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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ED ASNER, CLANCY BROWN, GEORGE COE, TOM BOWER, DENNIS HAYDEN, WILLIAM RICHERT, LOUIS REEKO MESEROLE, TERRENCE BEASOR, ALEX MCARTHUR, ED O'ROSS, ROGER CALLARD, STEVEN BARR, RUSSELL GANNON, STEPHEN WASTELL, JAMES A. OSBURN, and ERIC HUGHES aka JON WHITELEY, collectively known as the United Screen Actors Committee (USAC),

Plaintiffs,

v.

SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, a labor organization commonly known as SAG-AFTRA and its GUILD INTELLECTUAL PROPERTY REALIZATION, LLC,

Defendants.

Case No.: 13-CV-3741 R (FFMx)

PLAINTIFFS OPPOSITION TO MOTION TO DISMISS

Hearing: October 7, 2013
Courtroom: 8
Time: 10:00 a.m.

Action Filed: May 28, 2013
Trial Date: None

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Cases:

I) INTRODUCTION

16-members[1] strong, the United Screen Actors Committee (USAC) consists of well-known performers ED ASNER, CLANCY BROWN, GEORGE COE, TOM BOWER, DENNIS HAYDEN, WILLIAM RICHERT, LOUIS REEKO MESEROLE, TERRENCE BEASOR, ALEX MCARTHUR, ED O'ROSS, ROGER CALLARD, STEVEN BARR, RUSSELL GANNON, STEPHEN WASTELL, JAMES A. OSBURN,[2] and ERIC HUGHES aka JON WHITELEY, collectively

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[1] Although SAG-AFTRA repeatedly claims there are 17 Plaintiffs, there are 16, with each, except for James Osburn, possessing substantial television and feature film credits. Plaintiffs Declarations, referenced by the last name of each, i.e. Brown Decl., are submitted to show that this litigation must be allowed to proceed since Plaintiffs and other members of SAG-AFTRA, as well non-members, are fully entitled to know why SAG-AFTRA is secreting in excess of One Hundred and Thirty Million Dollars in a non-ERISA "trust", which it refuses to be accountable for, even though a labor organization is required to be transparent in these and other regards. See the Labor-Management Reporting and Disclosure Act of 1959 (*"LMRDA"*)(29 USC §§ 401, et seq). This Court has not hesitated to incarcerate Union Officials who have failed to properly perform their reporting and disclosure obligations, and/or who have wrongfully benefitted from financial transgressions.

[2] James A. Osburn is the only Plaintiff who no longer belongs to Defendant Labor Organization, electing to pursue his chosen profession within the Hollywood Sound Union, IATSE Local 695, including as its elected Business Representative, in lieu of a career as a performer. Osburn first gained SAG membership for a minor speaking part in Steven Spielberg's cult classic, *Close Encounters of the Third Kind,* commonly known as an upgrade for a background actor. (Complaint, ¶ 25). A microphone boom operator and mixer by trade, including on the Oscar-winning show, *Titanic,* Osburn is no stranger to this Court having resisted demands more than three decades ago by the International Alliance of Theatrical Stage Employes (IATSE) and the Alliance of Motion Picture and Television Producers (AMPTP) to execute a labor contract which was negotiated when Local 695 was under trusteeship. Osburn refused to sign the collective bargaining agreement since it was never submitted to or ratified by the membership, despite threats of incarceration and a sentence for contempt by this Court. *In the Matter of*

(footnote continued)

USAC or Plaintiffs. Plaintiffs oppose Defendants SAG-AFTRA and its Guild Intellectual Property Realization's[3] Motion to Dismiss, which although labeled as a 12(b)(6) Motion, is in effect an attempt to procure Summary Judgment or at least Summary Adjudication of the First Cause of Action without benefit of discovery based upon the improvident theory that a state court Class Action Settlement in *Osmond, et al. vs. SAG*[4], is res judicata and dispositive of all federal and state

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the Contempt Proceeding re James Osburn, et al., IATSE Local 695, et al., vs IATSE, (9th Cir., 1977), 611 F.2d 266, although this Court mandated Local 695's counsel, Timothy Sargeant, to immediately obtain a writ of habeas corpus to ensure that Osburn remained free.

[3] Hereinafter collectively Defendants and/or SAG-AFTRA.

[4] Ken Osmond who played Beaver in the beloved television series, *Leave It to Beaver,* filed a Class Action suit to recover Foreign Royalties/Foreign Levies to which he was entitled as a performer under foreign laws, after learning that the Screen Actors Guild (SAG), well before its merger with AFTRA, had agreed with the Producers, without notice to the membership, let alone an opportunity to review or ratify a Foreign Levy Agreement (FLA) which was entered into between SAG and the Producers, to permit collection from foreign collecting societies of the *performers share* of monies guaranteed by the Berne Convention. FLAs were devised in close proximity to Jay Roth, formerly with defense counsel herein and now head of the Directors Guild of America (DGA), and Robert Hadl, then with Universal Studios, and now a Foreign Royalties Consultant to the Producers and Labor alike, appeared before Congress and described the importance of recovering a new found pot of gold -- millions of dollars being extracted as levies and collected by foreign countries on audiovisual projects – which foreign laws acknowledged belonged to writers and performers. (USAC Request for Judicial Notice [USAC Req.Jud.Not.], Exh. "1", at 87-88,91, 94, 96, 102-103.)

