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15
16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **WESTERN DIVISION**

19
20 FLO & EDDIE, INC., a California
corporation, individually and on behalf
21 of all others similarly situated,

22 Plaintiff,

23 v.

24 SIRIUS XM RADIO INC., a Delaware
corporation; and DOES 1 through 10,

25 Defendants.
26

Case No. CV13-05693 PSG (GJSx)

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: January 30, 2017

Time: 1:30 p.m.

Place: Courtroom 880

1 **TO DEFENDANT SIRIUS XM RADIO, INC. AND ITS ATTORNEYS OF**
2 **RECORD:**

3 **PLEASE TAKE NOTICE** that on January 30, 2017 at 1:30 p.m., or as soon
4 thereafter or beforehand as it may be heard, in Courtroom 880 of the Edward R.
5 Roybal Federal Building and United States Courthouse, 255 East Temple St., Los
6 Angeles, CA, 90012-3332, Plaintiff Flo & Eddie, Inc. (“Flo & Eddie”), by and
7 through Gradstein & Marzano, P.C. and Susman Godfrey L.L.P., respectfully move
8 the Court pursuant to Federal Rule of Civil Procedure 23 for an order (i) granting
9 preliminary approval of the Settlement; (ii) certifying the Settlement Class for the
10 purpose of effectuating the settlement; (iii) appointing Gradstein & Marzano and
11 Susman Godfrey L.L.P. as Settlement Class Counsel and (iv) approving the form
12 and method of notice of the Settlement and directing that Notice be provided to the
13 Class in accordance with the notice plan.

14 This motion is based on this Notice of Motion and Motion for Preliminary
15 Approval of Class Action Settlement, the accompanying memorandum of points and
16 authorities, the Settlement Agreement filed herewith, the declarations of Steven G.
17 Sklaver and Michael Wallace also filed herewith, the pleadings and the papers on
18 file in this action and such other matters as the Court may consider.

19
20 Dated: November 28, 2016

21 By: /s/ Steven G. Sklaver

22 GRADSTEIN & MARZANO, P.C.

23 Henry Gradstein

24 Maryann R. Marzano

25 Daniel B. Lifschitz

26 SUSMAN GODFREY L.L.P.

27 Stephen E. Morrissey

28 Steven G. Sklaver

Kalpana Srinivasan

Rachel S. Black, *Admitted PHV*

Michael Gervais, *Admitted PHV*

Co-Lead Class Counsel

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Applications/Ex Parte Applications/Motions/Petitions/Requests

[2:13-cv-05693-PSG-GJS Flo & Eddie Inc v. Sirius XM Radio Inc et al](#)

(GJSx),DISCOVERY,MANADR,PROTORD,STAYED

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Sklaver, Steven on 11/28/2016 at 6:50 PM PST and filed on 11/28/2016

Case Name: Flo & Eddie Inc v. Sirius XM Radio Inc et al

Case Number: [2:13-cv-05693-PSG-GJS](#)

Filer: Flo & Eddie Inc

Document Number: [666](#)

Docket Text:

NOTICE OF MOTION AND MOTION for Settlement Approval of Preliminary Approval of Class Action Settlement filed by Plaintiff Flo & Eddie Inc. Motion set for hearing on 1/30/2017 at 01:30 PM before Judge Philip S. Gutierrez. (Attachments: # (1) Memorandum ISO Motion for Preliminary Approval of Class Action Settlement, # (2) Declaration of Michael Wallace, # (3) Declaration of Steven Sklaver, # (4) Exhibit 1, # (5) Exhibit 2, # (6) Exhibit 3, # (7) Proposed Order) (Sklaver, Steven)

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2:13-cv-05693-PSG-GJS Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:C:\fakepath\2016-11-28 Flo+Eddie Pl'tfs Notice of Mtn re Class Action.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-0] [b1eca623fd38f4b348137de6bfb53b5adf182a5cfa7f3ee96d53ea38db2939462dfb175ce8bb55f46063e0d8a46e564b5a12530297dcee2d3b779878d637b1d]]

Document description:Memorandum ISO Motion for Preliminary Approval of Class Action Settlement

Original filename:C:\fakepath\2016-11-28 Flo+Eddie Memo ISO Pl'tfs Mtn re Class Action.pdf

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[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-1] [b7c5fead989994b0ca0800737399e25ae053d43942a171441a143620fd915f68b7

ca45bdef7ba2191f0433a6f1390fa5d6ccaafd8af168253adf2dbfda6db73e]]

Document description:Declaration of Michael Wallace

Original filename:C:\fakepath\2016-11-28 Flo+Eddie Decl of M. Wallace ISO Pl'tfs Mtn re Class Action.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-2] [80bda81e7e1e6d63a54025ba41f0412d32f29db556bfaa0db1635c8b4df32c3f9b7bbc60888c36207eb7bc3fb5b96bfa726e316a2d59821882f32cf0f8518c5c]]

Document description:Declaration of Steven Sklaver

Original filename:C:\fakepath\2016-11-28 Flo+Eddie Decl of S. Sklaver ISO Pl'tfs Mtn re Class Action.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-3] [8f2c3b0893f425837727d27de57fcaa98588cc1d24f8a8e0a4d5c19634a84ffc380152f6687734fa76ad338edee29ae02cff93b5e3d2c7a3bc35b43db6403497]]

Document description:Exhibit 1

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[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-4] [53399c12ed8d4a2a2a27db8499f82c808fc3e239bc674929667e78c76ccd1999366d2356ed3ab76c141c6ec1e348f6018c7f5dcfad211cfcbb9a4e47ad57d2]]

Document description:Exhibit 2

Original filename:C:\fakepath\2016-11-28 Flo+Eddie Ex 2 to Decl of S. Sklaver ISO Pl'tfs Mtn re Class Action.pdf

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Document description:Exhibit 3

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Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-6] [7fd8c5eb44bd82304aeb9174de860cc2eda164073a29d9550b0c880f6cc77a341a56e3aff71afd518dfdb1662df9bdaceedd9ccbefc067a43dc462706749f04c]]

Document description:Proposed Order

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[STAMP cacdStamp_ID=1020290914 [Date=11/28/2016] [FileNumber=22598732-7] [5cdbacc9e951d84207a79ca11e088ed4d5f4b540a00eab2df06e2fc57b86aa04ceb942c660a45272d31fc68e14094483f118b9a6180a3ab9655b63f69d7d2313]]

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15 *Co-Lead Class Counsel*

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20 FLO & EDDIE, INC., a California
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23 v.

24 SIRIUS XM RADIO INC., a Delaware
corporation; and DOES 1 through 10,

25 Defendants.

Case No. CV13-05693 PSG (GJSx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: January 30, 2017

Time: 1:30 p.m.

Place: Courtroom 880

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VII. CONCLUSION 25

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1 **I. INTRODUCTION**

2 After three years of hard-fought litigation, Plaintiff Flo & Eddie, Inc.
3 (“Plaintiff” or “Flo & Eddie”), on behalf of itself and the class of owners of Pre-
4 1972 Sound Recordings proposed to be certified for purposes of settlement
5 (collectively, “Plaintiffs”), and Defendant Sirius XM Radio Inc. (“Sirius XM”)
6 have reached a settlement of this action, subject to Court approval, as set forth in
7 the parties’ Stipulated Class Action Settlement (the “Stipulation” or “Settlement”).¹
8 The Stipulation, attached to the supporting Declaration of Steven G. Sklaver as
9 Exhibit 1 (“Stip.”), provides a potential *\$99 million cash benefit* to the prospective
10 Settlement Class.² For past relief, Sirius XM has agreed to pay up to \$40 million.
11 Of that amount, the Class is guaranteed \$25 million upon final approval and will
12 receive an additional \$5 million—up to an additional \$15 million payment—for
13 each appeal in which Flo & Eddie prevails on the performance rights issue in
14 California, New York, and Florida. On a per-play basis, the minimum \$25 million
15 settlement represents approximately an award of *\$15.68 per play*; the \$40 million
16 settlement represents approximately *\$25 per play*. Wallace Decl. at ¶21. None of
17 these funds revert back to Sirius XM. By any measure, that compensation by itself
18 is an excellent result.

19 The Settlement also provides for a ten-year license through January 1, 2028
20 in exchange for cash royalty payments by Sirius XM at up to a 5.5% royalty rate
21 for each Settlement Class Member’s pro rata share of Sirius XM’s defined Gross
22 Revenue. The royalty rate of 5.5% is the *highest* royalty rate negotiated by any of
23 the independent record labels who chose to settle directly with Sirius XM after
24 class certification rather than await the resolution of this case. Wallace Decl. at ¶20.

25

26

27 ¹ All capitalized terms used herein are as defined in the Stipulation.

28 ² See Stip.; Declaration of Plaintiffs’ Damages Expert Michael Wallace (“Wallace Decl.”) ¶¶ 15-21.

1 Moreover, only one of those direct licenses expressly provided compensation for
2 past use of Pre-1972 Sound Recordings (for the year 2015). *Id.*

3 At the final approval hearing, the Court will have before it more extensive
4 submissions in support of Settlement and will be asked to make a determination as
5 to whether the Settlement is fair, reasonable, and adequate in light of all the
6 relevant factors, including the fact that Plaintiffs' expert estimates that the 5.5%
7 future license could generate between approximately \$45.47 million (assuming that
8 Sirius XM has no annual revenue growth) to over \$59.21 million (assuming
9 continued annual revenue growth) in additional cash payments to the Class over the
10 next 10 years. (Wallace Decl. at ¶¶15-16.) This portion of the Settlement represents
11 a substantial benefit for the Class, and generates monetary relief that could not be
12 obtained even if Plaintiffs were victorious at trial.

13 On preliminary approval, the question is whether the Settlement's
14 substantive terms fall within the range of "possible" approval, such that notice
15 should be sent to the Class and a full fairness hearing should be held. The
16 substantial recovery obtained for the Class in light of the risks of continued
17 litigation—namely the range of potential damages, competing damage models, and
18 adverse rulings on appeal on both the merits and on decertification in this and other
19 jurisdictions—easily meets that test. Of course, the Court is very familiar with the
20 issues raised in this litigation and the claims and defenses of the Parties. The
21 Settlement culminated less than 48 hours before the jury trial was set to commence
22 and after all pretrial filings were complete and after more than three years of hotly
23 contested litigation, and it resulted from an extensive, arm's-length negotiation
24 between the parties. Accordingly, Flo & Eddie respectfully requests that the Court
25 preliminarily approve the terms of the Settlement so that Class members can
26 receive notice of the Settlement and the final approval hearing.

27 **II. BACKGROUND**

28 Flo & Eddie filed its Complaint in this action on August 1, 2013 in state

1 court. Sirius XM removed the case to this Court on August 6, 2013. Dkt 1. Sirius
2 XM then filed a Motion to Transfer Venue, Dkt. 30, and a Motion to Stay
3 Proceedings, Dkt. 32. The Court denied both motions. Dkts. 42-43. Sirius XM also
4 filed a Motion to Strike Class Allegations, which the Court denied. Dkt. 47, 56. The
5 Court bifurcated discovery into liability and damages phases. Dkt. 58. After
6 conducting liability discovery, Plaintiffs moved for summary judgment on liability
7 as to all of their claims, and substantial briefing followed. Dkt. 65, 86, 97, 106, 111.
8 The Court heard oral argument on September 15, 2014. On September 22, 2014,
9 the Court granted summary judgment against Sirius XM on liability based on the
10 performance right issue, but not the reproduction issue. Dkt. 117.

11 On October 15, 2014, Sirius XM moved to certify the Court's summary
12 judgment order for interlocutory appeal and requested a stay, which Plaintiff
13 opposed. Dkt. 123, 143, 149. The Court denied Sirius XM's request for
14 interlocutory appeal on November 20, 2014. Dkt. 159. Sirius XM also filed a
15 motion for reconsideration of the Court's summary judgment order on November
16 17, 2014. Dkt. 154, 162 (opposition), 165 (reply). The Court denied Sirius XM's
17 motion on February 19, 2015. Dkt. 175.

18 On March 16, 2015, after conducting additional extensive discovery, Plaintiff
19 filed its motion for class certification. Dkt. 180. Plaintiff moved the Court under
20 Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure for an order certifying
21 the Action as a class action on behalf of:

22 The owners of sound recordings fixed prior to February 15, 1972 ...
23 which have been reproduced, performed, distributed, or otherwise
24 exploited by Defendant Sirius XM in California without a license or
25 authorization to do so during the period from August []1, 2009 to the
26 present.

27 Dkt. 180 at 2. *See also* Dkt. 193 (opposition), 200 (reply), and the Court held a
28 hearing on May 22, 2015, Dkt. 224. The Court entered an order certifying the class

1 on May 27, 2015. Dkt. 225.

2 Shortly thereafter, on June 2, 2015, Sirius XM filed an *Ex Parte* Application
3 for Stay Pending Rule 23(f) Petition or, Alternatively, to Modify Scheduling Order,
4 Dkt. 228, requesting the Court stay the case pending resolution of Sirius XM's
5 petition to the Ninth Circuit for permission to appeal the Court's order granting
6 Plaintiff's motion for class certification. Dkt. 228, 230 (opposition), 232 (reply).
7 The Court heard oral argument on June 8, 2015, Dkt. 236, and that same day
8 entered an order granting the motion. Dkt. 237. Sirius XM filed its Rule 23(f)
9 petition to the Ninth Circuit on June 10, 2015, which Plaintiffs opposed. On August
10 10, 2015, the Ninth Circuit denied the petition. On August 24, 2015, Sirius XM
11 filed a petition for rehearing or reconsideration *en banc*, which the Ninth Circuit
12 denied on November 10, 2015. On November 25, 2015, Sirius XM filed a Motion
13 to Continue Stay Pending Resolution of Related Appeal. Dkt. 264, Dkt. 269
14 (opposition), Dkt. 270 (reply). The Court denied Sirius XM's motion. Dkt. 271.

15 Thereafter, the Court entered an order permitting Plaintiffs to conduct limited
16 damages-related discovery on Sirius XM and Sirius XM to conduct absent class
17 member discovery. Dkt. 272. The parties conducted such discovery, which
18 involved numerous in-person meet and confer sessions as well as motion practice.
19 Sirius XM served subpoenas on absent class members across the country and took
20 19 depositions, with absent class members collectively producing thousands of
21 pages of documents.

22 On April 27, 2016, Plaintiffs filed a Motion for an Order Approving the
23 Form and Manner of Class Notice. Dkt. 294, 311 (opposition), 313 (reply), which
24 the Court granted on June 16, 2016, Dkt. 317. Sirius XM filed a petition for writ of
25 mandamus with the Ninth Circuit, which was denied.

26 On July 6, 2016, Sirius XM filed a motion for partial summary judgment,
27 seeking judgment against Plaintiffs' claims for punitive damages, disgorgement,
28 and common law unfair competition. Dkt. 335. On September 8, 2016, the Court

1 granted Sirius XM's motion in part, granting Sirius XM judgment as a matter of
2 law on Plaintiffs' punitive damages and common law unfair competition claim.
3 Dkt. 411. On July 29, 2016, Sirius XM filed a Motion for Decertification. Dkt.
4 345, 396 (opposition), 424 (reply). The Court denied Sirius XM's motion on
5 September 20, 2016. Dkt. 432.

6 The parties briefed a total of 18 motions *in limine*, designated deposition
7 testimony from 23 witnesses, prepared competing jury instructions, Dkts. 592-593,
8 and designated and conferred regarding the admissibility of the parties' hundreds of
9 exhibits comprised of thousands of pages. The Court held pretrial conferences on
10 November 7, 2016 and November 10, 2016. Dkts. 639, 661. A jury trial was
11 scheduled to begin on November 15, 2016.

12 Leading up to trial and prior to agreeing to the Settlement, Plaintiffs, through
13 Class Counsel, conducted a thorough investigation of the facts and law relating to
14 the matters alleged in the Complaint, including, among other things, (i) reviewing
15 and analyzing the evidence and applicable law, including the review and analysis of
16 thousands of pages of documents produced by Sirius XM and third parties; (ii)
17 consulting with experts retained by Class Counsel; (iii) taking and defending
18 numerous depositions of fact and expert witnesses; (iv) engaging in extensive
19 motion practice, including motions to compel, class certification, summary
20 judgment, motions *in limine*; and (vi) the preparing exhibit lists, jury instructions,
21 and related pretrial conference filings. Less than two days before the jury trial was
22 to begin, and after extensive arm's-length negotiations, the Parties entered into the
23 Settlement Agreement.

24 Sirius XM has denied and continues to deny each and all of the claims and
25 contentions alleged by Plaintiffs. Sirius XM has expressly denied and continues to
26 deny all charges of wrongdoing or liability arising out of any of the conduct,
27 statements, acts or omissions alleged, or that could have been alleged, in this action
28 and explicitly denies that it has committed the alleged infringement, violations of

1 law or breaches of duty to Plaintiffs, the Settlement Class, or anyone else.

2 Plaintiffs and Class Counsel believe that the claims as to liability asserted
3 and damages sought have merit and that the evidence developed to date supports
4 the claims asserted. However, based upon their extensive discovery, investigation,
5 and evaluation of facts and the law concerning the matters alleged, Plaintiffs and
6 Class Counsel agreed to settle the Action pursuant to the provisions of the
7 Settlement after considering, among other things: (1) the fairness, reasonableness,
8 and adequacy of the Settlement; (2) the substantial risks and uncertainty of
9 protracted litigation as to damages in this case and appeals as to all issues,
10 especially in complex actions such as this, as well as the difficulties and delays
11 inherent in such litigation; and (3) the desirability of promptly providing relief to
12 Plaintiff and the Settlement Class Members.

13 **III. TERMS OF THE SETTLEMENT**

14 The Stipulation and the exhibits thereto provide all of the material details of
15 the Settlement terms. Class representatives Flo & Eddie approved the terms of the
16 Settlement, and Class Counsel deems such settlement to be fair, reasonable, and
17 adequate to, and in the best interests of the members of the Class.

