assigns" for the purpose of the allocation of Foreign Levies as between WGA and the MPA companies.[16]

While we do not believe the release was intended to extend this far, the text of the Settlement's release language is just not clear enough. The Settlement should not be used

[16] For example, the WGA-MPA Agreements authorize the MPA production companies to make Foreign Levy claims against the foreign collecting Societies "on their own behalf, and on behalf of the Guilds, as representatives of covered Directors and Writers." (Exh. C, ¶ 3.)

to bootstrap a release of the production companies from potential claims by writers for the other half of their Foreign Levy royalties.

4. The Settlement Permits WGA to Retain Non-European Foreign Levy Funds Without Any Distribution Obligation.

The Settlement defines Foreign Levies as Video Levies and Video Rental Levies coming from European countries. (See, proposed Settlement Agreement, p. 1 (5th unnumbered paragraph.) Paragraph 7 of the FAC, however, alleges that WGA is refusing to pay writers for ***all*** Foreign Levy funds collected, and at least two Latin American countries (Mexico and Argentina) have Video Levy-type statutes. (*E.g.*, Exh. K [Mexico].) Claims for non-European Foreign Levies should be carved out of any release, or payments from such countries should be included in a final Settlement.

We assume that non-Europe levies were omitted due to oversight, but the omission is a serious textual defect.[17]

5. WGA Members Should Not Be Required to Release Their Claims That WGA Wrongfully Failed to Submit the WGA-MPA Agreements to Membership Ratification.

Finally, given its breadth, the release will require participating WGA members to relinquish any claims they may have that WGA failed to submit the WGA-MPA Agreements to membership ratification. WGA's bylaws required it to submit the WGA-MPA Agreement to its membership for ratification. (Exh. M, pp. 26-28.) It has never done that. (Hughes Decl., ¶ 9.)

In addition, the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411, provides that dues increases, as well as "general or special assessment[s]," may not be levied upon members except by a majority vote of members

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[17] Exactly what countries pay Foreign Levies is somewhat of a mystery, and the proposed Settlement Agreement makes no effort to solve it. WGA's Assistant Executive Director Charles Slocum testified that thirteen (13) countries pay Foreign Levies (Slocum Decl., ¶ 3), but WGA's 2009 Financial Report says that "20 counties in Europe and Latin America" pay foreign levies. (Exh. P, p. 10.)

or delegates to a convention (depending upon whether the union is a local or national organization.) There is no evidence in the record that WGA complied with this requirement with respect to the original 5% assessment; nor does the Settlement Agreement seem to require WGA approval (by membership vote or convention vote) of the increase in the assessment to 10%.

Whether or not WGA members wish to challenge WGA's failure to have this the WGA-MPA Agreements ratified, or challenge the special assessments under the LMRDA, WGA and plaintiffs should not use this Settlement as an indirect vehicle to stave off such potential litigation.

D. The Settlement Does Not Fairly Account for the Distinct Interests of Non-Covered Writers.

1. The Settlement Will Deprive Non-Covered Writers of Millions of Dollars.

To protect the interests of absent class members, the Court is obligated to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished." *Clark*, 175 Cal.App.4th at 800.

Here, both plaintiffs and WGA utterly fail to explain why key stakeholders, the non-covered writers, are treated the same as covered writers when their interests and rights diverge so dramatically.

To put this in context, recall that WGA claims that it represents covered writers. Acting as collective bargaining representative, WGA entered into the WGA-MPA Agreements with signatory producers, pursuant to which they split the Foreign Levies on a 50-50 basis as a way of resolving their dispute over who is entitled to the Writers' Share of Foreign Levy money. (Exh. C.)

But there is no parallel agreement and thus no parallel universe for non-covered writers. Unlike the MPA producers of covered works, the record contains no evidence

that producers of non-covered works ever claimed any portion of Foreign Levy funds, and unlike WGA represented writers, there is no evidence in the record that the writers of non-covered works have in any way agreed to relinquish any portion of their Foreign Levy royalties to any third parties.