Following the drafting and signing off on various undisclosed FLAs, SAG agreed to split the proceeds of foreign levies with the Producers, thereby avoiding a 100% distribution of the *performers share* of foreign levies to their rightful owners, namely actors and actresses like Plaintiffs who bring creative works to life on film, television and other mediums. Osmond's action was then filed in the Los Angeles Superior Court *Osmond, etc., vs. SAG,* Los Angeles Superior Court Case No. BC 377780, and once removed by SAG to federal court, the Honorable Margaret

(footnote continued)

claims, including the First Cause of Action brought under the *LMRDA,* 29 USC §§ 401, et seq. which was enacted by Congress to eliminate or prevent improper practices, including a breach of trust, corruption, disregard of the rights of individual employees and other failures to observe high standards of responsibility and ethical conduct on the part of unions, employers, labor relations consultants, and their officers and representatives. *First and foremost, the underlying Osmond action never involved an LMRDA claim, although it purports to waive all claims that could*

Morrow remanded same so that Osmond and other performers could obtain the monies rightfully due them which SAG refused to pay. *Osmond, et al. vs. SAG, et al., CV 07-07095 MMM (PJWx).* (USAC Req.Jud.Not.] Exh. "2").

After allowing for a passage of time following removal, and despite not having engaged in *discovery, let alone requiring an audit to see if SAG was being truthful as to how much it had collected from 1996 forward,* Osmond's Class Action counsel Neville Johnson and Paul Kiesel, also handling similar litigation against the Writers Guild of America and the Directors Guild of America where the reported sum of monies collected by the latter Unions were grossly disproportionate to the meager collection reported by SAG, suddenly agreed to mediate all three cases before JAMS Mediator Joel Grossman. Grossman, formerly with SONY Pictures, however had been instrumental in negotiating the Foreign Levy Agreements on behalf of the Producers with SAG, the WGA and the DGA, thereby entitling Producers to take a large chunk of the performers and writers share, in addition to those monies already earmarked under foreign laws for producers.

Shortly thereafter three Class Action Settlements were widely touted in the press, with Neville Johnson and Paul Kiesel, receiving in excess of two million dollars, including $315,000.00 from SAG, with the latter according to Plaintiffs, *based entirely upon minimal efforts*. All three Class Action Settlements were approved by the Honorable Carl West, now mediating with JAMS as well. For these and other reasons, the SAG Class Action Settlement is subject to collateral attack and should not be dispositive of Complaint at hand.

have been brought, even though such exculpatory language is contrary to and forbidden by the LMRDA. 29 U.S.C. Section 431 and 501. Secondly, it never involved issues about Residuals, including the Unions documented practice of signing checks made out to members and then keeping the proceeds because members or their beneficiaries could not be found purportedly due to SAG's use of an antiquated computer system. Thirdly, it did not involve AFTRA which did not even merge with SAG until more than one year after the Class Action Settlement was approved below. Lastly, the Class Action settlement was not fairly negotiated, with due process violations, including inadequate notice, and a refusal to account for funds received and disbursed while also denying access to agreements upon which the settlement was based, readily apparent, even though Defendant SAG was and remains a labor organization subject to the LMRDA.

The manner in which the settlement involving SAG was achieved, without genuine notice to all potential class members, let alone failure to certify the class until after Settlement was inked, coupled with ample evidence that Class counsel placed their interest above those of the class, warrants a full collateral attack as well as further briefing envisioned by a Motion for Summary Judgment before this Court gives any credence to SAG-AFTRA vitriolic attack on Plaintiffs.

II) FACTUAL STATEMENT

Defendants seek to portray themselves as an innocent labor organization who has been wrongly accused of mishandling of Residuals as well as Foreign Royalties/Foreign Levies, while seeking to deceive this Court into believing that Osmond's action also resolved issues about Residuals and purportedly resolved all disputes, including for LMRDA violations, against SAG-AFTRA, even though AFTRA was not even a party to the underlying action, nor were LMRDA violations or handling of Residuals before the state court. For reasons shows herein, Plaintiffs vigorously dispute that the *Osmond* action is dispositive of the issues raised by the instant Complaint.

a) Different Parties and Different Issues

AFTRA's receipt and distribution of Residuals as well as Foreign Royalties/Foreign Levies has never been challenged, while AFTRA had not even merged into SAG when the *Osmond* Class Action Settlement was sanctioned by the state court. Had AFTRA been included, the notice which would have to have been given would **have more than doubled.** Plaintiffs herein are with exception of Osburn well known television actors who as members of AFTRA are also entitled to Residuals as well as Foreign Royalties/Foreign Levies. The rejection of USAC's demands for accountability and transparency from SAG-AFTRA necessitates that the Motion to Dismiss be denied since AFTRA's receipt and distribution of monies is clearly at issue, just like SAGs, as well as those of the merged union, particularly when AFTRA's financial records show the same serious flaws as SAGs, and now SAG-AFTRAs do as well. (USAC Req.Jud.Not., Exhs. 28-29).