18 **A. The Settlement Class**

19 The Settlement Class is defined as follows:

20 All owners of Pre-1972 Sound Recordings, wherever situated, which
21 have been performed, reproduced, distributed, or otherwise exploited
22 by Sirius XM in the United States from August 1, 2009 through
23 November 14, 2016, other than the Major Record Labels, the Direct
24 Licensors and all persons and entities that submit a timely, valid and
25 properly completed written request to be excluded from the Settlement
26 Class in accordance with Section VI [of the Stipulation].

27

28

1 Stip. at 8 ¶ 1.A.42.³ Excluded from the Settlement Class are: (1) all federal court
2 judges who have presided over this case and any members of their immediate
3 families; (2) Direct Licensors; (3) Major Record Labels; and (4) Sirius XM’s
4 employees, officers, directors, agents, and representatives, and their immediate
5 family members. Stip. at Ex. 1 (Notice), p. 2 ¶ 4.

6 The Certified Class differs only slightly from the Settlement Class, in that the
7 Certified Class was limited to Pre-1972 Recordings that Sirius XM exploited in
8 California, whereas the Settlement Class broadens the territory to the United States.
9 Importantly, all members of the Settlement Class are members of the Certified
10 Class because Sirius XM broadcasts the recordings nation-wide. In other words, the
11 change from California to the United States does not alter who is eligible to
12 participate in the Settlement Class (other than the stated exclusions from the
13 Settlement Class); nor does it alter the Pre-1972 Sound Recordings at issue.

14 **B. The Right to Appeal**

15 In exchange for a contingent payment of an additional \$5 million to the
16 Settlement Class and a 2% increase in the royalty rate otherwise owed, the
17 Settlement provides that Sirius XM preserves its right to appeal the Court’s final
18 judgment of liability on the performance right issue and Commerce Clause issue in
19 this Action, but Sirius XM has also agreed that it will not appeal the Court’s class
20 certification rulings.

21 For similar, potential additional financial benefits to the Settlement Class (\$5
22 million per appeal, and a 2% royalty payment at issue for New York and 1.5%
23 royalty payment at issue in Florida), the parties also preserve their respective rights
24 to proceed with the appeal of two related actions, the New York Action and the
25

26 _____
27 ³ “Pre-1972 Sound Recording” is “a sound recording that was initially fixed prior to
28 February 15, 1972 (without regard to whether that sound recording was
subsequently re-released, re-issued, or re-mastered).” Stip. at 6 ¶ I.A. 32.

1 Florida Action.⁴ The New York Action was appealed to the United States Court of
2 Appeals for the Second Circuit and certified to the New York Court of Appeals on
3 April 13, 2016, Appeal No. CTQ-2016-0001 (“New York Appeal”) on the
4 underlying question of whether Sirius XM is entitled to publicly perform Pre-1972
5 Sound Recordings owned by Plaintiff without having to obtain permission from
6 and pay compensation to Plaintiff (the “Performance Right Issue”) under New
7 York law. Stip. at 5-6 ¶ I.A.26. Oral argument was heard before the New York
8 Court of Appeals on October 18, 2016 and a ruling is expected shortly. The Florida
9 Action was appealed to the Eleventh Circuit and certified to the Florida Supreme
10 Court on June 29, 2016, Appeal No. SC16-1161 (“Florida Appeal”). Stip. at 3-4 ¶
11 I.A.20. The Initial Brief and Answer Brief have been filed, and the Reply Brief is
12 due January 23, 2017.

13 **C. Settlement Benefits**

14 The Settlement, if approved by the Court, will establish a guaranteed cash
15 settlement fund of \$25 million for past Performances through December 31, 2017.
16 Stip. at 15-16 ¶ IV.A.1. The Settlement will also establish a cash settlement fund of
17 up to an additional \$15 million for past Performances, contingent on appellate
18 outcomes:

19

20

⁴ The Stipulation defines the Florida Action as:

21

22 the putative class action captioned *Flo & Eddie Inc. v. Sirius XM*
23 *Radio Inc.*, filed on September 3, 2013 in the United States District
24 Court for the Southern District of Florida (the “Florida Court”), Case
25 No. 13-CV-21382.

26

27 Stip. at 3 ¶ I.A.19. The Stipulation defines the New York Action as:

28

29 the putative class action captioned *Flo & Eddie Inc. v. Sirius XM*
30 *Radio Inc.*, filed on August 16, 2013 in the United States District
31 Court for the Southern District of New York (the “New York Court”),
32 case No. 13-CV-5784 (CM).

33

34 Stip. at 5 ¶ I.A. 25.

- 1 • If Plaintiff prevails on appeal of the Performance Right Issue in the New
2 York Action in the New York Court of Appeals, Sirius XM will pay an
3 additional \$5 million into the Settlement Fund. Stip. at 19 ¶ IV.B.1.
- 4 • If Plaintiff prevails on appeal of the Performance Right Issue in the
5 Florida Action in the Florida Supreme Court, Sirius XM will pay into the
6 Settlement Fund an additional \$5 million. Stip. at 19 ¶ IV.B.3.
- 7 • If Plaintiff prevails on appeal of the Performance Right Issue in this
8 Action, Sirius XM will pay into the Settlement Fund an additional \$5
9 million. Stip. at 19 ¶ IV.B.5.

10 The Settlement Payment, together with all interest accruing thereon, the
11 potential amounts of up to \$15 million in additional bonus payments (contingent on
12 appellate outcomes as described above) and all interest accruing thereon, are
13 collectively referred to as the “Settlement Fund.” There will be no reversion to
14 Sirius XM of the Settlement Fund.

15 The parties estimate that the Settlement Class accounts for 15% of the
16 11,808,927 million historical plays of pre-1972 recordings by Sirius XM from
17 August 2009 through October 2016 (1,771,339 historical plays). Stip. at 17-18 ¶
18 IV.A.6-7. By way of comparison, the \$210 million payment to the Major Record
19 Labels for purportedly 80% of the plays of Pre-1972 Sound Recordings through
20 2017, represents a payment of \$2,625,000 for each 1% of the Pre-1972 plays (\$210
21 million / 80). Wallace Decl. at ¶¶ 17-19. Applying this amount to the 15% of such
22 plays estimated to be owned or controlled by the Settlement Class generates an
23 amount of \$39,375,000 (= \$2,625,000 x 15). *Id.* Thus, the potential \$40 million
24 cash settlement provided for in the Settlement is on par with the Major Label
25 Settlement, just considering the past damage component.

26 Additionally, members of the Settlement Class will also license to Sirius XM
27 the right to publicly perform, reproduce, distribute, or otherwise exploit their Pre-
28 1972 Sound Recordings for a ten-year period from January 1, 2018 through January

1 1, 2028, and will be eligible to receive monthly royalty payments during that time
2 period at a royalty rate as high as 5.5%, depending on certain appellate outcomes:

- 3 • In the event Sirius XM prevails on the Performance Right Issue in the
4 New York Court of Appeals, the prospective royalty rate is reduced by
5 2%.
- 6 • In the event Sirius XM prevails on the Performance Right Issue in the
7 Florida Supreme Court, the prospective royalty rate is reduced by 1.5%.
- 8 • In the event Sirius XM prevails on the Performance Right Issue in an
9 appeal of this Action, the prospective royalty rate is reduced by 2%.
- 10 • If Sirius XM prevails regarding its appeal in the U.S. Courts of Appeal for
11 the Second, Ninth, or Eleventh Circuits, or in the United States Supreme
12 Court based on the question of whether it would violate the Commerce
13 Clause of the United States Constitution to apply a state-law right to
14 control and/or demand compensation for the public performance of Pre-
15 1972 Sound Recordings, Sirius XM will not be required to make any
16 prospective royalty payments, but the Settlement Class will keep all
17 royalties previously paid.

18 Stip. at 19 ¶ IV.B.

19 Sirius XM's payment of royalties pursuant to Part IV.C.2-9 of the Stipulation
20 is referred to as the "Royalty Program." Stip. at 7 ¶ I.A.36. The 5.5% future license
21 has significant value with estimated potential future royalties between \$45.47
22 million (assuming no revenue growth) and \$59.21 million (assuming continued
23 annual revenue growth) in royalties over the next 10 years based on the assumption
24 that 15% of Sirius XM's future plays are of Pre-72 Sound Recordings owned by the
25 Settlement Class. Wallace Decl. ¶¶15-16. Again, by way of comparison, the royalty
26 rate of 5.5% is the *highest* royalty rate negotiated by any of the record labels who
27 chose to settle directly with Sirius XM after class certification rather than await the
28 resolution of this case. Wallace Decl. at ¶20. Moreover, only one of those direct

1 licenses expressly provided compensation for past use of Pre-1972 Sound
2 Recordings (for the year 2015). *Id.*

3 Sirius XM also has agreed to pay for the reasonable costs of administering
4 the Settlement Fund and the Notice, up to an additional \$500,000. Stip. at 29 ¶ VII.

5 **D. Settlement Fund Distribution Plan**

6 To qualify for a payment from the Settlement Fund, a Settlement Class
7 Member must timely and validly submit a completed Proof of Claim. The Proof of
8 Claim will require each Settlement Class Member to (1) identify each Pre-1972
9 Sound Recording owned by providing the (i) title, (ii) artist, and (iii) album and/or
10 label; and (2) represent and warrant that it owns all right, title, and interest in such
11 recording(s). The Proof of Claim will be distributed to the Class via first class mail.
12 Any Class Member may also obtain a Proof of Claim on the Internet at the website
13 maintained by the Claims Administrator: www.pre1972soundrecordings.com.

14 Any disputes concerning ownership or control that cannot be resolved will be
15 referred to a magistrate judge appointed by the Court pursuant to Fed. R. Civ. P. 53.
16 Stip. at 9 ¶ 47. The Special Master will resolve disputes regarding the ownership
17 and/or control of Pre-1972 Sound Recordings between, amongst, or involving
18 Settlement Class Members who submit a timely, valid, and properly completed
19 claim for payment from the Settlement Fund. *Id.* All decisions by the Special
20 Master concerning ownership or control may be appealed to the Court. *Id.* at 28 ¶
21 VI.C.

22 All members of the Settlement Class who have established their entitlement
23 to participate in the Settlement will be entitled to a pro rata share of the Settlement
24 Payment based on the number of historical plays of the Settlement Class Members'
25 Pre-1972 Sound Recordings.

26 **E. Royalty Program Distribution Plan**

27 To qualify for a payment from the Royalty Program, a Settlement Class
28 Member must be a Bona Fide Claimant as defined in the Stipulation. Stip. at 1 ¶

1 I.A.3. A Bona Fide Claimant must properly submit an uncontested claim to specific
2 Pre-1972 Sound Recording(s) it claims to own or control by identifying each Pre-
3 1972 Sound Recording owned by providing the (i) title, (ii) artist, (iii) album, (iv)
4 label, (v) ISRC (if known), and (vi) date first fixed, in each case for each applicable
5 Pre-1972 Sound Recording owned. *Id.* at 5 ¶ I.A.23. A Bona Fide Claimant must
6 represent and warrant that it owns all right, title, and interest in such recording(s).
7 *Id.* at 1 ¶ I.A.3. Such a claim will be considered uncontested so long as no other
8 person or entity claims to own or control the same specific Identified Pre-1972
9 Sound Recording(s). *Id.* Because the royalty program begins in January 2018,
10 depending on the timing of final approval, the parties will have substantial time to
11 set-up administration and implementation details of the program.

12 Any disputes concerning ownership or control for the Royalty Program will
13 be referred to the Special Master, in the same manner and procedure as the
14 Settlement Fund. To the extent that Sirius XM has a reasonable, good faith basis to
15 believe that a claimant does not own or control an Identified Pre-1972 Sound
16 Recording(s) (on grounds other than a claimed public domain status of the
17 Recording(s)), it may contest the claim to the Special Master, bearing all of its own
18 attorneys' fees and costs. *Id.* at 1 ¶ I.A.3. All decisions by the Special Master
19 concerning ownership or control may be appealed to the Court. *Id.* at 28 ¶ VI.C.

20 Claim forms for participating in the Royalty Program will be distributed to
21 the Class via first class mail. Any Class Member may also obtain a Royalty
22 Program claim form on the Internet at the website maintained by the Claims
23 Administrator: www.pre1972soundrecordings.com. The Claims Administrator will
24 also maintain a toll-free number that Class Members can use to ask questions.

25 Sirius XM will account for the "Pro Rata Share" of royalties allocable to its
26 use of Identified Pre-1972 Sound Recordings owned by Bona Fide Claimants,
27 calculated as follows:

28 for any particular sound recording and for any applicable accounting

1 period, a fraction of which the numerator is the total number of
2 Performances of that particular Pre-1972 Sound Recordings in that
3 accounting period on the Reference Channels, and the denominator of
4 which is the total number of Performances of all sound recordings
5 broadcast by Sirius XM in that accounting period on the Reference
6 Channels.

7 *Id.* at 7 ¶ I.A.34.

8 The Royalty Program will be administered by the “Royalty Administrator”—
9 an independent company to be mutually agreed upon by the parties, or absent
10 agreement by the Parties, selected by the Court. *Id.* at 7 ¶ I.A.35. The parties have
11 narrowed the selection of the Royalty Administrator to two highly-respected and
12 experienced candidates, Royalty Review Council and Music Reports, are
13 considering their respective proposals, and are working diligently to reach
14 agreement as to the selection of the Royalty Administrator. The Royalty
15 Administrator shall develop and maintain a Royalty Claims Website, calculate,
16 prepare, and distribute royalty statements based on the usage information provided
17 by Sirius XM, and distribute payments to Bona Fide Claimants and any applicable
18 Court-approved fees to Class Counsel from the Royalty Program. The Royalty
19 Administrator has audit rights to examine the books and records of Sirius XM to
20 verify the accuracy of royalty accountings, with any disputes to be resolved by the
21 Court.

22 **F. License and Covenant Not To Sue**

23 Upon final approval, the Settlement Class will license and grant to Sirius XM
24 through January 1, 2028, in the United States, its territories, possessions,
25 commonwealths, and military bases, the right, through to the listener, to broadcast
26 and publicly perform by means of digital audio transmission and to make
27 reproductions, distributions, and other exploitations necessary or incident thereto,
28 any of all of the Pre-1972 Sound Recordings owned or controlled by the Settlement

1 Class in connection with Sirius XM's satellite digital audio radio service, Sirius
2 XM's Internet Service, Sirius XM's multi-channel video programming distributors
3 service, or Sirius XM's commercial business establishment service, including any
4 such service offered by agents or representatives on behalf of Sirius XM. Any sale,
5 assignment, transfer, or other disposition of a Pre-1972 Sound Recordings owned
6 or controlled by the Settlement Class shall be subject to such license. Upon final
7 approval, Plaintiff and each and every other Settlement Class Member covenant not
8 to sue and will be barred through January 1, 2028, from pursuing their own lawsuits
9 based on Sirius XM's performance, distribution, reproduction, or other exploitation
10 of their Pre-1972 Sound Recordings in the United States, with the exception of
11 pursuing the appeals related to the millions in additional cash payments provided
12 for in the Settlement.

13 **G. Costs and Fees**

14 The Settlement provides that Sirius XM will pay up to \$500,000 in notice
15 and administration costs of the Settlement, and that a portion of the Settlement
16 amount may be used to pay for any additional notice and administration costs. The
17 Settlement provides that Class Counsel may request incentive awards of up to
18 \$25,000 each for the two principals of Plaintiff Flo & Eddie, Inc. to be paid from
19 the Settlement Fund for their services as representatives on behalf of the Class.
20 The Settlement also provides that Class Counsel may seek reimbursement of
21 expenses and an award of up to one-third of the total cash benefits conferred by the
22 Settlement from the Settlement Fund and Royalty Program. Class Counsel will file
23 a motion seeking reimbursement of their costs, counsel fees, and incentive awards,
24 which will be scheduled to be heard at the same time as the final approval hearing.
25 Class members will be given an opportunity to object to that application prior to the
26 final approval hearing. No such costs, fees, or awards will be distributed without a
27 Court order.

28

1 **IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS**
2 **WARRANTED**

3 There are three steps to be taken by the Court in considering approval of a
4 tentative class action settlement: (i) the Court must preliminary approve the
5 proposed Settlement; (ii) members of the Class must be given notice of it; and (iii)
6 a final hearing must be held, after which, the Court must decide whether the
7 tentative settlement is fair, reasonable, and adequate. *See* MANUAL FOR COMPLEX
8 LITIGATION (FOURTH) § 21.632, at 320-21 (4th ed. 2004) (“MANUAL”).
9 “Preliminary approval is thus the first stage of the settlement process, and the
10 court’s primary objective at that point is to establish whether to direct notice of the
11 proposed settlement to the class, invite the class’s reaction, and schedule a final
12 fairness hearing.” NEWBERG ON CLASS ACTIONS § 13:10 (5th ed.).

13 Plaintiff and Class Counsel request that this Court preliminarily approve the
14 Settlement Agreement not only because public policy favors the settlement of
15 complex class actions such as this one, but also, as demonstrated herein, because
16 the Settlement has achieved excellent results for the Settlement Class. Plaintiffs and
17 Class Counsel respectfully submit that the proposed settlement is fair, reasonable,
18 and adequate and warrants preliminary approval by this Court.

19 **A. Legal Standard for Preliminary Approval of Settlement**

20 Federal Rule of Civil Procedure 23(e) requires judicial approval for any
21 compromise or settlement of class action claims. Approval of a proposed class-
22 action settlement is a matter within the sound discretion of the district court. *See,*
23 *e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Create-*
24 *A-Card, Inc. v. Intuit, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *7 (N.D. Cal. Sept. 22,
25 2009) (addressing final approval). This discretion should be exercised in the
26 context of a public policy which strongly favors the pretrial settlement of class
27 action lawsuits. *City of Seattle*, 955 F.2d at 1276; *see also Van Bronkhorst v. Safeco*
28 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (stating that “there is an overriding public

1 interest in settling and quieting litigation,” and this “is particularly true in class
2 action suits”).