Yet, under the Settlement Agreement, it appears that non-covered writers are being treated exactly like covered writers, which is to say they are only getting half of the Writers Share of their Foreign Levies. The other half appears to be going to the MPA companies, even though those companies have nothing to do with non-covered motion pictures. At best, with two known exceptions, the record is murky and makes it difficult to trace Foreign Levies belonging to non-covered writers.

These two exceptions establish that, at least for the Netherlands and Spain, WGA and the MPA companies are taking non-covered writers' Foreign Levies for themselves. Article XIII of the VEVAM (Netherlands collecting society) Foreign Levy agreement provides as follows:

> To the extent there are U. S. motion pictures that are ***not represented*** by Producers signatory to the Guild Agreement attached as Exhibit "A," VEVAM acknowledges that any amounts collected for these pictures after the distribution of fifteen percent (15%) to the WGA pursuant to Article II herein shall be held for the appropriate period of prescription. After said period, VEVAM agrees that it shall ***distribute these sums on a proportional basis to those Producers and Writers*** whose claims were paid in the year the unclaimed amounts were placed in the reserve."

(Exh. D, Art. XIII, emphasis added.) An identical provision exists in the Spanish agreement. (Exh. E, Art. XI.)

These provisions indicate, first, that the collecting societies are paying WGA the same percentage of Foreign Levy funds for non-covered writers as they are paying for covered writers. The provision also indicates that, if the retained Foreign Levy funds for non-covered works are not claimed by the non-covered producers of those works, then the money is split between the WGA and the MPA production companies (even though neither have any connection whatsoever with these non-covered works), rather than being given to the writers of non-covered works.

Because WGA admittedly does not represent non-covered writers, it has no legal authority to give away their money. And why WGA and the major production companies would want to be profiting off of pornographic film-making is a mystery.

WGA and plaintiffs might argue that a presumption of fairness attaches to the proposed Settlement - even if it looks like WGA is keeping money that does not belong to it. But the Court cannot approve such a suspicious looking settlement unless it has enough information from the case's "investigation and discovery" to enable it to "act intelligently." *Dunk*, 48 Cal.App.4th at 1802. This requirement is taken seriously: The Court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of these claims represents a reasonable compromise." *Kullar*, 168 Cal.App.4th at 130. Here, the parties failed to raise this problematic issue in their papers, even though it was the central theme of the FAC.

Simply put, there is no reason why non-covered writers should not receive 100% of their Foreign Levy distributions (less, perhaps, appropriate administrative fees). Both plaintiffs and WGA are inexcusably silent about this obvious inequity in the proposed Settlement Agreement. The interests of non-covered writers are so divergent from those of covered writers that the Settlement should not be approved without an adequate explanation (if one conceivably exists) for why they are treated similarly to covered writers, and why their royalties are being diverted to WGA and the MPA companies.

2. Non-Covered Writers' Interests Were Ignored Because Plaintiffs are Not Adequate Representatives of These Writers.

How could the paramount conversion claim of the FAC be ignored in the proposed Settlement? Simple. Not one of the class representatives is a writer (or heir of a writer) of non-covered works.[18] Thus, plaintiffs were not adequate representatives of non-

[18] In the January 30, 2008 Ruling and Order Re: Plaintiffs' Motion for Class Certification, not one of the named plaintiffs is alleged to have written a non-covered work, or to be the heir to a writer of non-covered work. Plaintiff Jamison is the heir to a

covered writers and their claims are not typical of those of non-covered writers. Plaintiffs had no interest in exploring this important problem, and made no effort in five years of litigation to do so. Obviously, what plaintiffs and WGA said to each was: "let's deal with our problems, and sweep the problems of non-covered writers under the rug." And that is what they did.

Although plaintiffs made no effort even to deal with this problem, WGA itself recognizes it. It admitted to its Board of Directors at a recent meeting that under the Settlement, there are "***legal and practical complexities associated with distributing funds for non-WGA projects***." (Exh. R [Minutes of WGA's November 9, 2009 WGA Board of Directors meeting].)

Objectors and WGA agree the Settlement is problematic for non-covered writers. A settlement agreement should not leave these "legal and practical complexities" unexplained and unresolved; the point of a settlement is to confront and resolve them.