Similarly, Residuals were never covered in the underlying *Osmond* Action. Except for a reference to Residuals in the definition of who was a member of the class, the entire Class Action Agreement and Judgment, as well as the original Complaint, the Remand Order, and the subsequent action initiated by SAG against Federal Insurance[5] because Federal Insurance refused to pay the attorneys fees to

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[5] *Screen Actors Guild vs. Federal Insurance*, CV 11-7123-DLG (VBKx), wherein the carrier defended its actions on the basis that wrongful conversion of monies belonging to performers was not a covered act, is attached to USAC's Req.Jud.Not., as Exhs. 24-25 , while the Order of the Honorable Dolly Gee granting Federal Insurance's Motion for Summary Judgment, is Exh.26 thereto.

SAG-AFTRA's counsel herein has advised that it is appealing the latter ruling. Nonetheless, the evidence adduced in the underlying action supports Plaintiffs claims herein, particularly since Federal Insurance extensively inquired about the Union's contradictory accounting records pertaining to its receipt and disbursements of Foreign Royalties/Foreign Levies, including pass-overs to Producers which although identified as monies transmitted to performers are now being reclassified as pass-overs because SAG seeks to diminish the pool of monies

(footnote continued)

Neville Johnson which SAG had agreed to pay as part of the Class Action Settlement, do not even discuss the Union's refusal to account for its handling, distribution and conversion of Residuals. (USAC Req.Jud.Not., Exhs " 24-26.)

Likewise, the failure of AFTRA and SAG to properly distribute Residuals, as evidenced by the recent announcement in the trades of stale Residuals checks found unopened in AFTRA's possession, a claim remarkably similar to 2002 when SAG claimed it was having problems with distributing residuals because stale checks were also found in its closets, justify a full and complete accounting. The excuse by SAG, AFTRA and now SAG-AFTRA that timely processing was caused by an antiquated computer system, as now National Executive Director David White, then General Counsel, in 2002 espoused when begging for time to improve upon the distribution of Residuals, including to the rightful owners of Unclaimed Residuals, should not be ignored by this Court. Rather than improve processing time, distribution is now delayed by more than 90 days, while the list of persons on the Unclaimed Residuals list has grown dramatically, from less than 22,000 to more than 77,000 persons. The continual reference to monies held in Trust in LM-2s, now more than One Hundred and Thirty Million, show that the Labor Organization needs to be accountable, particularly since it was obligated to turn over unclaimed

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received between 1996 and 2007 when the Osmond action was initiated, despite federally mandated forms which bring into serious disrepute the credibility of SAG-AFTRA's key executives and veracity of SAG-AFTRA's accounting records and the accountants, Pricewaterhousecoopers, who prepared unaudited records which Neville Johnson relied upon when settling Osmond. For instance see the vascillating testimony of the head of the foreign Royalties Department, Jo Sisson, as well as General Counsel Crabtree-Ireland, USAC Req.Jud.Not., Exh. 25.

The refusal of SAG to escheat is not to be taken lightly since accountants Pricewaterhousecoopers' role in Old Republic's failure to timely escheat substantially less monies than those at issue herein, to the State of California has been the subject of appellate decisions, see *State ex rel. Harris v. PricewaterhouseCoopers, LLP*, (2006), 39 Cal. 4th 1220.

monies to the State of California well before now. Although Defendants have plenty of excuses for not complying, efforts by even the *Hollywood Reporter* to justify the failure to comply with escheat laws[6] is suspect, in light of concessions by SAG-AFTRA that it possesses in excess of one hundred million in non-ERISA regulated trusts, and refuses to show receipts and disbursements to its members.

Similarly, the financial reports of AFTRA and the combining of its purported assets and liabilities into SAG-AFTRA, concurrent with SAG-AFTRA's refusal to provide transparency and accountability, and its consistent rejection of all requests by Plaintiffs to review financial records, including receipts and disbursements, cannot be countenanced by this Court either, particularly in light of the LMRDA which confers upon Plaintiffs the right to review financial records and to bring an action when one's labor organization runs afoul of these statutory requirements. 29 U.S.C. Sections 411 (4), 431(c) and 501(a), notwithstanding a Union's attempt to adopt exculpatory clauses and to adopt language, to wit, the Releases contained within the Class Action Settlement, which bar a member from suing their labor organization, let alone presumably pursuing the LMRDA action herein. (USAC Req.Jud.Not., Class Action Agreement, Exh. 16 .)