3 “At the preliminary approval stage, the court ‘evaluates the terms of the
4 settlement to determine whether they are within a range of possible judicial
5 approval.’” *Friedman v. Guthy-Renker, LLC*, Case No. CV 14-06009- ODW, 2016
6 WL 6407362, at *6 (C.D. Cal. Oct. 28, 2016) (quoting *Spann v. J.C. Penney Corp.*,
7 314 F.R.D. 312, 319 (C.D. Cal. 2016)). Preliminary approval does not require the
8 Court to answer the ultimate question of whether a tentative settlement is fair,
9 reasonable and adequate. That decision is instead made only at the final-approval
10 stage, after notice of the Settlement has been given to the Class Members and they
11 have had an opportunity to voice their views. *See* 5 JAMES WM. MOORE, MOORE’S
12 FEDERAL PRACTICE § 23.83(1), at 23-336.2 to 23-339 (3d ed. 2002). Preliminary
13 approval is merely the prerequisite to giving notice so that members of a class have
14 “a full and fair opportunity to consider the proposed [settlement] and develop a
15 response.” *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

16 “Preliminary approval is appropriate if the proposed settlement appears to be
17 the product of serious, informed, non-collusive negotiations, has no obvious
18 deficiencies, does not improperly grant preferential treatment to class
19 representatives or segments of the class, and falls within the range of possible
20 approval.” *Downey Surgical Clinic, Inc. v. Ingenix, Inc.*, Case No. CV 09-5457
21 PSG, 2015 WL 12645755, at *6 (C.D. Cal. Nov. 10, 2015) (internal quotation
22 marks deleted). Courts have consistently noted that the standard for preliminary
23 approval is *less rigorous* than the analysis at final approval. Courts employ a
24 “threshold of plausibility” standard intended to identify obvious deficiencies. *See*,
25 *e.g.*, *Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 47515, at *16 (N.D. Cal. June
26 19, 2007).

27 Unless the Court’s initial examination “discloses[s] grounds to doubt its
28 fairness or other obvious deficiencies,” the Court should order that notice of a

1 formal fairness hearing be given to settlement class members under Rule 23(e). *See*
2 MANUAL, § 21.633 at 321-22.

3 **B. The Proposed Settlement Is Within the Range of Possible**
4 **Approval**

5 To determine whether a settlement is fair, adequate, and reasonable, “a
6 district court must [ultimately] consider a number of factors, including: the strength
7 of plaintiffs’ case; the risk, expense, complexity, and likely duration of further
8 litigation; the risk of maintaining class action status throughout the trial; the amount
9 offered in settlement; the extent of discovery completed, and the stage of the
10 proceedings; the experience and views of counsel; the presence of a governmental
11 participant; and the reaction of the class members to the proposed settlement.”
12 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and
13 quotation marks omitted); *see In re Heritage Bond Litigation*, 546 F.3d 667, 674
14 (9th Cir. 2008); *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC, 2014
15 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014).

16 Plaintiff and Class Counsel respectfully submit that the proposed Settlement
17 plainly meets all of these standards.

18 **1. The strength of plaintiffs’ case and the amount offered in**
19 **settlement.**

20 The proposed Settlement provides substantial economic benefits to the Class.
21 Given the inherent risks associated with class certification, the liability issues found
22 by the Court as a matter of law which could be overturned on appeal, and any trial,
23 let alone an intensely disputed trial on the scope of damages which could produce
24 highly variable results from a jury, the monetary payments provided for in the
25 Settlement potentially exceeds the relief the Class could receive in a successful
26 trial.

1 **2. The risk, expense, complexity, and likely duration of further**
2 **litigation.**

3 The risk, expense, complexity, and likely duration of further litigation are
4 very significant. This second factor also weighs heavily in favor of preliminary
5 (and, ultimately, final) approval of the Settlement.

6 At trial, Sirius XM planned to offer testimony that Plaintiff's damages must
7 be measured by the alleged detriment, if any, caused by Sirius XM. *See, e.g.*, Dkt.
8 521 at 1. Sirius XM intended to present evidence demonstrating that Plaintiff
9 cannot show that it lost any sales due to Sirius XM's use of its property, that Sirius
10 XM did not prevent Plaintiff from granting other non-exclusive licenses, and that
11 Sirius XM's use of Plaintiff's recordings enhanced Plaintiff's ability to profit from
12 their recordings. *Id.* at 8-9. Sirius XM planned to offer expert testimony that the
13 appropriate measure of damages was a reasonable royalty rate, less any deduction
14 for Plaintiff's failure to mitigate damages. Dkt. 644 at 2. Sirius XM's expert
15 calculated the royalty to be vastly lower (*i.e.*, tens of millions of dollars lower) than
16 Plaintiff's damages model. At trial, jurors would have been left to choose between
17 two immensely differing and competing damages models: Plaintiff's model based
18 on Sirius XM's gross revenues and Sirius XM's model based on a royalty
19 calculated against a greatly reduced revenue base. If this matter went to a damages
20 verdict, a lengthy appeal period would certainly result. The proposed Settlement
21 guarantees a substantial recovery for the Class now while obviating the need for an
22 uncertain trial and appeal. *See Create-A-Card, Inc. v. Intuit, Inc.*, 2009 U.S. Dist.
23 LEXIS 93989, at *13 (N.D. Cal. Sept. 22, 2009).

24 **3. The risk of maintaining class action status throughout the trial.**

25 Sirius XM previously indicated its intention to move to decertify the Class
26 yet again. *See* Dkt. 594. Plaintiff believes it would be successful in maintaining
27 class action status through the trial and into an appeal, but there is a risk that Sirius
28 XM would prove successful in attacking class certification, either during or after

1 trial or on appeal. Pursuant to this Settlement, Sirius XM will not appeal the issue
2 of certification.

3 **4. The extent of discovery completed and the stage of proceedings**

4 This matter has been intensely litigated. This Settlement was reached after
5 the end of the discovery period, on the eve of trial. Dozens of depositions have
6 been taken of Plaintiffs, Defendant, numerous third parties and absent class
7 members, and the parties' respective experts. Sirius XM and third parties have
8 produced thousands of pages of documents. The parties both designated damages
9 experts, each of whom produced two reports and were deposed twice, including on
10 the brink of trial. Numerous motions were filed with the Court, including discovery
11 motions; a class certification motion; two summary judgment motions; a motion to
12 decertify the class; and multiple motions *in limine*. Both parties filed memoranda of
13 contentions of law and fact, trial briefs, exhibit lists, witness lists, jury instructions,
14 verdict forms, and competing statements of the case.

15 Given the advanced stage of these proceedings, there can be no question that
16 Class Counsel has a clear view of the strengths and weaknesses of the Class's
17 claims and damage approaches to recommend the Settlement.

18 **5. The experience and views of counsel**

19 Class Counsel is comprised of attorneys who have substantial experience
20 serving as counsel in numerous complex actions. They fully endorse the Settlement
21 as fair, reasonable and adequate to the Class.

22 **6. The reaction of the class members to the proposed settlement.**

23 Because Class Members have not yet received notice of the Settlement, this
24 factor cannot yet be evaluated fully. However, the Class Representatives Mark
25 Volman ("Flo") and Howard Kaylan ("Eddie") have reviewed and signed the
26 Stipulation and fully support the Settlement.

27

28

1 **C. The Proposed Settlement is the Result of Arduous, Arm’s-length**
2 **Negotiations Conducted by Experienced and Capable Counsel**

3 In addition to the factors just discussed, the Court must also be satisfied that
4 “the settlement is not the product of collusion among the negotiating parties.” *In re*
5 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011).
6 Factors considered here include: (1) whether the settlement resulted from arm’s-
7 length negotiations between experienced, capable counsel, *see City P’ship Co. v.*
8 *Atlantic Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (a
9 presumption of correctness attached to a class settlement reached in arm’s-length
10 negotiations between experienced, capable counsel); *Flinn v. FMC Corp.*, 528 F.2d
11 1169, 1173 (4th Cir. 1975) (“While the opinion and recommendation of
12 experienced counsel is not to be blindly followed by the trial court, such opinion
13 should be given weight in evaluating the proposed settlement.”); *see also*
14 *Newberg* § 13.53, at 477-79; (2) the end result achieved, *see Mars Steel Corp. v.*
15 *Continental Ill. Nat’l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987)
16 (“[r]ather than attempt to prescribe the modalities of negotiation, the district judge
17 permissibly focused on the end result of the negotiation. . . . The proof of the
18 pudding was indeed in the eating.”); *see also In re “Agent Orange” Prod. Liab.*
19 *Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (the most important concern for the
20 court in reviewing a settlement of a class action is the strength of the plaintiffs’
21 case if it were fully litigated), *aff’d*, 818 F.2d 145 (2d Cir. 1987); and (3) whether
22 counsel are to receive a disproportionate distribution of the settlement under a
23 “clear sailing” arrangement providing for the payment of attorneys’ fees separate
24 and apart from class funds where fees not awarded revert to defendants rather than
25 to the class. *In re Bluetooth*, 654 F.3d at 947.

26 The parties have actively engaged in many rounds of arm’s-length
27 negotiations, involving the exchange of numerous proposals and counter-proposals
28 over a period of months. The end result—a cash portion of up to \$40 million, plus a

1 10-year license at up to 5.5% for a total value of up to approximately \$99 million—
2 is fair, appropriate, and in the best interests of the Class.

3 **V. THE PROPOSED NOTICE FAIRLY APPRISES CLASS MEMBERS**
4 **OF THE TERMS OF THE SETTLEMENT AND THEIR RIGHTS**

5 Plaintiff requests that this Court approve the proposed form of notice, which
6 will, *inter alia*, advise Class Members of the proposed settlement and Class
7 Counsel’s application for a fee and expense award and for an incentive
8 compensation award to Plaintiff. Plaintiff and Class Counsel agree that the form of
9 notice is fair and adequate under the circumstances.

10 Reasonable notice must be provided to the Class to allow class members an
11 opportunity to object to the proposed Settlement. *See Durrett v. Housing Auth. of*
12 *Providence*, 896 F.2d 600, 604 (1st Cir. 1990). “The content and method of the
13 notice should be designed to apprise class members of the settlement terms and
14 class members’ rights.” *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC,
15 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (citing *Mullane v. Cent. Hanover*
16 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

17 In a settlement of a class maintained under Rule 23(b)(3), class notice must
18 meet the requirements of both the Federal Rules of Civil Procedure 23(c)(2) and
19 23(e). *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa.
20 1993) (stating that requirements of Rule 23(c)(2) are stricter than requirements of
21 Rule 23(e) and arguably stricter than the due process clause). Rule 23(c)(2) sets
22 forth several elements of the “proper” content of notice. If these requirements are
23 met, a notice satisfies due process, Fed. R. Civ. P. 23(c)(2), and Fed. R. Civ. P.
24 23(e), and binds all members of the Class. The notice should, among other things:
25 describe the essential terms of the settlement; disclose any special benefits or
26 incentives to the class plaintiffs; provide information regarding attorneys’ fees;
27 indicate the time and place of the hearing to consider approval of the settlement,
28 and the method for objection to or opting out of the settlement; explain the

1 procedures for allocating and distributing settlement funds; and explain the
2 procedures for allocating and distributing settlement funds; and prominently
3 display the address of class counsel and the procedure for making inquiries. *See*
4 MANUAL § 21.312 at 295. “Notice is satisfactory ‘if it generally describes the terms
5 of the settlement in sufficient detail to alert those with adverse viewpoints to
6 investigate and to come forward and be heard.’” *Ma*, 2014 WL 360196, at *5
7 (quoting *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.
8 2004)). “Notice that is mailed to each member of a settlement class ‘who can be
9 identified through reasonable effort’” constitutes reasonable notice. *Id.* (quoting
10 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1973)).

11 The proposed notice program provides “the best notice that is practicable
12 under the circumstances, including individual notice to all members who can be
13 identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The proposed
14 long form notice (Sklover Decl. Ex. 2), is clear, precise, informative, and meets the
15 foregoing standards. The notice is written in plain English, is easy to read, and
16 states who the members of the Settlement Class are and provides the terms of the
17 Settlement. It includes other information such as: a short, plain statement of the *Flo*
18 *& Eddie v. Sirius XM* cases; information regarding attorney’s fees and costs, and
19 how class members may object to the settlement or the application for fees and
20 costs; the impact of the proposed Settlement on the pending *Flo & Eddie* cases; the
21 effect of the covenant not to sue included in the proposed Settlement; and a
22 statement that any judgment entered whether favorable or unfavorable to the
23 Settlement Class shall include, and be binding on, all Settlement Class Members,
24 even if they objected to the proposed Settlement.

25 Notice will be provided to the Class Members using a three-part notice plan
26 generally consistent with the plan approved by the Court on June 16, 2016, *see* Dkt.
27 317, including: (i) a long form of class notice to be disseminated to all prospective
28 members of the Settlement Class for whom direct mailing addresses have already

1 been confirmed through direct mailing, no later than 10 days after the Court’s
2 entry of the Preliminary Approval Order (*see* Sklaver Decl. Ex. 2); (2) a short form
3 of class notice for use in publications and periodicals targeted to reach an audience
4 likely to include members of the Settlement Class (*see* Sklaver Decl. Ex. 3); and (3)
5 a press release and website setting forth essential details concerning the settlement
6 and opt-out requirements. Notice via first class mail, publication in periodicals and
7 newspapers, and website publication are avenues for notice that have been
8 approved by various courts. *See, e.g., White v. NFL*, 822 F. Supp. 1389, 1400 (D.
9 Minn. 1993) (notice by mail to identified Class members and publication once in
10 *USA Today* “clearly satisfy both Rule 23 and due process requirements”); *Lake v.*
11 *First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (approving as
12 reasonable notice by third class mail to identified Class members and publication
13 two times in the national edition of *USA Today*); *In re Michael Milken & Assocs.*
14 *Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice by mail to identified Class
15 members and publication in *USA Today*); *Mullane v. Central Hanover Bank &*
16 *Trust Co.*, 339 U.S. 306, 317 (1950) (“This Court has not hesitated to approve of
17 resort to publication as a customary substitute in another class of cases where it is
18 not reasonably possible or practicable to give more adequate warning.”).

19 The parties have selected Garden City Group LLC (“GCG”) to continue to
20 serve as the Claims Administrator in this case. Stip. at 1 ¶ I.A.1. GCG has already
21 served as the court-appointed Claims Administrator and provided the prior notice to
22 the Class of the Court’s class certification order. GCG is one of the premier class
23 action settlement administration firms in the country and has years of experience in
24 crafting notice plans.

25 Plaintiff and Class Counsel believe that the proposed Notice fully comports
26 with the requirements of Rule 23(c)(2)(VB) and (e)(1) and will fairly apprise Class
27 Members of the Settlement and their options relating thereto, and therefore should
28 be approved by the Court.

1 **VI. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED**

2 The Court has already certified the following class:

3 The owners of sound recordings fixed prior to February 15, 1972 ...
4 which have been reproduced, performed, distributed, or otherwise
5 exploited by Defendant Sirius XM in California without a license or
6 authorization to do so during the period from August []1, 2009 to the
7 present.

8 Dkt. 180 at 2. The Settlement Class is defined to include owners of sound
9 recordings that Sirius XM performed in the United States. Because Sirius XM
10 broadcasts its recordings nationwide, this change does not alter membership of the
11 Class. That is, the Certified Class and the Settlement Class are the same group of
12 persons or entities who own the same Pre-1972 Sound Recordings. Neither
13 membership in the class, nor the Pre-1972 Sound Recordings at issue will change.

14 Specifically, the Settlement Class is defined as follows:

15 All owners of Pre-1972 Sound Recordings, wherever situated, which
16 have been performed, reproduced, distributed, or otherwise exploited
17 by Sirius XM in the United States from August 1, 2009 through
18 November 14, 2016, other than the Major Record Labels, the Direct
19 Licensors and all persons and entities that submit a timely, valid and
20 properly completed written request to be excluded from the Settlement
21 Class in accordance with Section VI.

22 Stip. at 8 ¶ 42.

23 Although the Settlement Class will not cover a class different from that
24 certified, the Court should certify the above proposed Settlement Class for purposes
25 of settlement, for the same reasons set forth in the Court's Order Granting
26 Plaintiff's Motion for Class Certification, Dkt. 225, in Plaintiff's Motion for Class
27 Certification, Dkt. 180, and in Plaintiffs' Opposition to Sirius XM's Motion for
28 Decertification, Dkt. 396. The Settlement Class, comprised of the same members of

1 the Certified Class, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as the
2 requirement of Fed. R. Civ. P. 23(b)(3) that the question of law or fact common to
3 class members predominate, and that a class action is superior to other available
4 methods for fairly and efficiently adjudicating the controversy. *See Jenkins v. Pech*,
5 No. 8:14CV41, 2015 WL 6738624, at *1 (D. Neb. Nov. 4, 2015) (certifying class
6 for reasons stated in court’s prior order on certification, where earlier certified class
7 differed from the settlement class only with respect to the persons excluded).

8 **VII. CONCLUSION**

9 For all the above-stated reasons, Plaintiff respectfully requests that the Court
10 enter an order: (i) granting preliminary approval of the Settlement; (ii) certify the
11 Settlement Class for the purpose of effectuating the settlement; (iii) appointing
12 Gradstein & Marzano and Susman Godfrey L.L.P. as Settlement Class Counsel;
13 and (iv) approving the form and method of notice of the Settlement and directing
14 that Notice be provided to the Class in accordance with the notice plan.

15
16 Dated: November 28, 2016

17 By: /s/ Steven G. Sklaver

18 GRADSTEIN & MARZANO, P.C.

19 Henry Gradstein

20 Maryann R. Marzano

21 Daniel B. Lifschitz

22 SUSMAN GODFREY L.L.P.

23 Stephen E. Morrissey

24 Steven G. Sklaver

25 Kalpana Srinivasan

26 Rachel S. Black, *Admitted PHV*

27 Michael Gervais, *Admitted PHV*

28 *Co-Lead Class Counsel*

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21 [Additional Counsel for Plaintiff on Signature Page]

22 *Attorneys for Plaintiff FLO & EDDIE, INC. and the Class*

23 **UNITED STATES DISTRICT COURT**
24 **CENTRAL DISTRICT OF CALIFORNIA**
25 **WESTERN DIVISION**

26 FLO & EDDIE, INC., a California
27 corporation, individually and on behalf
28 of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO, INC., a Delaware
corporation; and DOES 1 through 10,

Defendants.