E. Additional Shortcomings in Settlement Agreement.

The Foreign Levy system is a complex one that, like an octopus, has tentacles reaching in many directions. Plaintiffs' inexperience and inattention to detail, which mark so much of the Settlement Agreement, result in several additional defects which the Court should consider when deciding whether this is a fair and adequate settlement.

1. The Last Minute Inclusion of Covered Writers Prevented Litigation of Whether WGA May Properly Represent Covered Writers.

First, in the rush to include writers of covered works in the Settlement, plaintiffs never thought to litigate an important foundational question - one about which the FAC

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writer of covered works, and a member of WGA's predecessor, the Screen Writers Guild. (WGA's 9/28/07 Supp. Opp., pp.6:9-7:5.) Plaintiff Feil is the heir to a WGA member and author of covered works. (*Id*., p. 7:9-16.) Richert is the author of covered works but he is a WGA member whose dues are in arrears - and as such he is not a member in good standing - but at least according to WGA he remains a member. (*Id*., pp.4:11-6:5.)

was silent because it was directly exclusively toward non-members. This foundational question is whether WGA has the right to represent covered writers with respect to the Foreign Levies controversy in the first instance.

There is no question that WGA has the right to represent writers employed by signatory employers for purposes of "rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a); see also *14 Penn Plaza LLC v. Pyett* (2009) 129 S.Ct. 1456, 1461-63. A union's duty of fair representation is coextensive with the scope of mandatory subjects of mandatory subjects of bargaining, such as wages, hours and working conditions. *Pyett*, 129 S.Ct. at 1463.

But Foreign Levies are not royalties paid by an employer, and thus they do not fall under the umbrella of "rates of pay or wages." ***Both WGA and the MPA companies admit this***. The current WGA-MPA Agreement provides:

> Exclusion from Collective Bargaining Agreement Provisions: With respect to monies collected and allocated in accordance with the terms of this agreement, ***the parties agree that such monies are not covered by the provisions of said Collective Bargaining Agreements*** . . .

(Slocum Decl., Exh. A, ¶ 12; Hughes Decl., Exh. C, ¶ 12, emphasis added.) If the Foreign Levies do not emanate from collective bargaining agreements, what is WGA doing in the first place getting involved?

It is most unlikely that the named plaintiffs would have an interest in exploring this important foundational question. Mr. Richert is not a WGA member in good standing (and he seems to deny his own membership status), while the other plaintiffs are merely heirs of former members.

Objectors do not pretend that this is a simple question or that there is a known answer at this time. The scope of a union's rights as exclusive representative is a complex one, and may sometimes extend beyond the limits of mandatory subjects of bargaining like "wages, hours and terms and conditions of employment." Objectors merely raise the question for the purpose of demonstrating to the Court that the current litigants have not acquitted themselves of their responsibilities to explore these issues

with the Court so that the Court can make an informed decision when it decides whether to approve the Settlement.

2. There Is No Definition of "Writer."

Authors of books, comic books, video games and other works that are used as source material for screenplays are probably entitled to Foreign Levies.[19] But these authors are excluded from the definition of writer under the Agreement. The WGA-MPA Agreement defines "Covered Writers" only as those who write works covered by a collective bargaining agreement (Exh. C, ¶ 1(b)), thereby excluding source material writers.

The Settlement Agreement, to the extent it deprives source material writers of these rights, must be rejected, and at the very least, the Foreign Levy rights of these additional authors must be protected in any Settlement.

3. The Agreement Is Silent Whether Website Postings Will Be Public.

The proposed Settlement Agreement contains several provisions requiring WGA to post information on its website for the benefit of writers. (Settlement, §§ 3, 4(b), 6(b)-(d).) The Agreement is silent about whether these postings will be available only to WGA members or to any person who seeks information to ascertain whether he or she is eligible for Foreign Levies.

Obviously, this part of the WGA website must be open to the entire public to allow prospective claimants to know what has been paid and whether they are entitled to Foreign Levies.

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[19] For example, the French Intellectual Property Code, Art. L-113-7, provides: "Lorsque l'oeuvre audiovisuelle est tirée d'une oeuvre ou d'un scénario préexistants encore protégés, les auteurs de l'oeuvre originaire sont assimilés aux auteurs de l'oeuvre nouvelle," meaning "If an audiovisual work is adapted from a preexisting work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work."