To suggest that the proverbial footnote appearing in SAG's LM-2 reports to justify a failure to be accountable and transparent is contrary to the LMRDA is to put it politely. See LM-2 Reports, Exh. 28 of USAC Req.Jud.Not.:

> "Certain Receipts that would normally be itemized on Schedule 14 have been included in Line 3 because the information may provide

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[6] Reporter Jonathan Handel shortly after reporting this lawsuit in the trades referenced SAG-AFTRA's denial that it failed to comply with California's Escheat laws with Handle stating that SAG claimed it had an Agreement with the Controller's Office that permitted it to avoid turning Unclaimed Residuals over to the State. Said revelation is most interesting, especially since at the Early Meeting of Counsel, defense counsel has conceded there is no such agreement, despite Handle's article to the contrary. (Wise Decl., ¶ 14 and Exh. R thereto.)

a tactical advantage to an entity with whom the Guild is in Contract negotiations."

b) **Due Process and Fairness Lacking**

Plaintiff Eric Hughes, with established credentials as a writer, as a member of the WGA's esteemed Screen Credits Committee, as the WGA's Interim President, and as a performer who previously received Residuals for work, including as a child actor, intervened in the SAG litigation when it became readily apparent that Class Action counsel was settling the SAG litigation without benefit of discovery, let alone verifying that the unaudited report furnished by SAG comported with the substantial documentation Hughes possessed and possesses showing payments by foreign collecting societies of Foreign Royalties/Foreign Levies to the WGA in significantly greater sums on the same shows that SAG was reporting it was supposed to be collecting a proportionate share on for performers. (Complaint, ¶

Hughes' efforts to intervene, not only challenging the right of the Unions to claim superior ownership rights in monies specifically earmarked by foreign laws for performers and writers, but the readily apparent denial of due process and basic unfairness of the process used to approve of the SAG Class Action were discarded, although the Court did agree with Hughes that the class definition needed to be modified, but only after the opt out period expired. Although Defendants claim Hughes is not a proper Plaintiff herein because purportedly Hughes is one of 14 Plaintiffs who did not opt out, Defendants overlook the Court's finding that based upon SAG's erroneous submission below, Hughes was not even a member of the class. (Hughes Decl., ¶ 2-3.)

Principles of due process further belie attempts to disqualify the other Plaintiff-members who did not opt out, with William Richert and James Osburn clearly retaining their rights to sue since neither were members of SAG and thus clearly did not receive any notice of opt out rights. Of the remaining 11 Plaintiffs who did not submit opt outs, the actions taken by SAG and Class Action counsel in

denying notice to even these Plaintiffs, let alone more than 100,000 members, not to mention tens of thousands of non-members, and the Estates of deceased members, should preclude Defendants from barring Plaintiffs from obtaining relief herein.

Instead of certifying the class to begin with, counsel in the *Osmond* action elected instead to agree upon a definition of eligible class members that effectively disqualified elderly performers and their beneficiaries of Foreign Levies/Foreign Royalties on SAG work predating 1960, including even Ken Osmond given the date he started performing in Leave It to Beaver. SAG, as opposed to an independent Class Administrator, let alone an independent mailing house typically used by Union's during elections and contract ratification votes, was then directed to issue a notice of a Class Action Settlement with an Opt Out provision which was to be sent by E-Mail and mail, as well as publicized in SAG's **quarterly** magazine, as well as one edition of the hard-copy version of *Hollywood Reporter* and *Variety*, on October 18, 2010, declining to publish in the *Los Angeles Times,* let alone on the Internet sites for such publications. After Crabtree-Ireland stated that the notice would be published in the quarterly magazine, for some strange reason, SAG withdrew its offer to print the Notice, even though that Magazine is widely sought out and read by the acting community, not to mention the general public. (USAC Req.Jud.Not., Exh. 17).

The method of publication finally used was clearly calculated to not reach class members, while bonafide proof of mailing, including from a mailing house let alone a print-out of the E-Mail's sent , in lieu of self-serving statements from SAG's Pamela Greenwald, were never furnished before the Court issued final

approval below, nor do Defendants even offer this Court any Notice sent which contains details about how and by when to opt out. [7]Verification of mailing was clearly warranted since Greenwald's declaration of notice conflicts with General Counsel Duncan Crabtree-Ireland's earlier declaration, immediately before the notices were purportedly sent, about the number of E-Mail addresses available to SAG. (USAC Req.Jud.Not., Exh.5.) This when combined with SAG's own admission it was contemporaneously holding onto Residuals for more than 77,000 persons because of incomplete addresses, involving not only members, but Estates of deceased performers, as well, shows that something was and continues to be foul smelling in these regards. (USAC Req.Jud.Not., Exh. 30.)

The Class Action Settlement also purports to bind heirs of deceased performers, even though proof of notice to this group was never tendered to the Court below, even though SAG holds substantial Residuals owing to the Estates of Deceased members, claiming it does not know how to get ahold of the Estates belonging to such beloved performers as Elvis Presley and Frank Sinatra. (USAC Req.Jud.Not., Newspaper Articles, Exh. 30.)