Case No. CV13-05693 PSG (GJSx)

**DECLARATION OF MICHAEL
WALLACE**

1 **DECLARATION OF MICHAEL WALLACE**

2 I, Michael Wallace, hereby declare and state as follows:

3 1. I have personal knowledge of the facts stated herein and, if called upon,
4 could and would testify competently thereto. I submit this Declaration in support of
5 plaintiff Flo & Eddie, Inc.'s ("Flo & Eddie") Motion for Preliminary Approval.

6 **Qualifications**

7 2. I am a founding member and the Chief Operating Officer of TM
8 Financial Forensics, LLC (TMF). I have over 30 years of experience in forensic
9 accounting and the preparation and analysis of claims for economic damages in a
10 wide variety of business disputes. TMF is a specialized business and litigation
11 consulting firm with approximately 60 professionals experienced in accounting,
12 economics, finance, engineering and information technology, with offices in Los
13 Angeles, San Francisco and Chicago. I have testified as an expert witness on the
14 subjects of accounting and economic damages in federal and state courts, as well as
15 in arbitrations.

16 3. Prior to becoming a founding member of TMF in 2010, I was a
17 Managing Director in the Los Angeles office of Navigant Consulting, an
18 international business, management and litigation consulting firm. Prior to joining
19 Navigant Consulting in 2004, I was a Vice President and founding member of
20 Tucker Alan, a business and litigation consulting firm. Prior to joining Tucker Alan
21 in 1994, I was a Vice President in the Los Angeles office of Peterson Consulting, an
22 international consulting firm. At Navigant Consulting, Tucker Alan, and Peterson
23 Consulting, I performed consulting and expert witness work similar to the work I
24 currently perform at TMF.

25 4. I received a Master of Business Administration degree from the
26 University of California at Berkeley with a specialization in finance and accounting
27 and a Bachelor of Science degree in mechanical engineering from the University of
28 California at Los Angeles. While earning my MBA, I was employed as a Teaching

1 Assistant by the University of California in the subjects of statistics and quantitative
2 methods for business decisions. Prior to attending business school, I worked as a
3 design engineer in Chevron's El Segundo, California oil refinery.

4 5. I have extensive experience analyzing accounting issues and economic
5 damages in connection with the entertainment industry. I have served as an expert
6 witness or consulted on dozens of litigation disputes involving licensing, production
7 and distribution of music, television, motion pictures, and related merchandise,
8 among other entertainment matters. In the course of my entertainment industry
9 work, I have studied the revenues, expenses and profits associated with the
10 recording and distribution of music in a variety of formats. I have testified in
11 federal court, state court and in arbitrations on accounting issues and economic
12 damages related to the music, television and motion picture industries.

13 6. I am experienced in the financial, economic, accounting, statistics and
14 damages concepts relevant to my work on this matter. As examples, I have
15 consulted and testified on many commercial litigation and intellectual property
16 matters. I have prepared and analyzed numerous claims for improper accounting,
17 lost earnings, lost profits, unjust enrichment, increased costs, cost of capital,
18 reasonable royalties, disgorgement of revenues or profits, and other measures of
19 economic damages. I am familiar with standards for preparation of forensic
20 accounting analyses and economic damage claims for use in judicial proceedings
21 and the requirement for the use of reliable principles and supporting data.

22 7. My resume and a listing of my testimony in the last four years are
23 included as Appendix A and Appendix B, respectively. My current billing rate for
24 work performed on this matter is \$650 per hour.

25 8. I have performed my work to date with the assistance of other TMF
26 professionals working at my direction. A listing of the documents used in the
27 course of performing this work is attached to my Supplemental Expert Report dated
28 September 21, 2016. The opinions and analyses presented in this declaration are

1 based on currently available information and may be supplemented or revised if
2 relevant new information becomes available.

3 **Background**

4 9. I have previously submitted two declarations and two expert reports in
5 this matter. I submitted (1) a Declaration In Support of Flo & Eddie, Inc.’s Motion
6 for Class Certification and associated exhibits dated March 12, 2015 (“First
7 Declaration”); (2) a Supplemental Declaration In Support of Flo & Eddie, Inc.’s
8 Motion for Class Certification and associated exhibits dated May 6, 2015 (“Second
9 Declaration”); (3) an Expert Report dated March 13, 2015 (“Initial Expert Report”);
10 and (4) a Supplemental Expert Report dated September 21, 2016 (“Supplemental
11 Expert Report”).

12 10. I was initially asked by counsel for Flo & Eddie to: (1) determine
13 whether damages are capable of measurement on a class-wide basis (“Class
14 Damages”); (2) identify a reasonable method for calculating Class Damages; and (3)
15 calculate the amount of those Class Damages. Tasks 1 and 2 were discussed in
16 detail in my First Declaration dated March 12, 2015 and my Second Declaration,
17 dated May 6, 2015. Task 3 was addressed in my Initial Expert Report dated March
18 13, 2015.

19 11. Subsequent to my Initial Expert Report and Class Certification, certain
20 Class Members opted out of this action and Sirius XM entered into settlement
21 agreements or written licenses for certain Pre-1972 Sound Recordings with a
22 number of Class Members. In my Supplemental Expert Report, I (1) updated my
23 calculation of Class Damages to include the period March 1, 2015 through October
24 31, 2016; and (2) excluded from the calculated Class Damages the amount of
25 damages attributable to the use of Pre-1972 Sound Recordings owned or controlled
26 by Class Members that had opted out of this action, and for which Sirius XM
27 asserted it had authorization to exploit pursuant to settlement agreements or written
28 licenses.

1 and (3) applying the 5.5% royalty rate under the Stipulation, I estimate future
2 royalties for the period 2018 to 2028 to be approximately \$45.475 million.

3 **Royalty Estimate with 3.5% Annual Growth in Revenues**

4 16. I also performed a calculation of future royalties for Sirius XM's
5 exploitation of Pre-1972 Sound Recordings during the period 2018 to 2028
6 assuming that Sirius XM's revenues attributable to Pre-1972 Sound Recordings will
7 increase at a rate similar to the growth experienced during the last several years.
8 After studying the growth rates for Sirius XM's Pre-1972 revenues from 2010 to
9 2015, I concluded that a 3.5 % annual growth rate is a reasonable and conservative
10 estimate of future growth rates for estimating future royalties.¹ After applying (1) a
11 3.5% annual growth rate to the Pre-1972 revenues; (2) the assumption that 15% of
12 these estimated Pre-1972 revenues will be attributable to Pre-1972 Sound
13 Recordings owned or controlled by Class Members; and (3) a 5.5% royalty rate, I
14 estimate future royalties for the period 2018 to 2028 to be approximately \$59.210
15 million.

16 **Comparison of Stipulation to Major Label Settlement and Direct Licenses**

17 17. I have reviewed the Stipulation dated November 13, 2016, which covers
18 15% of historical plays of Pre-1972 Sound Recordings during the damage period
19 estimated to be owned or controlled by the Settlement Class. The Stipulation
20 provides for a cash settlement ranging from \$25 million to \$40 million depending on
21 the outcomes of certain appellate actions, in exchange for a release of claims
22 through 2017.

23
24
25 ¹ To estimate the annual growth rate for Pre-1972 revenues, I studied Sirius
26 XM's historical growth in Pre-1972 revenues during the period 2010 to 2015.
27 Annual growth rates ranged from 3.3% to 36.8% during this period, with an average
28 compound annual growth rate of 14.5% over the entire 2010 to 2015 period. To be
conservative, I used the compound annual growth observed during the period 2013
to 2015 of 3.5%.

1 18. I have also reviewed the Major Label Settlement dated June 17, 2015. It
2 reportedly accounts for 80% of historical plays of Pre-1972 Sound Recordings
3 during the damage period and, like the Stipulation, provides for a release through
4 2017. (Sirius XM Form 8-K, June 26, 2015, Dkt. 242-1, pp.2-4.) The \$210 million
5 payment to the Major Record Labels, for 80% of the plays of Pre-1972 Sound
6 Recordings through 2017, represents a payment of \$2,625,000 for each 1% of the
7 Pre-1972 plays (\$210 million / 80).

8 19. Applying this \$2,625,000 amount for each 1% of Pre-1972 Sound
9 Recording plays to the 15% of such plays estimated to be owned or controlled by
10 the Settlement Class gives an amount of \$39,375,000 ($\$2,625,000 \times 15$). Thus, the
11 potential \$40 million cash settlement provided for in the Stipulation is slightly more
12 favorable than a pro rata projection based on the Major Label Settlement.

13 20. As part of my work in this case, I have also reviewed all of the Direct
14 Licenses covering Pre-1972 Sound Recordings entered into by Sirius XM with
15 independent record labels since June 2015. Only one Direct License expressly
16 provided compensation for past use of Pre-1972 Sound Recordings (for the year
17 2015). Moreover, the royalty rate of 5.5% is the highest royalty rate provided for in
18 any of the Direct Licenses. (Dkt.. 489-3, Ex. 19 at 1.)

19 21. The minimum number of historical plays required to be accounted for by
20 the Settlement Class under the Stipulation -- 1,594,205 historical plays -- represents
21 a per-play payment of between \$15.68 ($\$25 \text{ million} / 1,594,205$) to \$25.09 ($\$40$
22 $\text{million} / 1,594,205$). Based on my work in this case, the data exists to allocate the
23 Settlement Fund on a per-play basis for any Pre-1972 Sound Recordings owned or
24 controlled by members of the Settlement Class.

25 Conclusion

26 22. Based on the foregoing, it is my opinion that either \$45.475 million
27 (assuming no revenue growth) or \$59.210 million (assuming 3.5% annual revenue
28 growth) are reasonable estimates of future royalties for the period 2018 to 2028,

1 based on the further assumptions that 15% of projected Pre-1972 revenues will be
2 attributable to Pre-1972 Sound Recordings owned or controlled by Class Members,
3 and applying a 5.5% royalty rate. It is further my opinion that the terms of the
4 Stipulation compare favorably to the Major Label Settlement and Direct Licenses
5 entered into by Sirius XM with independent record labels since June 2015.

6 I declare under penalty of perjury under the laws of the United States that the
7 foregoing is true and correct.

8 Signed this 28th day of November, 2016, at Los Angeles, California.

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Michael Wallace



Michael J. Wallace

Michael J. Wallace
Chief Operating Officer, Member

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40th Floor
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Professional History

- Navigant Consulting, Managing Director
- Tucker Alan Inc., Vice President
- Peterson Consulting, Vice President
- Chevron USA El Segundo Refinery, Design Engineer

Education and Certifications

- MBA in finance and accounting
 - UC Berkeley
- BS in mechanical engineering
 - UCLA

Professional Associations

- Western Justice Center Foundation – Board Member, Audit Committee Chair
- USC Intellectual Property Institute – Planning Committee Member
- Institute for Corporate Counsel – Advisory Board Member
- National Contract Management Association
- American Bar Association – Litigation Section, Public Contract Section
- State Bar of California – Intellectual Property Section

Michael Wallace is the Chief Operating Officer and a founding Member of TM Financial Forensics, LLC. He has over 30 years of experience in the field of business and litigation consulting. He specializes in providing consulting and testimony services to clients regarding financial, economic, accounting and damages issues. Mr. Wallace has testified as an expert witness in federal and state court, in arbitration and in depositions in a number of jurisdictions.

Mr. Wallace has prepared and analyzed numerous damages claims, including claims for lost profits, increased costs, unjust enrichment, reasonable royalties and other measures of economic damages. He has extensive experience in the interpretation and application of financial and accounting principles and standards in regulatory and contractual settings. His professional work has included analyzing the financial condition and financial performance of businesses through review of financial statements, public disclosures, accounting information, operational reports, and other business records.

Mr. Wallace's experience has included significant work in the following practice areas, among others:

- » Commercial Litigation
- » Construction
- » Entertainment And Sports
- » Financial Institutions
- » Government Contracts
- » Health Care
- » Investment Management
- » Intellectual Property
- » Regulated Industries



Michael J. Wallace

CLIENT AND INDUSTRY EXPERIENCE

Clients have included corporations, partnerships and individuals; in-house and outside counsel; plaintiffs, defendants and judicial bodies; on litigation, non-litigation, arbitration and mediation matters. Client matters have involved issues in a wide variety of industries including the following:

Advertising	Electronics	Oil and Gas
Aerospace	Environmental	Pharmaceutical
Airline	Health Care	Professional Sports
Asset Management	Industrial Supplies	Promotion
Automotive	Insurance	Real Estate
Banking	Licensing	Restaurants
Biotechnology	Manufacturing	Retail
Commercial Fishing	Marketing	Sporting Goods
Construction	Medical Practice	Structured Investments
Data Processing	Merchandising	Telecommunications
Defense	Motion Pictures	Television
Distribution	Music Recording	Transportation
Electric Power	Newspaper	Video

SELECTED EXPERIENCE

Economic, Operational, Damage and Accounting Analyses

Consulted on projects involving calculation of lost profits, business valuation, reasonable royalty analysis, determination and allocation of costs, investigation and analysis of fraud allegations, tracing of funds, and other economic damages issues.

Prepared and analyzed claims resulting from breach of contract, business interruption, patent infringement and other intellectual property claims, antitrust, fraud and other allegations.

Evaluated issues such as lost or diminished product sales and other lost revenues, loss of market share, loss of business value, losses of specific customer accounts or contracts, diminution of future revenue prospects, increased costs, avoided costs, fixed and variable costs, costs of capital and mitigation.

Utilized a variety of statistical analysis techniques in a number of circumstances. Have applied or analyzed statistical methods including random sampling, estimation, extrapolation, stratification, simple and multiple regression, and analysis of variance.



Michael J. Wallace

ENTERTAINMENT AND SPORTS

Performed consulting services and provided expert witness testimony on a variety of entertainment and sports matters.

Entertainment and sports matters have involved the production, recording, licensing, promotion, distribution and sale of a variety of entertainment media including motion pictures, television, recorded music, online games, concert and sports merchandise and DVD/video.

Addressed a wide range of issues on entertainment and sports matters including the following:

Accounting practices	Management fees
Antitrust issues	Personal vs. business expense
Breach of contract	Pricing policies
Budgets and forecasts	Production costs and funding
Cooperative advertising	Professional malpractice
Contract terms	Promotional tie-ins
Copyrights	Revenue recognition
Distribution costs and fees	Sales projections
Diversion of collateral	Trademarks
Financing vehicles	Trade Secrets
Fraud and embezzlement	Tax Incentives
Lost profits	Valuation

Assisted counsel for seven major motion picture studios in responding to price-fixing and other antitrust allegations in class action matter. Evaluated and presented the variety of financial and other contractual terms for thousands of motion picture talent contracts, including front-end and back-end fixed and contingent payments and profit participations.

Analyzed lost profits and disgorgement of profit issues related to numerous breach of contract, copyright and trademark matters in the music industry.

Prepared and reviewed breach of contract lost profits claims related to videocassette licensing and promotion, as well as licensed concert and sports merchandise.

Analyzed direct and indirect revenues and costs associated with online games, online direct marketing, online distribution and other internet based business models.

Performed an accounting of motion picture production funds and distribution proceeds for over 40 films. Evaluated producer's fees, distribution fees and the accounting procedures and practices of the production company to evaluate allegations of management fraud.

Evaluated unjust enrichment damages related to the misappropriation of trade secrets used for manufacturing competition-quality sporting goods.



Michael J. Wallace

INTELLECTUAL PROPERTY

Analyzed and prepared claims for damages in a broad range of intellectual property matters, including patent, copyright, trade secret, trademark and trade dress. Evaluated lost profits, price erosion and reasonable royalty issues on patent infringement matters. Patent cases have included analysis of market share issues, non-infringing alternatives and design around issues.

In connection with copyright, trademark and trade secret matters, analysis has been performed of the lost profits or other damages to the rights holder, and the profits or cost savings of the alleged infringer. Have also studied apportionment of profits between the infringed property and other factors unrelated to infringement.

Addressed intellectual property issues with respect to the following industries or technologies:

- | | |
|----------------|--------------------|
| Advertising | Petroleum Products |
| Aerospace | Pharmaceutical |
| Automotive | Publishing |
| Communications | Religion |
| Diagnostics | Restaurants |
| Electronics | Satellites |
| Electric Power | Software |
| Fitness | Sports |
| Internet | Television |
| Manufacturing | Test Equipment |
| Music | Toys |
| Paper Products | Water Treatment |

Analysis of lost profits has included evaluating achievability of sales; capacity for manufacturing, sales and distribution; and impacts of competition on pricing. Cost analysis has included determining fixed and variable costs, costs of expansion, research and development costs and costs of capital.

LABOR AND EMPLOYMENT MATTERS

Analyzed and prepared claims for damages in connection with labor termination and discrimination matters. These engagements have included economic analysis of compensation, fringe benefits, retirement and pension plans, stock options, appropriate period of loss, and wage escalation and discount rates.

Analyzed replacement compensation, including independent consulting ventures and operation of small businesses. Performed numerous analyses of labor and related costs on commercial damage matters, including analysis of labor burdens, benefit costs, salary and compensation plans.



Michael J. Wallace

GOVERNMENT CONTRACT MATTERS

Provided consulting services and testified on a variety of government contracts matters involving issues such as cost accounting, cost estimating, defective pricing, false claims, pension accounting, purchase price adjustments, regulatory compliance and contract claims.

Have assisted counsel on liability, damages and penalty issues on numerous cases filed under the Federal False Claims Act. Provided expert testimony on qui tam matters, in addition to providing formal and informal presentations to Department of Justice, Defense Contract Audit Agency and Defense Criminal Investigative Service regarding defective pricing and false claims issues. Consulted and testified on False Claims Act matters involving defective pricing, improper accounting, mischarging, overbilling, design defects, violations of the Cost Accounting Standards and the Federal Acquisition Regulation, non-compliance with contract terms, and false certification, among other claims

Government contract matters have included substantial work in analyzing and applying provisions of the Federal Acquisition Regulations, Cost Accounting Standards and other regulatory guidance. Application of this regulatory guidance has involved evaluation of cost estimating procedures and proposal preparation; determination of the cost of service and allocation of costs among multiple cost objectives; and in the pricing of contracts, contract claims and contract price adjustments. Analyzed proper accounting for pension costs, pension assets and pension liabilities under the Cost Accounting Standards (CAS) and the Employee Retirement Income Security Act (ERISA). Studied Prepayment Credits and Segment Closing Claim procedures under CAS rules. Assisted buyers and sellers in resolving acquisition disputes regarding the transfer of pension assets and liabilities upon the sale of subsidiaries and divisions.