4. There is No Generally Accepted Procedure to Establish Credit for Writers of Non-Covered Works.

Although the issue of "credit" for non-covered writer is mentioned last in this section, this is not because of its lack of importance. Today, there is no generally recognized system to determine who gets credit for writing a non-covered work. By taking on the responsibility to distribute Foreign Levies to writers of non-covered works, WGA will be forced to decide who gets credit in the event there is uncertainty or a dispute. The Settlement fails entirely even to address this question, let alone to establish any adjudicatory system.

F. WGA's Website Materially Misrepresented That the Court Has Adjudicated its Legal Rights.

Approval of the proposed Settlement should be denied because WGA has made a material misrepresentation on its website that will mislead class members and cause them to erroneously conclude that a key unresolved legal issue was actually resolved.

Specifically, WGA's Frequently Asked Questions (FAQ) (Exh. L) states that the settlement "affirms the Guild's right to collect and distribute these funds to all U.S. writers - whether WGA members or not." This is a false and misleading statement, for neither this litigation nor the settlement in any way address or resolve WGA's "right" to collect and distribute Foreign Levies (whether for union members or non-members, or whether for writers of covered or non-covered motion pictures). At best, the Settlement "creates" a contractual obligation to distribute money for participating class members, but it does not "affirm" any legal right. Unfortunately, the horse is now out of the barn, and before any settlement should be considered, WGA should be required to retract its false statement and make a public correction.

VI. CONCLUSION.

At the end of the day, a writer should ask himself or herself: "what changes if I participate in the settlement, and how will I differ from participating class members if I opt out?" The answer to these intertwined questions is: Probably nothing; although class members who opt-out may be better off than those who do not, for WGA will still be responsible to pay them their Foreign Levies, but they will not be subject to the release and they may not be subject to the increase in administrative fees.

The Court should reject the proposed Settlement Agreement for all the reasons set forth in these Objections, and send the parties back to the drawing board, where the Objectors could then intervene and either ensure that these complex issues are thoroughly litigated or facilitate a meaningful settlement that truly embraces the interests of the various Foreign Levy stakeholders.

DATE: February 8, 2010

LAW OFFICES OF STEVEN J. KAPLAN PC
LAW OFFICES OF JEFFREY WINIKOW

By: _____
Steven J. Kaplan

Attorneys for Objectors Stefan Avalos and Art Eisenson

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, City of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11377 West Olympic Blvd., Suite 500, Los Angeles, California 90064-1683.

On February 8, 2010, I served the foregoing document(s) described as: "Notice of Intention to Object to Proposed Class Action Settlement; Objections to Proposed Class Action Settlement; Notice of Intent to Appear at Final Settlement Hearing of Objectors Stefan Avalos and Art Eisenson; and Notice of Intention to Intervene" on all interested parties in this action by placing ___ the original X a true copy thereof enclosed in a sealed envelope addressed as follows:

Neville Johnson Johnson & Johnson 439 No. Canon Dr., Ste. 200 Beverly Hills, CA 90210	Paul Kiesel Kiesel, Boucher & Larson, LLP 8648 Wilshire Blvd. Beverly Hills, CA 90211-2910	Emma Leheny Rothner, Segall, Greenstone & Leheny 510 So. Marengo Ave. Pasadena, CA 91101-3115

___ (FIRST CLASS MAIL) and caused such envelope with postage thereon prepaid to be placed in the United States Mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited in the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit;

___ (ELECTRONIC MAIL) I sent or caused to be sent a true and correct PDF copy of said document to the interested parties in the within action using the e-mail address listed above. The e-mail was sent from the e-mail address ___ sjkaplan@sjkaplanlaw.com __x__ ashley@sjkaplanlaw.com. ~~This e-mail was sent in accordance with an agreement between counsel that such e-mail would constitute service as if by personal delivery;~~

__x___ (BY HAND DELIVERY) I caused such envelope to be delivered by hand to the interested parties in the within action at the addresses listed above.

__X___ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

___ (FEDERAL) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on this 8th day of February, 2010, at Los Angeles, California.

_____
Ashley J. Sharp Ching