For these reasons, the size of the class has not to this day been determined, while SAG's own LM-2 filings as a labor organization show that right when it was seeking Class Action Settlement approval, it had 180,000+ members. Although the Court at the Hearing on Final Approval changed the definition of the class to eliminate the discriminatory aspect of the original definition, such a change so drastically changed the size of the class that a new opt out notice was warranted.

Because of these well documented shortcomings, Plaintiffs believe that SAG

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[7] Plaintiffs would protest offering of such evidence in Defendants Reply, since an opportunity to respond, let alone to verify authenticity of same would be denied Plaintiffs.

then engaged in another artifice when its General Counsel Crabtree-Ireland sent E-Mails well after the Class Action Settlement was approved by the Court, including to such well-known celebrities as Ed Asner and George Coe, wherein it alluded to recipients as having received earlier E-Mails and notices. (Coe Decl., ¶ 2-6 and Exh. S.) Covering one's tracks should not be tolerated by this Court, while the E-Mail is just as troubling because it directs recipients to documents, including the Foreign Levy Agreement and the Class Action Settlement, which purportedly could be viewed on the Screen Actors Guild website, when, to this day those documents have not been accessible on Defendants website, necessitating that Plaintiffs post same prefatory to engaging in the instant litigation.

Notice of a settlement after-the-fact, if notice at all, is being offered to deprive Ed Asner, George Coe and the remaining Plaintiffs herein, as well as tens of thousands of members, not to mention tens of thousands of heirs and non-members alike, along with non-members whose Foreign Royalties/Foreign Levies SAG has come into possession of, not only an accounting that Osmond clearly said he was seeking, but the proceeds of the Foreign Royalties/Foreign Levies wrongfully withheld, along with the interest earned thereon.

III) ARGUMENT

A)"*Osmond* Class Action" Settlement is Not Dispositive of Federal Issues

In class action settlements, the court "acts as a fiduciary who must serve as guardian of the rights of absent class members . . . [t]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *Grunin v. International House of Pancakes,* 513 F.2d 114, 123 (8th Cir. 1975); *Malchman v. Davis,* 706 F.2d 426, 433 (2d Cir. 1983); *Piambino v. Bailey,* 610 F.2d 1306, 1329 (5th Cir. 1980). Any suggestion that the instant Class Action Settlement was fair, reasonable and adequate is defied by the record below. Under these circumstances, Binding absentees to any part of a class action judgment "is an

act of judicial power," which should only be exercised over absentees when their interests have, in fact, been adequately represented by parties lawfully authorized to represent them.

1) All Prongs of Res Judicata are Not Satisfied

The doctrine of res judicata, or claim preclusion, applies in later litigation if an earlier decision was (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) in a case involving the same parties or their privies, and (4) involving the same cause of action. *In re Adelphia Recovery Trust* 634 F 3d 578, 694 (2nd Cir., 2011). As noted above, AFTRA was not a party to the prior action while an LMRDA claim was never presented, thus paving the way for the First Cause of Action to proceed against all parties for an accounting of Residuals and Foreign Royalties/Foreign Levies. At least five Plaintiffs can proceed herein on their state law claims since they opted out, were found by the Court to not be a member of the class, or were not even members of SAG. As for the remaining plaintiffs, serious due process violations have occurred which make a res judicata finding also inappropriate. Res judicata generally applies to judgments in class actions, but it does not bind class members "where to do so would violate due proess." *Stephenson vs. Dow Chem. Co.* 273 F 3d 249, 260 (2d, Cr., 2001), aff'd in part by an equally divided court and vacated in part, 539 US 111 (2003).

2) Due Process Right to Notice Not Satisfied

Absent class members have a due process right to notice and an opportunity to opt out of class litigation when the action is "predominantly" for money dmaages. *Phillips Petroleum Co. vs. Shutts,* 472 U.S. 797, 811-12 & n. 3 (1985); see *Wal-Mart Stores, Inc. vs. Dukes,* 564 US --, 131 S. Ct. 2541, 2558-59 (2011). After the Supreme Court's decision in Dukes, the right to notice and an opportunity to opt out under Federal Rules of Civil Procedure, Rule 23, now applies not only when a class action is predominantly for money damages, but also when a claim for money damages is more than "incidental". Herein the claim for monetary recovery of