Prepared and reviewed claims and counterclaims for cost and schedule impacts on a variety of government contract projects. Analyzed claims based on defective specifications, change orders, regulatory changes, increased project scope, acceleration, constructive changes, defective work, excessive inspections, and delay and disruption, among other causes.

HEALTH CARE

Assisted clients with health care related matters and researched emerging industry issues, including fraud, waste and abuse. Client matters have included private hospital urgent care affiliates, municipalities providing emergency medical care to the public and the incarcerated, a biomedical research material supplier, a manufacturer of hematology equipment and reagents, and a medical transportation company, among others.

Issues analyzed have included false claims allegations, lost profits, business valuation, lost wages, insurance claims coverage, construction costs and professional liability.



Michael J. Wallace

CONSTRUCTION CLAIMS AND RELATED MATTERS

Provided consulting services on a variety of construction related matters. Prepared and analyzed claims related to construction projects including assessment of formal and constructive change orders, delay and disruption, defective specifications, differing site conditions, acceleration, defective workmanship and cost of rework, and false claims allegations.

Analyzed issues including assessment of the reasonableness of original bids, causes for cost growth and budget overruns, determining the impact of individual events or changes on cost and schedule. Have also prepared and analyzed claims for economic impacts of delayed, diminished or lost use of facilities including lost profits, cost of substitute facilities, costs of capital and other measures of economic damages.

Construction project analyzed have included the following types of facilities:

- | | |
|---------------------------|------------------------------|
| Apartment Buildings | Oil Refineries and Pipelines |
| Environmental Remediation | Petroleum Tank Farms |
| Hospitals | Prisons |
| Municipal Sewers | Residential Housing |
| Nuclear Power Plants | Retail Complex |
| Office Buildings | University Facilities |

Experienced in working with counsel and other experts to combine entitlement analysis with cost, schedule and other technical analyses to develop a coherent presentation of the chronology of a construction project and the resultant economic impacts of unplanned and unforeseen events and conditions.

REAL ESTATE DEVELOPMENT

Consulted on a variety of real estate development matters. Real estate projects have included office buildings, hotels, apartments, townhouses, university housing, theatres, retail complexes and condominiums. Issues have included market value, lease costs, occupancy rates, construction defects, loss of use, lost profits and breach of contract.

Evaluated damages claimed by the limited partners due to the reorganization of a real estate limited partnership. Damage issues included the real estate valuations and transaction costs for a number of distressed properties. Risks associated with various scenarios were analyzed, along with the appropriate discount rates applicable to the financial analysis.



Michael J. Wallace

FINANCIAL INSTITUTIONS AND ASSET MANAGEMENT

Provided consulting services on a variety of financial institutions and asset management matters. Prepared and analyzed claims related to mortgage origination and servicing, real estate development, structured investments, film financing, custodial and trustee services, private equity and hedge funds, Ponzi schemes and embezzlement.

Analyses have included funds tracing, collateral analysis, portfolio analysis, calculations of carried interest, alternative investment returns and analysis of lost profits, among other areas.

Projects have included the following types of entities:

Asset Management Companies	Insurance Companies
Commercial Banks	Mortgage Originators & Servicers
Commodities Brokers	Real Estate Investment Trusts
Film Financing Vehicles	Structured Investments

Evaluated claims for lost profits and loss of business value damages in connection with the departure of key executives from a major asset management company. Also assessed counterclaims for lost income of key executives due to termination of employment.

Studied causation and damages issues in a professional malpractice claim, including determination of the losses suffered by an asset management company and its investors caused by the failure of independent accountants, outside counsel and investment bankers to uncover and disclose fraudulent practices of the asset manager's prime broker.

Analyzed investor losses in connection with a Ponzi-type scheme. Determined potential losses attributable to the failure by the financial institution that served as custodian of investor funds to uncover the scheme. Evaluated involvement and fees earned by plaintiff banks in connection with the distribution and sale of the investments in the fraudulent funds.

Evaluated claims for lost investment income asserted by investor against an asset management company. Studied potential alternative investment results under a number of different asset allocation scenarios.

Analyzed a claim for damages related to lost commercial real estate opportunities in an REIT investment. Studied the causes of losses incurred by a financial institution in connection with the development of a condominium complex.

Evaluated claims for losses by financial institutions related to fraud perpetrated by a mortgage originator. Determined potential losses attributable to the failure by the financial institution that served as custodian of investor funds to uncover the scheme.



Michael J. Wallace

TESTIMONY AND ALTERNATIVE DISPUTE RESOLUTION EXPERIENCE

Testified on Federal Court, State Court and arbitration matters regarding lost profits, business valuation, forensic accounting, asset management, false claims, breach of contract, intellectual property, employment termination, cost allocation, product defects, construction claims and statistical analyses, among other issues.

Provided written testimony and expert witness reports on Federal and State Court matters regarding data processing billing algorithms, interest accruals on deferred compensation, and internet-based business damages in addition to the testimony subjects listed above.

Prepared analyses and reports which were the bases of findings by a court-appointed Special Master in a case involving allegations of management fraud in an independent motion picture production and distribution company.

LECTURES AND SEMINARS

“Program and Contract Changes” - Albuquerque, NM

- Managing, tracking and pricing contract changes and contract claims
- National Contract Management Association (NCMA) seminar

“What You Need To Know About Trademarks” - Beverly Hills, CA

- Valuation, licensing and economic damages related to trademarks
- Minimum Continuing Legal Education seminar approved by California Bar

**MICHAEL J. WALLACE
TESTIMONY**

<u>Case Name</u>	<u>Venue</u>	<u>Approximate Date</u>
Himelsein Mandel Fund Management, LLC; HM Ruby Fund, L.P; Quantlife, LLC; and Brentwood Holdings, LLC v. Fortress Investment Group LLC, et al.	Superior Court of California, County of Los Angeles (Trial)	2016
Flo & Eddie, Inc., individually and on behalf of all others similarly situated v. Sirius XM Radio, Inc.	Superior Court of California, County of Los Angeles Central District (Deposition)	2016
Aeros Aeronautical Systems Corp. v. United States of America, the Department of the Navy	United States District Court for the Central District of California (Deposition)	2016
Himelsein Mandel Fund Management, LLC; HM Ruby Fund, L.P; Quantlife, LLC; and Brentwood Holdings, LLC v. Fortress Investment Group LLC, et al.	Superior Court of California, County of Los Angeles (Deposition)	2016
MJC America, Ltd., MJC America Holdings Co., Inc., and MJC Supply, LLC v. Gree Electric Appliances, Inc. of Zhuhai and Hong Kong Gree Electric Appliances Sales Ltd. et al.	United States District Court for the Central District of California (Trial)	2015
Flo & Eddie, Inc., individually and on behalf of all others similarly situated v. Sirius XM Radio, Inc.	Superior Court of California, County of Los Angeles Central District (Deposition)	2015
MJC America, Ltd., MJC America Holdings Co., Inc., and MJC Supply, LLC v. Gree Electric Appliances, Inc. of Zhuhai and Hong Kong Gree Electric Appliances Sales Ltd. et al.	United States District Court for the Central District of California (Deposition)	2015
San Diego Gas & Electric Company, City of Riverside, City of Anaheim v. Southern California Edison Company	Judicial Arbitration and Mediation Services, Inc. (Deposition)	2014

**MICHAEL J. WALLACE
TESTIMONY**

<u>Case Name</u>	<u>Venue</u>	<u>Approximate Date</u>
Medley Capital LLC, and Fourth Third, LLC, v. Milbank, Tweed, Hadley & McCloy LLP	Superior Court of California, City and County of San Francisco (Deposition)	2013
In re Medical Capital Securities Litigation; Kenneth and Gwen Bain, et al. v. Wells Fargo Bank, National Association, et al.; James L. Abbate, et al. v. Wells Fargo Bank, National Association, et al.	United States District Court for the Central District of California (Deposition)	2013
Core Industries, Inc. v. Shinn Fu Corporation	United States District Court for the Central District of California (Deposition)	2012
Bagdasarian Productions, LLC v. Capitol Records, Inc. et al.	Superior Court of California, County of Los Angeles, (Deposition)	2012

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21 [Additional Counsel for Plaintiff on Signature Page]
22 *Attorneys for Plaintiff FLO & EDDIE, INC. and the Class*

23 **UNITED STATES DISTRICT COURT**
24 **CENTRAL DISTRICT OF CALIFORNIA**
25 **WESTERN DIVISION**

26 FLO & EDDIE, INC., a California
27 corporation, individually and on behalf
28 of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO, INC., a Delaware
corporation; and DOES 1 through 10,

Defendants.

Case No. CV13-05693 PSG (GJSx)

**DECLARATION OF STEVEN G.
SKLAVER IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

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DECLARATION OF STEVEN G. SKLAVER

I, Steven G. Sklaver, hereby declare and state as follows:

1. I am a partner at Susman Godfrey LLP, counsel of record for the plaintiff Flo & Eddie, Inc. and the certified class (collectively, “Plaintiffs”) in the above-entitled action. I have personal knowledge of the facts set forth in this declaration and, if called to testify thereto, could and would do so competently.

2. Attached as Exhibit 1 is the parties’ Stipulated Class Action Settlement (the “Stipulation” or “Settlement”).

3. Attached as Exhibit 2 is the proposed long form notice to advise class members of settlement. Blank spaces will be filled in with the Court-approved dates.

4. Attached as Exhibit 3 is the proposed short form notice to advise class members of settlement. Blank spaces will be filled in with the Court-approved dates.

Signed this 28th day of November, 2016, at Los Angeles, California.

/s/ Steven G. Sklaver
Steven G. Sklaver

Exhibit 1

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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 FLO & EDDIE, INC., a California
18 corporation, individually and on behalf
of all others similarly situated,

19
20 Plaintiffs,

21 v.

22 SIRIUS XM RADIO INC., a Delaware
23 corporation, and DOES 1 through 10,

24 Defendants.

Case No. 13-CV-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**STIPULATED CLASS ACTION
SETTLEMENT**

1 This Stipulation of Class Action Settlement (this “Stipulation”) is between
2 plaintiff Flo & Eddie, Inc., on behalf of itself and the Settlement Class, and
3 defendant Sirius XM Radio Inc. (“Sirius XM”). It is subject to preliminary and
4 final approval by the Court.

5 **I. DEFINITIONS**

6 A. As used in this Stipulation, the following capitalized terms have the
7 meanings specified below:

8 1. “Administrator” means Garden City Group LLC, which will
9 provide Class Notice and administer the Claim Program.

10 2. “BES Service” means Sirius XM’s commercial business
11 establishment services service, including any such service offered by agents or
12 representatives on behalf of Sirius XM.

13 3. “Bona Fide Claimant” means a Settlement Class Member
14 claimant to the Royalty Program who has properly submitted an uncontested claim
15 to specific Identified Pre-1972 Sound Recording(s) it claims to own or control, and
16 further represents and warrants that it owns all right, title and interest in such
17 recording(s). A claim made to the Royalty Program shall only be considered
18 uncontested so long as no other person or entity claims to own or control the same
19 specific Identified Pre-1972 Sound Recording(s) and further represents and
20 warrants that it owns and has the right to control all right, title, and interest such
21 recording(s). To the extent that Sirius XM has a reasonable, good faith basis to
22 believe a claimant does not own or control an Identified Pre-1972 Sound
23 Recording(s) (on grounds other than a claimed public domain status of the
24 Recording(s)), it may also contest the claim, bearing all of its own attorneys’ fees
25 and costs. Any ownership or control challenges shall be handled as described in
26 ¶ VI.C and contested claims shall be considered uncontested if the Special Master
27 rules (subject to any appeals) that the claimant owns or controls the specific
28 Identified Pre-1972 Sound Recording(s) at issue or the matter is otherwise resolved

1 by written agreement of the competing claimants or, to the extent applicable, the
2 Parties.

3 4. "CABSAT Service" means Sirius XM's multi-channel video
4 programming distributors service.

5 5. "California Action" means the putative class action captioned
6 *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, filed on August 1, 2013 in the Superior
7 Court of the State of California for the County of Los Angeles, Case No. BC517082,
8 and removed to the United States District Court for the Central District of
9 California (the "Court"), Case No. CV 13-05693 PSG (GJSx), on August 6, 2013.

10 6. "California Appeal" means any appeal that may be taken from
11 the final judgment in the California Action (substantially in the form attached
12 hereto as Exhibit B, entered by the Court) by Sirius XM.

13 7. "California Class" means the owners of Pre-1972 Sound
14 Recordings which have been performed, reproduced, distributed, or otherwise
15 exploited by Sirius XM in California without a license or authorization to do so
16 during the period from August 1, 2009 to the present.

17 8. "Claim Program" means the plan for distribution of the
18 Settlement Fund to the Settlement Class provided for in ¶ VI.E.

19 9. "Class Counsel" means the law firms of Gradstein & Marzano,
20 P.C. and Susman Godfrey L.L.P.

21 10. "Class Notice" means the notice the Administrator shall provide
22 to the Settlement Class as described in ¶ VI.B.

23 11. "Commerce Clause Issue" means the question of whether it
24 would violate the Commerce Clause of the United States Constitution to apply a
25 state-law right to control and/or demand compensation for the public performance
26 of Pre-1972 Sound Recordings to Sirius XM, where Sirius XM contends that it is
27 an interstate broadcaster.

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1 12. “Covenantees” means Sirius XM and its direct or indirect parent
2 entities, associates, affiliates or subsidiaries, and each and all of its respective past,
3 present or future officers, directors, stockholders, partners, agents, representatives,
4 insurers, co-insurers and reinsurers, franchisees, predecessors, successors and
5 assigns.

6 13. “Covenantors” means Plaintiff and the Settlement Class
7 Members.

8 14. “Direct Licensors” means the persons and/or entities, other than
9 the Major Record Labels, that have entered into written licenses or other written
10 agreements or instruments with Sirius XM to perform, reproduce, distribute, or
11 otherwise exploit Pre-1972 Sound Recordings.

12 15. “Effective Date” means the date described in ¶ V.A of this
13 Stipulation.

14 16. “Final Approval Hearing” means the hearing to be held by the
15 Court to consider and determine whether the proposed Settlement contained in this
16 Stipulation should be approved as fair, reasonable, and adequate, and whether the
17 Final Judgment approving the Settlement should be entered.

18 17. “Final Judgment” means the order and judgment, substantially
19 in the form attached hereto as Exhibit B, entered by the Court.

20 18. “Flo & Eddie Cases” means the California Action, the New
21 York Action, and the Florida Action.

22 19. “Florida Action” means the putative class action captioned *Flo*
23 *& Eddie Inc. v. Sirius XM Radio Inc.*, filed on September 3, 2013 in the United
24 States District Court for the Southern District of Florida (the “Florida Court”), Case
25 No. 13-CV-23182.

26 20. “Florida Appeal” means the appeal of the Florida Action, filed
27 on July 10, 2015 in the United States Court of Appeals for the Eleventh Circuit (the
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1 “Eleventh Circuit”), Appeal No. 15-13100, and certified to the Florida Supreme
2 Court on June 29, 2016, Appeal No. SC16-1161.

3 21. “Gross Revenue” shall comprise subscription revenue
4 recognized by Sirius XM in accordance with United States generally accepted
5 accounting principles directly from subscribers in the Territory for the Service and
6 advertising revenues, or other monies received from sponsors, if any, attributable to
7 advertising on channels, other than those that use only incidental performances of
8 sound recordings (less advertising agency and sales commissions), excluding, in
9 each case, (i) monies or other consideration attributable to the sale and/or license of
10 equipment and/or other technology, including but not limited to bandwidth, sales of
11 devices and any taxes, shipping and handling fees therefor; (ii) royalties paid to
12 Sirius XM for intellectual property rights; (iii) monies or other consideration
13 received by Sirius XM from the sale of phonorecords and digital phonorecord
14 deliveries; (iv) revenues earned by Sirius XM for current and future data services
15 (e.g., weather, traffic, destination information, messaging, sports scores, stock
16 ticker information, extended program associated data, video and photographic
17 images, and such other telematics and/or data services as may exist from time to
18 time); (v) revenues earned by Sirius XM for channels, programming, products
19 and/or other services offered for a separate charge where such channels offer only
20 incidental or occasional performances of sound recordings; (vi) revenues earned by
21 Sirius XM for channels, programming, products and/or other services provided
22 outside of the Territory; (vii) all transaction fees, such as sales and use taxes,
23 shipping and handling, credit card, invoice, and fulfillment service fees; and (viii)
24 bad debt expense. The portion of Gross Revenue attributable to Sirius XM’s
25 Webcasting Service shall be further multiplied by two fractions. The numerator of
26 the first fraction shall be the aggregate portion of subscription revenue recognized
27 by Sirius XM attributable to subscribers who log in to the Webcasting Service
28 during the applicable accounting period and the denominator shall be the aggregate

1 subscription revenue recognized by Sirius XM from subscribers to the Webcasting
2 Service during the applicable accounting period. The numerator of the second
3 fraction shall be the number of aggregate tuning hours of programming on channels
4 featuring sound recordings in the Webcasting Service during the applicable
5 accounting period and the denominator shall be the number of aggregate tuning
6 hours of programming on all channels of the Webcasting Service during the
7 applicable accounting period (i.e., inclusive of both channels featuring sound
8 recordings, and channels featuring news, talk, weather, and/or sports).

9 22. “Gusto Action” means the action captioned *Gusto Records, Inc.*
10 *v. Sirius XM Holdings Inc.*, filed on May 16, 2016 in the Superior Court of the State
11 of California for the County of Los Angeles, Case No. 620374.

12 23. “Identify” or “Identified,” when used in reference to a claim for
13 payment under the Royalty Program for a Pre-1972 Sound Recording or an opt out
14 by a Settlement Class Member, means to provide the: (i) title, (ii) artist, (iii) album,
15 (iv) label, (v) ISRC (if known), and (vi) date first fixed, in each case for each
16 applicable Pre-1972 Sound Recording. The identification requirement shall not be
17 required for the Claim Program.

18 24. “Major Record Labels” means Capitol Records, LLC, Sony
19 Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and
20 ABKCO Music & Records, Inc., and their respective subsidiaries and affiliates,
21 which entered into a separate settlement agreement with Sirius XM and opted out of
22 the California Class.

23 25. “New York Action” means the putative class action captioned
24 *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on August 16, 2013 in the United
25 States District Court for the Southern District of New York (the “New York
26 Court”), Case No. 13-CV-5784 (CM).

27 26. “New York Appeal” means the appeal of the New York Action,
28 filed on April 15, 2015 in the United States Court of Appeals for the Second Circuit

1 (the “Second Circuit”), Appeal No. 15-1164, and certified to the New York Court
2 of Appeals on April 13, 2016, Appeal No. CTQ-2016-00001.

3 27. “Parties” means the Plaintiff and Sirius XM.

4 28. “Performance,” “Perform,” and/or “Performed” means each
5 instance in which a sound recording is publicly performed to a listener within the
6 Territory by means of a digital audio transmission on those channels of the
7 Webcasting Service that are offered on Sirius XM’s SDARS Service, that are
8 capable of being received on all models of Sirius radio, all models of XM radio, or
9 either or both, and on which the programming consists primarily of sound
10 recordings (“Reference Channels”). “Performances” will in all cases exclude
11 performances of less than thirty (30) seconds and performances that make no more
12 than incidental use of sound recordings (including, without limitation, brief musical
13 transitions in and out of commercials or program segments, brief performances
14 during news, talk and sports programming, brief background performances during
15 disc jockey announcements, brief performances during commercials of sixty
16 seconds or less in duration, or brief performances during sporting or other public
17 events).

18 29. “Performance Right Issue” means the question of whether Sirius
19 XM is entitled to publicly perform Pre-1972 Sound Recordings owned by Plaintiff
20 without having to obtain permission from and pay compensation to Plaintiff.

21 30. “Plaintiff” means Flo & Eddie, Inc., the named plaintiff in the
22 Flo & Eddie Cases.

23 31. “Play” or “Plays” means each instance in which a sound
24 recording is transmitted on Sirius XM’s SDARS Service.

25 32. “Pre-1972 Sound Recording” means a sound recording that was
26 initially fixed prior to February 15, 1972 (without regard to whether that sound
27 recording was subsequently re-released, re-issued, or re-mastered).

28

1 33. “Preliminary Approval Order” means the “Order Granting
2 Preliminary Approval of Class Action Settlement,” substantially in the form
3 attached as Exhibit A hereto, entered by the Court.

4 34. “Pro Rata Share” means, for any particular sound recording and
5 for any applicable accounting period, a fraction of which the numerator is the total
6 number of Performances of that particular Pre-1972 Sound Recordings in that
7 accounting period on the Reference Channels, and the denominator of which is the
8 total number of Performances of all sound recordings broadcast by Sirius XM in
9 that accounting period on the Reference Channels. In the event the allocation
10 methodology under 37 C.F.R. 382.11 and 382.12 changes from a Performance
11 based allocation to an allocation based on Plays, or in the event that Sirius XM
12 ceases during the Term to offer the Webcasting Service, then an allocation
13 methodology based on Plays shall be used.

14 35. “Royalty Administrator” means an independent company agreed
15 upon by the Parties, or absent agreement by the Parties, selected by the Court, to
16 administer the Royalty Program. The Royalty Administrator shall develop and
17 maintain the Royalty Claims Website, calculate, prepare and distribute royalty
18 statements based on the usage information provided by Sirius XM, and distribute
19 payments to Bona Fide Claimants and any applicable Court-approved fees to Class
20 Counsel from the Royalty Program.

21 36. “Royalty Program” means Sirius XM’s payment of royalties
22 pursuant to ¶ IV.C.2-9.

23 37. “Royalty Fund” means all monies held in the Royalty Fund
24 Escrow Account.

25 38. “Royalty Fund Escrow Account” shall mean an interest bearing
26 escrow account with a financial institution designated by Class Counsel and
27 reasonably acceptable to Sirius XM, into which Sirius XM shall make all payment
28 of royalties required pursuant to the Royalty Program. Class Counsel and the

1 Royalty Administrator shall have the responsibility for the creation, maintenance
2 and oversight of the Royalty Fund Escrow Account.

3 39. "SDARS Service" means Sirius XM's satellite digital audio
4 radio service.

5 40. "Service" means the SDARS Service, the Webcasting Service,
6 the CABSAT Service and the BES Service.

7 41. "Settlement" means the terms contained in this Stipulation
8 (together with the exhibits attached hereto).

9 42. "Settlement Class" and/or "Settlement Class Members" means
10 all owners of Pre-1972 Sound Recordings, wherever situated, which have been
11 performed, reproduced, distributed, or otherwise exploited by Sirius XM in the
12 United States from August 1, 2009 through November 14, 2016, other than the
13 Major Record Labels, the Direct Licensors and all persons and entities that submit a
14 timely, valid and properly completed written request to be excluded from the
15 Settlement Class in accordance with Section VI. The Settlement Class excludes all
16 Pre-1972 Sound Recordings that the Major Record Labels, the Direct Licensors or
17 persons and entities that submit a timely, valid and properly completed written
18 request to be excluded from the Settlement Class in accordance with Section VI
19 own, control, or otherwise have the right to settle with respect to.

20 43. "Settlement Fund" means the fund described in ¶ IV.A, together
21 with all interest accruing thereon.

22 44. "Sheridan Actions" means, collectively, the actions captioned
23 *Sheridan v. Sirius XM Radio Inc.*, filed in the United States District Court for the
24 Northern District of California on September 8, 2015 (Case No. 3:15-cv-04081-
25 VC), filed in the United States District Court for the Southern District of New York
26 on September 8, 2015 (Case No. 1:15-cv-07056-GHW), filed in the United States
27 District Court for the Northern District of Illinois on October 19, 2015 (Case: No.
28

1 1:15-cv-09236), and filed in the United States District Court for the District of New
2 Jersey on October 19, 2015 (Case No. 2:15-cv-07576-WHW-CLW).

3 45. "Sirius XM Prevails" means, in the context of the California
4 Appeal, New York Appeal, and the Florida Appeal, that as a result of the appeal,
5 Sirius XM is entitled to publicly perform Pre-1972 Sound Recordings owned by
6 Plaintiff without having to obtain permission from and pay compensation to
7 Plaintiff. Any other outcome or resolution, including any failure to pursue or
8 perfect an appeal by Sirius XM, shall be considered one in which "Plaintiff
9 Prevails." Neither Party, however, shall be deemed to have "prevailed" for
10 purposes of this paragraph in the event that a court of appeal declines to resolve the
11 merits of an appeal on justiciability grounds. Any appeal determined to be non-
12 justiciable shall neither trigger a contingent payment nor reduction of the royalty
13 rate under ¶ IV.B below.

14 46. "Stipulation of Class Action Settlement" and/or "Stipulation"
15 means this Stipulation of Class Action Settlement, including its attached exhibits
16 (which are incorporated herein by reference), duly executed by the Parties and
17 approved as to form through their respective attorneys of record.

18 47. "Special Master" means a magistrate judge appointed by the
19 Court pursuant to Fed. R. Civ. P. 53. The role of the Special Master will be limited
20 to resolving disputes regarding the ownership and/or control of Pre-1972 Sound
21 Recordings between, amongst, or involving Settlement Class Members who submit
22 a timely, valid and properly completed claim for payment from the Settlement Fund
23 or Royalty Program and third parties, including without limitation the Major Labels
24 and the Direct Licensors, that may assert conflicting claims against Settlement
25 Class Members.

26 48. "Term" means the period from the Effective Date through
27 January 1, 2028.

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1 49. “Territory” means the United States, its territories, possessions,
2 commonwealths and military bases.

3 50. “Webcasting Service” means Sirius XM’s Internet service.

4 B. Capitalized terms used in this Stipulation, but not defined above, shall
5 have the meaning ascribed to them in this Stipulation and the exhibits attached
6 hereto.

7 **II. RECITALS**

8 A. The operative complaint in the California Action included five claims:
9 (1) misappropriation under California Civil Code Section 980(a)(2) (“Section
10 980”); (2) common law misappropriation; (3) unfair competition under California
11 Business and Professions Code Section 17200 (“Section 17200”); (4) common law
12 unfair competition; and (5) conversion. Plaintiff alleged, on behalf of itself and the
13 California Class, that Sirius XM, a national satellite radio broadcaster, publicly
14 performed and reproduced Pre-1972 Sound Recordings in violation of Plaintiff’s
15 and the California Class’s “exclusive ownership” rights in such recordings.
16 Plaintiff alleged similar claims in the New York Action and the Florida Action
17 based on those states’ laws.

18 B. In the California Action, the Court concluded that California law
19 provided for an exclusive right of public performance of Pre-1972 Sound
20 Recordings. On September 22, 2014, the Court granted Plaintiff’s motion for
21 summary judgment with respect to the alleged unauthorized public performance of
22 Plaintiff’s Pre-1972 Sound Recordings. The Court did not grant summary
23 judgment with respect to the alleged unauthorized reproduction of such recordings.
24 On May 27, 2015, the Court granted Plaintiff’s motion for class certification. On
25 September 8, 2016, the Court granted Sirius XM’s motion for summary judgment
26 on Plaintiffs’ claim for common law unfair competition and request for punitive
27 damages. A jury trial was scheduled to commence on November 15, 2016 to
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1 resolve the California Class’s claims for damages and injunctive relief, which was
2 to be followed by a post-trial claims administration process.

3 C. In the New York Action, the New York Court denied Sirius XM’s
4 motion for summary judgment on November 14, 2014 and concluded that New
5 York law provided for an exclusive right of public performance of Pre-1972 Sound
6 Recordings. On April 15, 2015, the Second Circuit granted Sirius XM’s petition
7 pursuant to 28 U.S.C. § 1292(b) for leave to appeal the New York Court’s orders
8 denying summary judgment and reconsideration. On April 13, 2016, the Second
9 Circuit certified the Performance Right Issue to the New York Court of Appeals
10 (while retaining jurisdiction over the Commerce Clause Issue). The New York
11 Court of Appeals heard oral argument on October 18, 2016, but has not yet
12 rendered an opinion.

13 D. In the Florida Action, the Florida Court granted Sirius XM’s motion
14 for summary judgment on June 22, 2015 and concluded that Florida law did not
15 provide for an exclusive right of public performance of Pre-1972 Sound
16 Recordings. On June 29, 2016, the Eleventh Circuit certified the Performance
17 Right Issue to the Florida Supreme Court (while retaining jurisdiction over the
18 Commerce Clause Issue). Briefing before the Florida Supreme Court has not yet
19 concluded.

20 E. At least two other states (North Carolina and South Carolina) have
21 statutes that “abolish any common-law rights attaching to phonograph records.”
22 N.C. GEN. STAT. § 66-28 (2015); S.C. CODE ANN. § 39-3-510 (2015). Plaintiff has
23 not yet filed lawsuits in the remaining 45 states.

24 F. Prior to agreeing to this Settlement, Plaintiff and Class Counsel
25 conducted a thorough investigation and evaluation of the facts and law relating to
26 the matters alleged in the Flo & Eddie Cases, including, among other things, (i)
27 reviewing and analyzing the evidence and applicable law, including the review and
28 analysis of thousands pages of documents produced by Sirius XM and third parties;

1 (ii) consultation with experts retained by Class Counsel; (iii) taking and defending
2 numerous depositions of fact and expert witnesses; and (iv) engaging in extensive
3 motion practice, including motions to compel, class certification, summary
4 judgment, motions *in limine*, and the preparation of exhibit lists, jury instructions,
5 and related pretrial conference filings. Plaintiff and Class Counsel have evaluated
6 the relevant law and facts to assess the merits of Plaintiff's claims and the scope of
7 recovery at trial. Plaintiff and Class Counsel believe that the claims and damages
8 asserted have merit and that the evidence developed to date supports the claims
9 asserted. However, based upon their extensive discovery, investigation, and
10 evaluation of facts and the law concerning the matters alleged, Plaintiff and Class
11 Counsel agreed to settle the Flo & Eddie Cases pursuant to the provisions of this
12 Stipulation after considering, among other things: (1) the fairness, reasonableness,
13 and adequacy of this Stipulation; (2) the substantial risks and uncertainty of
14 protracted litigation and trial and appeals, especially in complex actions such as
15 this, as well as the difficulties and delays inherent in such litigation; and (3) the
16 desirability of promptly providing relief to Plaintiff and the Settlement Class
17 Members.

18 G. Sirius XM denied and continues to deny each and all of the claims and
19 contentions alleged by Plaintiff. Sirius XM has expressly denied and continues to
20 deny all charges of wrongdoing or liability arising out of any of the conduct,
21 statements, acts or omissions alleged, or that could have been alleged, in the Flo &
22 Eddie Cases and explicitly denies that it has committed the alleged infringement,
23 violations of law or breaches of duty to Plaintiff, the Settlement Class Members, or
24 anyone else. Sirius XM also maintains that class certification is inappropriate in the
25 California Action (and all other Flo & Eddie Cases).

26 H. Sirius XM recognizes that further defense of the Flo & Eddie Cases
27 and other potential lawsuits in other States will be protracted, burdensome and
28 expensive. Sirius XM has also taken into account the uncertainty, distraction and

1 risks inherent in any litigation. Sirius XM, therefore, has determined that it is
2 desirable and beneficial to it that the issue of damages in the Flo & Eddie Cases be
3 fully and finally resolved in the manner and upon the terms and conditions set forth
4 in this Stipulation.

5 I. Sirius XM has agreed to class action treatment of claims by the
6 Settlement Class solely for the purpose of effecting the compromise and settlement
7 of those claims on a class basis as set forth herein and does not consent to
8 certification for any other purpose. In the event the Settlement does not become
9 final for any reason, Sirius XM reserves the right to seek decertification of the
10 California Class as well as to defend on the merits, in future proceedings, the
11 matters at issue in the Flo & Eddie Cases, and Plaintiff reserves the right to oppose
12 such efforts.

13 J. The Parties agree that a bona fide justiciable dispute remains as to the
14 Performance Right Issue and the Commerce Clause Issue. The Parties agree to
15 retain all procedural and substantive rights to proceed with the New York and
16 Florida Appeals and any further proceedings to the United States Supreme Court,
17 and except for the limitation provided for in Section III.A below with regards to not
18 appealing class certification rulings in the California Action, to proceed with the
19 California Appeal and any further proceedings to the United States Supreme Court,
20 to resolve those issues. Each Party agrees not to dismiss or abandon their pending
21 appeals (for Sirius XM, the New York Appeal; for Plaintiff, the Florida Appeal),
22 and Sirius XM agrees to pursue the California Appeal in good faith and not dismiss
23 or abandon that Appeal. However, neither Party is required but is permitted to
24 pursue any further appeal or petition for certiorari to the United States Supreme
25 Court.

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1 **III. ENTRY OF FINAL JUDGMENT, PRESERVATION OF**
2 **APPELLATE RIGHTS, AND COVENANT NOT TO SUE**

3 A. California Action. In the California Action, as of the Effective Date,
4 the Parties shall be deemed to have stipulated to the entry of final judgment as
5 provided in Exhibit B, while preserving their respective rights to appeal that
6 judgment. Unless this Stipulation is terminated in accordance with its terms, Sirius
7 XM shall not appeal the Court's May 27, 2015 and September 20, 2016 class
8 certification rulings. If, after the conclusion of the California Appeal and
9 satisfaction of any payment obligations required under Section IV.B.5, the
10 California Action is remanded to the Court, Plaintiff and the California Class shall
11 immediately dismiss with prejudice any and all claims against Sirius XM by way of
12 a stipulated dismissal that shall provide that each Party shall bear their own costs
13 and fees, except for all fees and costs provided for in Section VII below.

14 B. New York Action. The Parties preserve their respective rights to
15 proceed with the New York Appeal and any further proceedings. If, after the
16 conclusion of the New York Appeal and the Effective Date and satisfaction of any
17 payment obligations required under Section IV.B.1, the New York Action is
18 remanded to the New York Court, Plaintiff shall immediately dismiss with
19 prejudice any and all claims against Sirius XM by way of a stipulated dismissal that
20 shall provide that each Party shall bear their own costs and fees, except for all fees
21 and costs provided for in Section VII below.

22 C. Florida Action. The Parties preserve their respective rights to proceed
23 with the Florida Appeal and any further proceedings. If, after the conclusion of the
24 Florida Appeal and the Effective Date and satisfaction of any payment obligations
25 required under Section IV.B.3, the Florida Action is remanded to the Florida Court,
26 Plaintiff shall immediately dismiss with prejudice any and all claims against Sirius
27 XM by way of a stipulated dismissal that shall provide that each Party shall bear
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1 their own costs and fees, except for all fees and costs provided for in Section VII
2 below.

3 D. Covenant Not to Sue. As of the Effective Date, in consideration of the
4 obligations set forth herein, and with the exception of the California Appeal, New
5 York Appeal, and Florida Appeal and for any actions necessary to enforce this
6 Settlement, the Covenantors shall be deemed to have, and by operation of law shall
7 have, covenanted and agreed during the Term not to sue the Covenantees based
8 upon any and all claims, demands, rights, actions or causes of action, liabilities,
9 damages of any kind, losses, obligations, judgments, suits, fees, expenses, costs,
10 matters and issues of any kind or nature whatsoever, whether known or unknown,
11 contingent or absolute, suspected or unsuspected, disclosed or undisclosed, hidden
12 or concealed, matured or unmatured, that have been, could have been, or in the
13 future can or might be asserted in the Flo & Eddie Cases or in any court, tribunal or
14 proceeding by or on behalf of any or all Covenantors, whether individual, class,
15 derivative, representative, legal, equitable or any other type or in any other
16 capacity, which have arisen, could have arisen, arise now or hereafter arise out of,
17 are based on, or relate in any manner to Sirius XM's exploitation, performance,
18 reproduction, copying, storage, distribution, lease, rent, or any other use of Pre-
19 1972 Sound Recordings in the ordinary course of Sirius XM's Service.