Foreign Royalties/Foreign Levies and never before contested Residuals as well is unmistakable. The recent Second Circuit decision in *Hecht vs. United Collection Bureau* (2012), F 3rd , shows precisely why a collateral attack on a class action judgment should be allowed. Therein the district court found that "constructive notice through publication may be sufficient", because the amount of money at stake was minuscule since the more-than-two-million class members had only approximately $13,000 to divide among themselves. *Hecht vs. United Collection Bureau, 2011 WL 1134245, at *6 (D.Conn. March 25, 2011).* Despite the paucity of money at issue, the Second Circuit had no hesitation in reversing because the class-action notice plan -- no personal notice and just one ad in *USA Today* [8] -- did not provide constitutionally adequate notice to the class members. Personal notice is denied by most of the Plaintiffs herein, while notice acknowledged by some as being given by E-Mails sent after the fact cannot cure the denial of due process herein. Unlike Hecht, more than One Hundred and Thirty Million Dollars purportedly held "in trust" are at stake, if not substantially more depending upon a true forensic accounting of the financial practices of SAG-AFTRA and their predecessors in these and other regards. The attempt to claim the amount of monies are de minimus, to wit, less than $10.00 is also not persuasive, since for those Plaintiffs who have received some Foreign Royalties, substantially more than $10.00 has been paid. With respect to Royalties, the sizeable sums of money withheld, ranging from $70,000 needed to support an autistic daughter in 2002, to $1800 for *Hollywood Reporter* David Robb which Robb received because his deceased father appeared in *Kung Fu* movies, is not chump change to many actors who are barely surviving.(USAC Req.Jud.Not., Exh. 30, newspaperarticles.)

3) Self-Serving Interests of Class Counsel Compromised Representation of Absentee Class Members Herein

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[8] At least *USA Today* was a nationally circulated newspaper.

As *Richards v. Jefferson Cty., Ala.*, ___ U.S. ___, ___, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996) notes, ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party ... [except, in a class action, where he] has his interests adequately represented."). It would defy this fundamental principle of our jurisprudence to allow the due process right of absent class members to adequate representation to be litigated by random, volunteer objectors. Herein, the random volunteer objector was Eric Hughes who after filing meritorious objections, was told by the Court that he was not even a member of the Class, thus qualifying Hughes to be a proper Plaintiff to obtain recovery on his own behalf herein. (USAC Req.Jud.Not., Exhs. 12 and 15.)

Defendants counsel have not and cannot establish that the settlement was the result of a fair fight between informed parties negotiating at arm's-length. "For Plaintiffs to have brokered a fair settlement, they must have been armed with sufficient information about the case to have been able to reasonably assess its strengths and value." *Figueroa v. Sharper Image Corp.,* 517 F. Supp. 2d 1292, 1322 (S.D. Fla. 2007) (Altonaga, J.); see also *Acosta v. Trans Union LLC*, 243 F.R.D. 377, 396 (C.D. Cal. 2007) ("the parties must have engaged in sufficient investigation of the facts to enable the court to intelligently make an appraisal of the settlement").

Herein, David Schecter conceded there was no discovery conducted prior to entering into an agreement with Neville Johnson and Paul Kiesel to quickly dispose of Ken Osmond's claims, let alone those of the absentee class members. Likewise, suspicious timing of mediation involving a Mediator who negotiated the original Foreign Levies Agreement (USAC Req.Jud.Not., Exh. 3), alone should have warranted rejection of the Class Action Settlement below, based upon basic conflict of interest standards.

Given the lack of information available to Osmond's counsel, the lack of consideration for the Class, the total lack of litigation, and the weakness of

Osmond's counsel's position of agreeing to enter into a Class Action Settlement without even requesting Certification of the Class, let alone providing Plaintiffs and others an opportunity to "opt out" before seeking approval of the Class Action Settlement Agreement, is suspicious timing which should be considered by the Court as a factor clearly militating against affording res judicata effect to the Class Action Judgment entered by the Superior Court herein. *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 283 (7th Cir. 2000) (*"Reynolds I"),* (reversing settlement approval of a pre-packaged settlement that had been agreed to by plaintiffs and defense counsel prior to plaintiff commencing litigation and noting that "[a]lthough there is no proof that the settlement was actually collusive in the reverse-auction sense, the circumstances demanded closer scrutiny than the (court) gave it." Furthermore, the settlement consideration is woefully inadequate and does not fall within the range of reasonableness when viewed in relation to: (a) the sizeable Foreign Royalties/Foreign Levies collected by SAG, including the Producers Share which strongly calls into question SAG's representation that it had only collected $8 million before settling with Neville Johnson, at a time when the DGA and the WRA admitted to collecting well in excess of $ 200 million. The failure and refusal of Class Counsel Johnson to demand to see the books, accepting an "unaudited" statement furnished by SAG which contradicted SAG's own federally mandated LM-2s showing greater disbursements and different sums collected than those suggested to Neville Johnson, before agreeing to settle the Osmond action is intolerable and should not be condoned by this Court.

See *Zimmerman v. Zwicker & Assocs, P.C.,* 09 Civ. 3905 (RMB/JS), 2011 WL 65912, at *4 (D.N.J. Jan. 10, 2011) (refusing to grant preliminary approval because "the class gives up too much for what they get"); see also *Figueroa*, 517 F. Supp. 2d at 1326 (refusing to approve settlement because, inter alia, settlement consideration below "the range of recovery in which a settlement of this case may be considered fair"); *Reynolds 1*, 260 F. Supp. 2d at 682-83 (N.D. Ill. 2 003)

(refusing to approve settlement because, inter alia, $25 million fund arrived at without regard to amount of Defendants' exposure); *Acosta*, 243 F.R.D. at 394 (refusing to approve settlement because of the "paltry monetary value the Settlement would deliver to the Settlement Class in exchange for the sacrifice of its claims"). Herein, SAG has admitted that from the time it first started collecting Foreign Royalties/Foreign Levies, it took all of the interest earned on these monies while same simply sat in its investment accounts because SAG refused to distribute the Performers Share to their rightful owners, despite having told Foreign Collecting Societies that they were in fact doing so. Any suggestion that SAG did not assert entitlement rights is belied by the defense proferred by Federal Insurance when declining to pay Neville Johnson $330,000. Simply put, conversion is just that – a wrongful act. (USAC Req.Jud.Not., Exh. 24 .)

Similarly, in the underlying action, Eric Hughes as an objector and intervenor developed concise and reasonable discovery demands targeted to discover relevant information. These entitlements to discovery when "lead counsel has not conducted adequate discovery or if the discovery conducted by lead counsel is not made available to objectors" were clearly ignored in the *Osmond* action. *In re Community Bank of Northern Virginia,* 418 F.3d 277, 316 (3d Cir. 2005); see also *In re General Motors Corp. Engine Interchange Litig.,* 594 F.2d 1106 (7th Cir. 1979) (trial court abused its discretion by declining request for discovery)

Even the California Supreme Court has noted that under certain circumstances even a criminal judgment may be subject to collateral attack on the ground, for example, that it was obtained through the knowing use of perjured testimony (*Mooney v. Holohan,* (1935) 294 US 103; *Alcorta v. Texas* (1957) 355 US 28; or suppression of evidence, *People v. Carter* (1957), 48 Cal.2d 737; or when a pardon is based on the defendant's innocence (see *Pen. Code, § 4900*). Under these circumstances, the Court noted that the Judgment is not res judicata in a subsequent action. (See Rest. Judgments, § 11.) *Teitelbaum Furs, Inc. v.*

Dominion Ins. Co. (1962) 58 Cal.2d 601, 607.

A) EFFORTS TO CLAIM PLAINTIFFS LACK STANDING ARE NOT MERITORIOUS

A demand for an accounting when a Union refuses to fulfill its obligations to itemize receipts and expenditures in its federally filed forms, relative to Foreign Royalties/Foreign Levies as well as Residuals, and a demand to see collective bargaining agreements and contracts which pertain to the same is not the type of act that is exercised solely by an individual to further their own personal interests. Congress clearly adopted Section 431 to provide transparency and accountability within labor organizations, for its members. Any effort to state Plaintiffs lack standing is specious, while the filing of a Section 501 Ex Parte Application hereinafter should resolve any issues in these regards, as well as the fact that damages can also be obtained when a labor organization, labor consultants, officers and representatives, breach their fiduciary obligations.

The United States Supreme Court has recently reaffirmed observed in *Knox vs. SEIU,* 567 U. S. __, in yet another agency shop context, a labor union cannot extract a loan from unwilling nonmembers even if the money is later repaid. In the same vein, borrowing against Residuals and Foreign Royalties/Foreign Levies has clearly taken place in light of admissions including in the press of millions of dollars of Unclaimed Residuals and a Foreign Tracker now present on SAG-AFTRA's website. To suggest that the spirit behind the LMRDA and Congressional strengthening of the reporting requirements contemporaneous with SAG claiming it no longer would itemize a substantial portion of its yearly revenue on Schedule 14, is compromised is to put it mildly.

Similarly, at present, a payment of fees to Robert Hadl as an attorney, when he no longer possesses a Bar Card in Washington, D.C., and is now being described on SAG-AFTRA's federal filings as counsel, instead as a Consultant as he has been

for years, strongly suggests a desire to avoid reporting requirements since a labor relations consultant is clearly covered by the LMRDA as well, 29 USC § 401(b), and 402(m). (USAC Req.Jud.Not., Exh.28, LM2 2011 and 2012.) Similarly, payment of 1st Class Airfare as reported by SAG and AFTRA on their 990s appears inappropriate since the labor organization's own members had to forfeit 1st Class Travel in collective bargaining negotiations, with the extent of this practice revealed in greater detail upon reviewing SAG-AFTRA's financial records, including receipts and disbursements. Counsel is mindful that the a member of the Grips Union was permitted by the Ninth Circuit to pursue a §501 action because the Business Representative insisted on having the Union pay for weekly car washes of a vehicle regularly taken to Studios and off-the-lot film productions. *Cowger vs. Rohrbach* (1989) 868 F.2d 1064. $15.00 for a car wash is a far cry from more than $1500 charged to travel to the distant lands of China, Morocco and the Netherlands, where Union officials, executives and/or consultants, have met with foreign collecting societies to ensure that SAG continued to receive the funneling of monies who received at the expense of the performers who were entitled to the performers share of Foreign Royalties/Foreign Levies in the first place.