20 E. Gusto and Sheridan Actions. Plaintiff and Class Counsel agree not to
21 cooperate or otherwise voluntarily assist, directly or indirectly, with prosecution of
22 the Gusto Action and Sheridan Actions.

23 **IV. SETTLEMENT RELIEF**

24 A. Settlement Fund.

25 1. Within ten (10) business days after the Court enters the
26 Preliminary Approval Order, Sirius XM shall pay into an interest bearing escrow
27 account with a financial institution designated by Class Counsel and reasonably
28 acceptable to Sirius XM (the "Settlement Fund Escrow Account") the sum of

1 twenty-five million dollars (\$25 million) (the “Settlement Payment”). There will be
2 no reversion to Sirius XM of the Settlement Payment or any additional payments
3 that Sirius XM may be required to make pursuant to Section IV.B below, except as
4 provided for in Section V.C below. The Settlement Payment, together with all
5 interest accruing thereon, the potential amounts of up to \$15 million in additional
6 payments (contingent on appellate outcomes provided for in Section IV.B below)
7 and all interest accruing thereon, shall collectively constitute the “Settlement
8 Fund.” Class Counsel shall have the responsibility for the creation, maintenance
9 and oversight of the Settlement Fund Escrow Account.

10 2. As of the time any portion of the Settlement Fund is deposited
11 into the Settlement Fund Escrow Account, Sirius XM shall no longer have any
12 right, title or interest in the sums held, except if the Court declines to enter a Final
13 Judgment approving the Settlement or the Court’s approval is reversed on appeal,
14 in which case the funds in the Settlement Fund Escrow Account will revert to Sirius
15 XM, notwithstanding the non-reversionary provision described in the prior
16 paragraph. The Settlement Payment and any additional funds required to be paid
17 pursuant to ¶ IV.B will remain in the Settlement Fund Escrow Account until the
18 Effective Date described in ¶ V.A.

19 3. All funds held in the Settlement Fund Escrow Account, the
20 Settlement Administration Account (as defined below), and the Royalty Fund
21 Escrow Account (collectively, the “Escrow Accounts”) and all earnings thereon,
22 shall be deemed to be *in custodia legis* of the Court and shall remain subject to the
23 jurisdiction of the Court until such time as the funds shall have been disbursed or
24 returned pursuant to the terms of this Stipulation or further order of the Court. The
25 escrow agent(s) shall invest funds in the Escrow Accounts in instruments backed by
26 the full faith and credit of the United States Government (or a mutual fund invested
27 solely in such instruments), or deposit some or all of the funds in non-interest
28 bearing transaction accounts that are fully insured by the Federal Deposit Insurance

1 Corporation (“FDIC”) in amounts that are up to the limit of FDIC insurance. All
2 risks related to the investment of the Settlement Payment or Settlement Fund shall
3 be borne by the Settlement Fund, and all risks related to the investment of the
4 Royalty Fund shall be borne by the Royalty Fund Escrow Account.

5 4. After the Settlement Payment has been paid into the Settlement
6 Fund Escrow Account, the Parties agree that the Settlement Fund is intended to be a
7 Qualified Settlement Fund within the meaning of Treasury Regulation § 1.468B-1
8 and shall be treated as a Qualified Settlement Fund from the earliest date possible,
9 and agree to any relation-back election required to treat the Settlement Fund
10 Escrow Account as a Qualified Settlement Fund from the earliest date possible.

11 5. All taxes resulting from the tax liabilities of the Settlement Fund
12 shall be paid solely out of the Settlement Fund. Any taxes or tax expenses owed on
13 any earnings on the Settlement Fund prior to its transfer to the Settlement Fund
14 Escrow Account shall be the sole responsibility of the entities that make the
15 deposit. The Settlement Fund shall not be responsible for any taxes owed by the
16 Plaintiff or the Settlement Class as a result of any distributions to them out of the
17 Settlement Fund.

18 6. The Parties estimate that 85% of the 11,808,927 million
19 historical Plays from August 2009 through October 2016 of Pre-1972 Sound
20 Recordings by Sirius XM have been authorized and/or licensed pursuant to Sirius
21 XM’s agreements with the Major Record Labels and/or the Direct Licensors and/or
22 are otherwise purported to be owned by persons and entities that opted out of the
23 California Class, submitted opt-out forms for the California Class (whether valid or
24 not), or otherwise excluded themselves from the California Class, and that the
25 Settlement Class accounts for the remaining 15% of historical Plays (the “15%
26 Remainder”). The Parties shall cooperate with each other to develop an agreed
27 upon list of the Pre-1972 Sound Recordings that constitute the 15% Remainder (the
28 “Database”). Within ten (10) business days of execution of this Stipulation, Sirius

1 XM shall use reasonable efforts to cause its expert, Keith R. Ugone, Ph.D., to
2 provide to Class Counsel a spreadsheet listing the approximately 36% of Pre-1972
3 Sound Recordings played by Sirius XM on the Service from August 2009 through
4 October 2016 that he has identified as “Unmatched Recordings.” The Parties shall
5 promptly provide this spreadsheet to the Major Record Labels (as well as Direct
6 Licensors that the Parties agree upon). The Parties shall request that the Major
7 Record Labels (as well as Direct Licensors that the Parties agree upon) review the
8 spreadsheet of “Unmatched Recordings,” and identify any “Unmatched
9 Recordings” that they claim to own or control and that should be excluded from the
10 spreadsheet in order to assist in developing the Database.

11 7. Each Party shall have the option to terminate the Settlement in
12 writing no later than ten (10) days from the close of the opt-out exclusion period if
13 Settlement Class Members opt-out of the Settlement who, in the aggregate, own (a)
14 Pre-1972 Sound Recordings representing 10% or more of historical Plays of the
15 15% Remainder or (b) 3,600 or more Pre-1972 Sound Recordings in the Database.
16 Neither Party shall have the option to terminate the Settlement if Settlement Class
17 Members who have not opted out own Pre-1972 Sound Recordings representing
18 1,594,205 or more historical Plays.

19 8. Neither Party will solicit or encourage opt-outs. Prior to the
20 Effective Date, Sirius XM shall not negotiate settlements or direct licenses with
21 Settlement Class Members (excluding persons and entities who previously entered
22 into settlements or direct licenses with Sirius XM, opted out of the California Class,
23 or otherwise excluded themselves from the California Class) with respect to Pre-
24 1972 Sound Recordings. Any and all issues concerning the effectiveness or
25 propriety of any purported opt-outs of the California Class shall be determined by
26 the Court.

27 B. Additional Payment Terms Contingent on Appellate Outcomes.

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1 1. In the event that Plaintiff Prevails on the Performance Right
2 Issue in the New York Court of Appeals, Sirius XM shall pay into the Settlement
3 Fund Escrow Account an additional five million dollars (\$5 million).

4 2. In the event that Sirius XM Prevails on the Performance Right
5 Issue in the New York Court of Appeals, the prospective royalty rate provided for
6 in Section IV.C.2 shall be reduced by 2% points (i.e., from 5.5% to 3.5%, if not
7 already reduced as provided herein).

8 3. In the event that Plaintiff Prevails on the Performance Right
9 Issue in the Florida Supreme Court, Sirius XM shall pay into the Settlement Fund
10 Escrow Account an additional five million dollars (\$5 million).

11 4. In the event that Sirius XM Prevails on the Performance Right
12 Issue in the Florida Supreme Court, the prospective royalty rate provided for in
13 Section IV.C.2 shall be reduced by 1.5% points (i.e., from 5.5% to 4.0%, if not
14 already reduced as provided herein).

15 5. In the event that Plaintiff Prevails on the Performance Right
16 Issue in the California Appeal, Sirius XM shall pay into the Settlement Fund
17 Escrow Account an additional five million dollars (\$5 million).

18 6. In the event that Sirius XM Prevails on the Performance Right
19 Issue in the California Appeal, the prospective royalty rate provided for in Section
20 IV.C.2 shall be reduced by 2% points (i.e., from 5.5% to 3.5%, if not already
21 reduced as provided herein).

22 7. In the event that Sirius XM Prevails on the Performance Right
23 Issue in all of the California, New York, and Florida Appeals, the royalty
24 obligations provided for in Section IV.C.2 shall immediately terminate and Sirius
25 XM shall not be obligated to pay any further royalties to perform, reproduce,
26 distribute, or otherwise exploit Pre-1972 Sound Recordings owned or controlled by
27 the Settlement Class. The license granted pursuant to Section IV.C.1 shall remain
28

1 in full force and effect throughout the Term, regardless of whether Sirius XM's
2 royalty obligations terminate.

3 8. In the event that Sirius XM Prevails on the Commerce Clause
4 Issue in the Second Circuit, Eleventh Circuit, Ninth Circuit, or United States
5 Supreme Court, the royalty obligations provided for in Section IV.C shall
6 immediately terminate and Sirius XM shall not be obligated to pay any further
7 royalties to perform, reproduce, distribute, or otherwise exploit Pre-1972 Sound
8 Recordings owned or controlled by the Settlement Class. In such an event, the
9 termination of Sirius XM's royalty obligation shall be prospective only and no
10 funds previously disbursed to Class Members under the Royalty Program shall
11 revert back to Sirius XM. The license granted pursuant to Section IV.C.1 shall
12 remain in full force and effect throughout the Term, regardless of whether Sirius
13 XM's royalty obligations terminate.

14 9. The outcome of the California Appeal, New York Appeal and/or
15 Florida Appeal, shall not operate to terminate the Settlement, and regardless of the
16 pendency and outcome of those appeals, Sirius XM remains obligated to fund the
17 Settlement Payment pursuant to the terms in Section IV.A.1.

18 C. License.

19 1. Grant of Rights. During the Term, the Settlement Class hereby
20 licenses and grants to Sirius XM in the Territory, the right, through to the listener,
21 to broadcast and publicly perform by means of digital audio transmission and to
22 make reproductions, distributions, and other exploitations necessary or incident
23 thereto, any or all of the Pre-1972 Sound Recordings owned or controlled by the
24 Settlement Class ("Recordings") in connection with the Service (including, without
25 limitation, as made available to subscribers via the SDARS Service, the Webcasting
26 Service, the CABSAT Service, and the BES Service). Each Settlement Class
27 Member agrees that any sale, assignment, transfer, or other disposition of a Pre-
28 1972 Sound Recording shall be subject to the license set forth in the immediately

1 preceding sentence. The Settlement Class Members shall promptly notify the
2 Royalty Administrator in writing of any such sale, assignment, transfer, or
3 disposition. This license shall supersede any federal or state law that may be
4 enacted during the Term which specifies a different royalty rate for the public
5 performance of Pre-1972 Sound Recordings than that specified in Section
6 IV.C.2. The Settlement Class shall be free to grant licenses to other third parties.

7 2. Royalties for Recordings. During the period from January 1,
8 2018 to January 1, 2028, Sirius XM (or an agent of Sirius XM) will pay into the
9 Royalty Fund Escrow Account monthly royalties for Sirius XM's performance of
10 properly Identified Pre-1972 Sound Recordings owned or controlled by Bona Fide
11 Claimants for the SDARS Service, the Webcasting Service, CABSAT Service, and
12 BES Service. The amount of the monthly royalty for each properly Identified Pre-
13 1972 Sound Recording owned by a Bona Fide Claimant will be that properly
14 Identified Pre-1972 Sound Recording's Pro Rata Share of 5.5% of the Gross
15 Revenue for that particular month, before deduction of any attorneys' fees awarded
16 to Class Counsel. The royalty rate may be adjusted from time to time as described
17 in ¶ IV.B. However, regardless of any rate adjustments, the license described in the
18 immediately preceding paragraph shall remain in full force and effect throughout
19 the Term. The Parties agree that such amount represents the rate that has been
20 established by negotiations between a willing buyer and willing seller in a
21 competitive market for Pre-1972 Sound Recordings, and shall be precedential in all
22 future and/or pending proceedings (including rate making proceedings and
23 arbitrations) relating to sound recordings.

24 3. In the event that Sirius XM ceases during the Term to offer the
25 Webcasting Service, then Sirius XM shall provide to the Royalty Administrator
26 reasonable information regarding its Plays of Recordings on the SDARS Service,
27 sufficient for reporting the Pro Rata Share.

28

1 4. Settlement Class Members must submit claims through a
2 website (the “Royalty Claims Website”) in order to be entitled to royalties for
3 Sirius XM’s performance of properly Identified Pre-1972 Sound Recordings. The
4 Royalty Claims Website, including its look and functionality, shall be acceptable in
5 all respects to the Parties, with any disputes resolved by the Court. The Royalty
6 Claims Website will contain and display the Database to assist the Settlement Class
7 Members to Identify Pre-1972 Sound Recordings he, she or it may own or control.
8 The Royalty Administrator shall make the Royalty Claims Website available to the
9 Settlement Class Members within fifteen (15) days after the Effective Date. The
10 license granted pursuant to Section IV.C.1 shall remain in full force and effect
11 throughout the Term, regardless of whether Settlement Class Members submit
12 claims pursuant to this paragraph.

13 5. The Royalty Claims Website shall require Bona Fide Claimants
14 to confirm and/or update their contact information (including a valid email address)
15 to be used in connection with notifications and payments. Bona Fide Claimants
16 must also fully complete a form to Identify any and all Pre-1972 Sound Recordings
17 they own or control, and to represent and warrant that they own all right, title and
18 interest in and to such recordings and such information is true and correct in all
19 respects.

20 6. The Royalty Administrator shall deliver to Sirius XM and Class
21 Counsel the Identification of all Pre-1972 Sound Recordings claimed by Settlement
22 Class Members within thirty (30) days after receiving notice of such claim. Sirius
23 XM shall commence making any required royalty payments within ninety (90) days
24 after Sirius XM’s receipt of the written Identification of the Pre-1972 Sound
25 Recordings owned by the Settlement Class Member, and no royalty payment
26 obligations shall attach until receipt of such written Identification. Sirius XM shall
27 have no liability for past royalties resulting from a Settlement Class Member’s
28 failure to properly Identify any Pre-1972 Sound Recording owned or controlled by

1 he, she or it. Sirius XM will make any required payments to the Royalty Fund
2 Escrow Account within one hundred and twenty (120) days after the month in
3 which such properly Identified Pre-1972 Sound Recording was performed. In
4 making such payments, Sirius XM shall identify the number of Performances on
5 the Reference Channels of each Identified Pre-1972 Sound Recording owned by a
6 Bona Fide Claimant and set forth the total number of Performances of all sound
7 recordings in that accounting period on the Reference Channels. As a condition to
8 payment, Bona Fide Claimants and Class Counsel shall provide the Royalty
9 Administrator such documents as it reasonably requests, including all tax
10 documents reasonably necessary to report to federal, state and local governments.

11 7. Sirius XM shall maintain accurate books and records concerning
12 the use of Settlement Class Members' Identified Pre-1972 Sound Recordings in
13 connection with the Service that are reasonably necessary for the Royalty Claims
14 Administrator to verify the accuracy of the royalty accountings. Such books and
15 records will be maintained in Sirius XM's customary form and are anticipated to be
16 kept in searchable electronic form. The Royalty Claims Administrator shall have
17 the right, upon not less than sixty (60) days' written notice, to designate an
18 independent certified public accountant of national standing, who will not be
19 retained on a contingency basis, to examine those books and records solely for the
20 purpose of verifying the accuracy of royalty accountings provided for herein, only
21 once per year. No period may be audited in any event more than once. Each
22 accounting statement rendered hereunder by Sirius XM will be binding and not
23 subject to any objection unless the Royalty Administrator notifies Sirius XM of that
24 objection within one year after the date such statement is sent by Sirius XM to the
25 Royalty Claims Administrator. The Royalty Claims Administrator may not object
26 to any accounting (or failure to account) pursuant to this Stipulation unless such
27 objection has been raised within one year after the date the applicable accounting
28

1 statement is rendered. All costs and expenses of any such audit shall be paid solely
2 by the Royalty Claims Administrator and/or royalty recipient.

3 If any such audit reveals an overpayment of royalties by Sirius XM, the
4 Royalty Administrator and the Bona Fide Claimants shall promptly repay such
5 amounts, without interest, to Sirius XM. If any such audit reveals an underpayment
6 of royalties by Sirius XM, Sirius XM shall promptly pay such amounts, without
7 interest, to the Royalty Administrator for payment to the applicable Bona Fide
8 Claimants.

9 8. After any required royalty payments pursuant to the Royalty
10 Program have been paid into the Royalty Fund Escrow Account, the Parties agree
11 that the Royalty Fund is intended to be a Qualified Settlement Fund within the
12 meaning of Treasury Regulation § 1.468B-1 and shall be treated as a Qualified
13 Settlement Fund from the earliest date possible, and agree to any relation-back
14 election required to treat the Royalty Fund Escrow Account as a Qualified
15 Settlement Fund from the earliest date possible.

16 9. All taxes resulting from the tax liabilities of the Royalty Fund
17 shall be paid solely out of the Royalty Fund. Any taxes or tax expenses owed on
18 any earnings on the Royalty Fund prior to its transfer to the Royalty Fund Escrow
19 Account shall be the sole responsibility of the entities that make the deposit. The
20 Royalty Fund shall not be responsible for any taxes owed by the Plaintiff or the
21 Settlement Class as a result of any distributions to them out of the Royalty Fund.

22 **V. CONDITIONS; TERMINATION**

23 A. This Stipulation shall become final on the first date after which all of
24 the following events and conditions have been met or have occurred (the "Effective
25 Date"):

26 1. The Court has preliminarily approved this Stipulation (including
27 all attachments), the Settlement set forth herein, and the method for providing
28 notice to the Settlement Class Members;

1 2. The Court has entered the Final Judgment; and

2 3. One of the following has occurred:

3 a. The time to appeal from such orders in ¶¶ V.A.1 and
4 V.A.2 has expired and no appeals have been timely filed;

5 b. An appeal has been filed and finally resolved resulting in
6 an affirmation of the Final Judgment, and for the avoidance of doubt, such an
7 appeal does not encompass the California Appeal, New York Appeal, or Florida
8 Appeal; or

9 c. An appeal, other than the California Appeal, New York
10 Appeal, or Florida Appeal, has been filed and the appeal has resulted in the case
11 being remanded to the Court, the Court has entered a further order or orders
12 approving the Settlement on the terms set forth in this Stipulation and in accordance
13 with the appellate court's remand order, and all further appeals, if any, have been
14 exhausted or resolved consistent in all respects with the Final Judgment.