In light of the entrenched refusal to permit inspection of financial records, Collective Bargaining Agreements and contracts, not only relative to Foreign Royalties/Foreign Levies, but Residuals, and in general, Plaintiffs fear that other inappropriate expenditures if not improvident investments and losses will also be revealed. One need not speculate that the throwing of $100,000.00 plate dinners and publicity about the presence of Union officials at same would also raise eyebrows if paid by Union funds, either directly or indirectly, especially when more than One Hundred Million has been sitting around allegedly in a non-ERISA regulated " trust".

B) THE STATUTUE OF LIMITATIONS DEFENSES TO STATE

COURT CLAIMS ARE NOT MERITORIOUS

Similarly, when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run …until the 'last overt act' pursuant to the conspiracy has been completed. *Wyatt vs. Union Mortgage Co.* (1979), 24 C 3d 773. Herein, the conspiracy commenced shortly after Jay Roth and Robert Hadl appeared before Congress about the need to collect millions of dollars of Foreign Royalties/Foreign Levies on behalf of performers, writers and directors. *Cellular Plus vs. Superior Court* (1993), 14 Cal.App.4th 1224, regarding standing of individuals to assert claims in non-class action setting, and pleading requirements when a conspiracy is alleged.

C) DAMAGES ARE RECOVERABLE FOR LMRDA VIOLATIONS

Although the First Cause of Action is presently premised upon 29 USC § 431, which Defendants claim do not provide for recovery of damages, § 431(c) specifically states that a Plaintiff may recover fees and expenses "in addition to any judgment awarded to plaintiff". See *Kinslow vs. American Postal Workers,* 223 F 3d 269 (7th Cir., 2000), for the magnitude of damages, including punitives, awarded in an LMRDA action premised on the refusal of the Union to permit inspection of financial records, when corruption within the Union was suspected. If this Court does not believe that a Judgment can encompass damages, then § 501 clearly provides for the recovery of damages, with Plaintiffs originally deferring same until access to the financial records, including receipts and disbursements, is made available to Plaintiffs, at which time Plaintiffs can discern whether there have been other financial transgressions warranting further pursuit of §501 relief herein. See *Cowger vs. Rohrbach* (1989) 868 F.2d 1064, where the instant Court's refusal, ironically at the insistence of undersigned counsel, to permit a union member to challenge payment of car wash expenses for the soon deceased head of the Grips Union, IATSE Local 80, without first exhausting internal

remedies, was reversed by the Ninth Circuit, largely because the purpose of the LMRDA is to further union democracy and prevent the misuse of power by union leaders.

D) SUFFICIENT ALLEGATIONS TO SUPPORT PUNITIVE DAMAGES HAVE BEEN ALLEGED

Defendants convert efforts by Plaintiffs to recover punitive damages in the Second and Fourth Claims for Relief to claims sounding in fraud and thus seek to impose greater particularity upon Plaintiffs, while simultaneously seeking to strike paragraphs that provide an ample basis for recovery of punitive damages against the instant labor organization. As to the outrageous nature of the individual Defendants' actions when denying LMRDA-sanctioned access to financial records, see *Kinslow, supra,* 223 F 3d 269 (7th Cir., 2000), which afforded recovery of punitive damages. Likewise California law, together with the treatises cited therein, clearly notes that "behavior may be considered outrageous when a defendant abuses a relation or position which gives him power to damage the plaintiff's interest." *Newby vs. Alto Rivera Apartments,* 60 Cal.App. 3d 288, 297; . The *Restatement 2d Torts, Section 46 comment e,* provides: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. ..." In the same vein that an employer-employee relationship falls within this classical definition, *Alcorn vs. Anbro Engineering, Inc.*, (1970) 2 Cal. 3d 493, 497, footnote 2, so should the relationship between a member and his/her Union.

DATED: September 16, 2013

LAW OFFICES OF HELENA S. WISE

By: /s/HELENA S. WISE
HELENA S. WISE
Attorneys for Plaintiffs USAC

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____ a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____ a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, ____, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT

(other than summons and complaint)

Received copy of document described as _____

on _____, ____.

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county 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: 1907 W. Burbank Boulevard, Suite A , Burbank, California 91506

On September 16, 2013 I served the foregoing document described as PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

_____ on _____

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Robert Bush, Esq.
Ira Gottlieb, Esq.
BUSH GOTTLIEB SINGER LOPEZ
KOHANSKI ADELSTEIN & DICKINSON
500 North Central Avenue, Suite 800
Glendale, California 91203-3345

BY EMAIL 9/16/13
AND BY PERSONAL SERVICE 9/17/13

☐ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at _____, California.

Executed on _____, ____, at _____, California.

☒ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on September 17, 2013, ____, at Burbank, California.

☐ (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.

PATTY VILLASENOR

Type or Print Name

Patty Villasenor

Signature