15 B. If the Settlement is not made final (per the provisions of ¶ V.A of this
16 Stipulation), this entire Stipulation shall become null and void. In the event this
17 Stipulation becomes null and void for any reason whatsoever, all administrative and
18 notice costs incurred as of the date this Stipulation becomes null and void shall be
19 borne equally by the Parties, including the costs of notifying the Settlement Class
20 Members and any claim administration costs reasonably and actually incurred by
21 the Administrator, but excluding the costs the Court has previously ordered that
22 Sirius XM pay to the Administrator, for which Sirius XM shall remain responsible
23 (June 16, 2016 Order (Dkt. 317, California Action)). The Parties may agree in
24 writing to waive any failed events or conditions and proceed with this Settlement,
25 in which event this Stipulation shall be deemed to have become final on the date of
26 such written agreement. Any decision by the Court not to approve, in full or in
27 part, any application for attorneys' fees and expenses filed by Class Counsel shall
28 not nullify or void this Stipulation.

1 C. If the Settlement is not made final (per the provisions of ¶ V.A of this
2 Stipulation or otherwise), then Sirius XM shall be entitled to a prompt return of the
3 Settlement Fund.

4 D. In the event this Stipulation and the Settlement are not finally
5 approved, or are terminated, cancelled, or fail to become effective for any reason
6 whatsoever, the Parties will revert to their respective positions immediately prior to
7 the execution of this Stipulation. Under no circumstances shall this Stipulation be
8 used as an admission or as evidence concerning the merits of Plaintiff's or the
9 California Class's claims in the California Action or any other action or the
10 appropriateness of class certification in the California Action or any other action
11 against Sirius XM.

12 E. During the period between execution of this Stipulation and the
13 Effective Date, Plaintiff and the Settlement Class (with the exception of those
14 entities that timely and validly opted out of the California Class) shall be deemed to
15 be bound by the covenant not to sue provided in ¶ III.D to the fullest extent
16 permissible.

17 **VI. CLASS NOTICE, OWNERSHIP DISPUTES, COURT APPROVAL**
18 **AND CLAIMS HEARING**

19 A. Preliminary Approval.

20 Within fifteen (15) days after the execution of this Stipulation, Plaintiff shall
21 apply to the Court for a Preliminary Approval Order substantially in the form of
22 Exhibit A attached hereto, and ask the Court to preliminarily approve the
23 Settlement, schedule a Final Approval Hearing, approve the contents and method of
24 dissemination of the proposed Class Notice, and approve the Claim Program and
25 Royalty Program.

26 B. Class Notice.

27 Within ten (10) days following the entry of the Preliminary Approval Order,
28 the Administrator shall provide the best notice practicable under the circumstances

1 to the Settlement Class. The mailing of Class Notice to a person or entity that is not
2 in the Settlement Class, as defined herein, shall not render such person or entity a
3 part of the Settlement Class or otherwise entitle such person to participate in this
4 Stipulation.

5 Class Counsel and Sirius XM shall cooperate in good faith with the
6 Administrator to provide documentation within their possession and reasonably
7 necessary to identify and provide notice to Settlement Class Members in
8 substantially the form of Exhibit C attached hereto. The Class Notice shall (a)
9 contain a short, plain statement of the Flo & Eddie Cases and the proposed
10 Settlement, (b) describe the category of persons and entities in the Settlement Class
11 and inform such persons and entities that, if they do not exclude themselves from
12 the Settlement Class, they may be eligible to receive relief under the proposed
13 Settlement; (c) explain the impact of the proposed Settlement on the pending Flo &
14 Eddie Cases; (d) describe the effect of the covenant not to sue included in the
15 proposed Settlement; (e) explain that a member of the Settlement Class may
16 exclude himself, herself, or itself from the Settlement Class by submitting a written
17 exclusion properly Identifying all of the Pre-1972 Sound Recordings that he, she or
18 it owns postmarked no later than thirty (30) days after the notice date; (f) explain
19 that a Settlement Class Member who has not submitted a written request for
20 exclusion properly Identifying the Pre-1972 Sound Recordings that he, she or it
21 owns may, if he or she desires, object to the proposed Settlement by submitting to
22 the Court and Parties' Counsel a written statement of objections postmarked no
23 later than thirty (30) days after the notice date; (g) explain that any judgment
24 entered whether favorable or unfavorable to the Settlement Class shall include, and
25 be binding on, all Settlement Class Members, even if they objected to the proposed
26 Settlement; (h) explain that a Settlement Class Member should consult their own
27 tax advisors regarding the tax consequences of the proposed Settlement, including
28 but not limited to, any payments, credits, royalties, and payment periods provided

1 hereunder, and any tax reporting obligations they may have with respect thereto; (i)
2 state that any relief to Settlement Class Members is contingent on the Court's final
3 approval of the proposed Settlement; and (j) explain the provisions of this
4 Settlement relating to attorneys' fees, expenses, and costs and explain that
5 individual Settlement Class Members will be responsible themselves for the fees
6 and costs of any persons they may retain to represent them for any reason,
7 including, but not limited to, counsel retained in connection with the Final
8 Approval Hearing.

9 Settlement Class Members who wish to opt out of the Settlement shall be
10 required to Identify any and all Pre-1972 Sound Recordings they own and represent
11 and warrant that they own all right, title and interest in and to those recordings and
12 that such information is true and correct in all respects. Any opt-out that does not
13 contain the foregoing information shall not be valid for any purpose.

14 C. Ownership Disputes.

15 The Special Master shall in a timely matter resolve disputes regarding
16 ownership or control of Pre-1972 Sound Recordings. Any challenges to ownership
17 or control must be brought within one hundred and twenty (120) days after a
18 claimant has made a claim to a specific Identified Pre-1972 Sound Recording(s) or
19 one hundred and twenty (120) days after another person or entity has made a
20 conflicting claim to a specific Identified Pre-1972 Sound Recording, whichever
21 comes later. All decisions by the Special Master concerning ownership or control
22 may be appealed to the Court. Sirius XM, its counsel, Plaintiff, and Class Counsel
23 shall not be responsible for any claims, damages, liabilities, losses, suits or actions
24 arising out of, or relating to the distributions made by the Administrator, the
25 Royalty Administrator, including determinations of ownership or control of Pre-
26 1972 Sound Recordings.

27 D. Final Approval Hearing.

28

1 The Parties shall request that, after Class Notice has been disseminated and
2 the opt-out period has closed, the Court hold a Final Approval Hearing for the
3 purpose of determining whether final approval of the Settlement is fair, adequate,
4 and reasonable to the Settlement Class Members, whether Final Judgment should
5 be entered, whether the proposed plan of allocation for the proceeds of the
6 Settlement is fair and reasonable and should be approved by the Court, and to
7 consider Class Counsel's application for an award and/or interim award of
8 attorneys' fees, expense reimbursements, and incentive awards.

9 E. The Settlement Fund Claim Program.

10 Class Counsel shall have full discretion over allocation of the Settlement
11 Fund Escrow Account to the Settlement Class, including the formula and manner
12 that will be used to pay claims to the Settlement Class Members, subject to Court
13 approval. Any disputes with respect to such allocation shall be separate and
14 severable from this Stipulation.

15 **VII. COSTS, FEES, EXPENSES, CLASS REPRESENTATIVE AWARDS**

16 Sirius XM will pay for all reasonable notice and administrative costs,
17 including but not limited to the reasonable costs related to the Claim Program and
18 the Royalty Program, up to \$500,000, but will not pay for any additional costs that
19 exceeds that amount or any costs for proceedings that are appealed from the Special
20 Master to the Court to resolve any ownership disputes related to Pre-1972 Sound
21 Recordings, unless appealed by Sirius XM who shall bear its own attorneys' fees
22 and costs. Any additional costs shall be paid out of the Settlement Fund or out of
23 amounts due to Bona Fide Claimants under the Royalty Program. Sirius XM shall
24 make an initial payment of one hundred thousand dollars (\$100,000) to an escrow
25 agent designated by Class Counsel and reasonably acceptable to Sirius XM, which
26 shall establish the Settlement Administration Account. Prior to the Effective Date,
27 without further approval from Sirius XM or further order of the Court, Class
28 Counsel may pay notice, administration, and Royalty Administrator expenses

1 actually incurred in an amount not to exceed \$100,000. Upon written notice by
2 Class Counsel that additional funds are necessary, Sirius XM shall make
3 supplemental deposits of such additional reasonable amounts—not totaling more
4 than four hundred thousand dollars (\$400,000)—within ten (10) business days after
5 receipt of such written notice. If Sirius XM wishes to challenge any notice and
6 administrative costs as being unreasonable, it shall first notify Class Counsel, and if
7 such challenge is not resolved within ten (10) business days of notice, Sirius XM
8 may file an application with the Court. Any such challenged costs will not be due
9 and payable unless and until the Court rules upon the application. Any unused
10 funds in the Settlement Administration Account shall be refunded to Sirius XM.
11 Otherwise, all payments specified in this Section and Section IV above shall be
12 inclusive of any payments to the Settlement Class, attorneys' fees, costs of suit,
13 incentive payments to Plaintiff, and costs of administration.

14 The payments specified in this Stipulation, after deducting the attorneys' fees
15 and expenses awarded, shall be paid to the Settlement Class Members pursuant to
16 the Claim Program and Royalty Program. Sirius XM will not oppose any motions
17 or applications filed by or on behalf of Class Counsel seeking an award and/or
18 interim award of attorneys' fees of up to and including 33 1/3% (one-third) from
19 the Settlement Fund and Royalty Program and reimbursement of costs, nor an
20 award not to exceed \$50,000 total (\$25,000 for each of Howard Kaylan and Mark
21 Volman of Flo & Eddie, Inc.) as an incentive award to the Plaintiff. Any incentive
22 award made to the Plaintiff shall be in addition to, and shall not diminish or
23 prejudice in any way, the settlement relief which Plaintiff may be eligible to
24 receive.

25 Class Counsel will, in their sole discretion, allocate and distribute the fees
26 and costs that they receive pursuant to this Stipulation among Class Counsel and
27 any and all other counsel, if applicable. The attorneys' fees and expenses awarded
28 shall be set forth in a separate in a fee and expense award separate from the Final

1 Judgment so that any appeal of one shall not constitute an appeal of the other. Any
2 order or proceedings relating to the attorneys' fees and expense reimbursement
3 application, or any appeal from any order related thereto, or reversal or
4 modification thereof, will not operate to terminate or cancel this Stipulation or
5 delay the Effective Date.

6 **VIII. NOTICE UNDER THE CLASS ACTION FAIRNESS ACT**

7 Within ten (10) days following the filing of this Stipulation with the Court,
8 Sirius XM shall serve notices of the proposed Settlement upon the appropriate
9 officials in compliance with the requirements of the Class Action Fairness Act
10 ("CAFA"), 28 U.S.C. § 1715. The identities of such officials and the content of the
11 materials shall be mutually agreeable to the Parties.

12 **IX. COVENANTS AND WARRANTIES**

13 A. Authority to Enter Agreement.

14 Each of the Parties covenants and warrants that it has the full power and
15 authority to enter into this Stipulation and to carry out its terms, and that it has not
16 assigned, sold, or otherwise pledged or encumbered any right, title or interest in the
17 claims addressed herein or its right, power and authority to enter into this
18 Stipulation. Any person signing this Stipulation on behalf of any other person or
19 entity represents and warrants that he or she has full power and authority to do so
20 and that said other person or entity is bound hereby. Sirius XM warrants that, as of
21 the date of this Stipulation, it is not insolvent, nor will its payment of the Settlement
22 Fund render it insolvent within the meaning of and/or for the purpose of the United
23 States Bankruptcy Code.

24 B. Represented by Counsel.

25 In entering into this Stipulation, each of the Parties represents that it has relied
26 upon the advice of attorneys, who are the attorneys of its own choice, concerning
27 the legal consequences of this Stipulation; that the terms of this Stipulation have
28

1 been explained to it by its attorneys; and that it fully understands and voluntarily
2 accepts the terms of this Stipulation.

3 C. No Other Actions.

4 As of the date of executing this Stipulation, the Parties represent and warrant
5 to each other that, other than the Gusto and Sheridan Actions, they are not aware of
6 any action or action it expects to be filed against Sirius XM other than the Flo &
7 Eddie Cases that: (1) raises allegations similar to those asserted in the Flo & Eddie
8 Cases; and (2) is pending or is expected to be filed in any forum by any person or
9 entity against Sirius XM. Until the Effective Date, Plaintiff and Class Counsel shall
10 have a continuing duty to notify Sirius XM if Plaintiff or Class Counsel become
11 aware of any such action, and Sirius XM shall have a continuing duty to notify
12 Plaintiff and Class Counsel if Sirius XM becomes aware of any such action.

13 **X. MISCELLANEOUS**

14 A. Governing Law.

15 The interpretation and construction of this Stipulation shall be governed by
16 the laws of the State of California.

17 B. Counterparts.

18 This Stipulation may be executed in counterparts. All counterparts so
19 executed shall constitute one agreement binding on all of the Parties,
20 notwithstanding that all Parties are not signatories to the original or the same
21 counterpart.

22 C. No Drafting Party.

23 Any statute or rule of construction that ambiguities are to be resolved against
24 the drafting party shall not be employed in the interpretation of this Stipulation and
25 the Parties agree that the drafting of this Stipulation has been a mutual undertaking.

26 D. Entire Agreement.

27 All agreements, covenants, representations and warranties, express or
28 implied, written or oral, of the Parties hereto concerning the subject matter hereof

1 are contained in this Stipulation and the exhibits attached hereto. Any and all prior
2 or contemporaneous conversations, negotiations, drafts, terms sheets, memoranda of
3 understanding, possible or alleged agreements, covenants, representations and
4 warranties concerning the subject matter of this Stipulation are waived, merged
5 herein and superseded hereby.

6 E. Retained Jurisdiction.

7 The Court shall retain jurisdiction over Sirius XM, Plaintiff, and the
8 Settlement Class as to all matters relating to the administration, consummation,
9 implementation, enforcement, and interpretation of the terms of this Stipulation—
10 including the final resolution of any ownership disputes as set forth in ¶ VI.B—and
11 the Parties hereto submit to the jurisdiction of the Court for purposes of
12 implementing and enforcing the Settlement. Any dispute arising out of or relating
13 in any way to this Stipulation shall not be litigated or otherwise pursued in any
14 forum or venue other than the Court.

15 F. Cooperation.

16 Each of the Parties hereto shall execute such additional pleadings and other
17 documents and take such additional actions as are reasonably necessary to effectuate
18 the purposes of this Stipulation.

19 G. Amendments in Writing.

20 This Stipulation may only be amended in writing signed by Class Counsel
21 and by Sirius XM.

22 H. Binding Effect; Successors and Assigns.

23 This Stipulation shall inure to the benefit of, and shall be binding upon, the
24 Parties as well as the legal successors and assigns of the Parties and each of them.

25 I. Construction.

26 As used in this Stipulation, the terms “herein” and “hereof” shall refer to this
27 Stipulation in its entirety, including all exhibits attached hereto, and not limited to
28 any specific sections. Whenever appropriate in this Stipulation, the singular shall be

1 deemed to refer to the plural, and the plural to the singular, and pronouns of any
2 gender shall be deemed to include both genders.

3 J. Waiver in Writing.

4 No waiver of any right under this Stipulation shall be valid unless in writing.

5 K. Computation of Time.

6 All time periods set forth herein shall be computed in business days if seven
7 days or less, and calendar days if eight days or more, unless otherwise expressly
8 provided herein. In computing any period of time prescribed or allowed by this
9 Stipulation or by order of the Court, the day of the act, event or default from which
10 the designated period of time begins to run shall not be included. The last day of the
11 period so computed shall be included, unless it is a Saturday, a Sunday or a legal or
12 court holiday, or, when the act to be done is the filing of a paper in Court, a day in
13 which weather or other conditions have made the office of the clerk of the Court
14 inaccessible, in which event the period shall run until the end of the next day. As
15 used in this subsection, "legal or court holiday" includes New Year's Day, Martin
16 Luther King Jr. Day, Presidents' Day, Memorial Day, Independence Day, Labor
17 Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day and any
18 other day appointed as a holiday by the President or the Congress of the United
19 States or by the State of California.

20 L. No Admission of Liability or Waiver of Right to Object to
21 Certification.

22 Each of the Parties understands and agrees that it has entered into this
23 Stipulation for the purposes of purchasing peace and preventing the risks and costs
24 of any further litigation or dispute. This Settlement involves disputed claims;
25 specifically, Sirius XM denies any fault, liability or wrongdoing as to the facts or
26 claims that have been or might be alleged or asserted in the Flo & Eddie Cases, and
27 maintains that certification of the California Class, despite being granted by the
28 Court over its objection, is inappropriate in this case. The Parties understand and

1 agree that neither this Stipulation, nor the fact of this Settlement, may be used as
2 evidence or admission of any wrongdoing by Sirius XM, or that, with the exception
3 of Sirius XM's agreement herein not to appeal the Court's class certification rulings
4 in the California Appeal, class certification is appropriate in the Flo & Eddie Cases
5 or in any other action against Sirius XM. The Parties further understand and agree
6 that neither this Stipulation, nor the fact of this Settlement, constitutes a waiver of
7 Sirius XM's right to object to class certification, except as otherwise provided for
8 above.

9 M. Notice.

10 Any notice to the Parties required by this Stipulation shall be given in writing
11 by first class U.S. Mail and e-mail to:

12 For Plaintiff and the Class:

13 Henry Gradstein
14 Maryann R. Marzano
15 Gradstein & Marzano, P.C.
16 6310 San Vicente Blvd., Suite 510
17 Los Angeles, California 90048
18 Telephone: (323) 776-3100
19 hgradstein@gradstein.com
20 mmarzano@gradstein.com

21 Stephen E. Morrissey
22 Steven G. Sklaver
23 Kalpana D. Srinivasan
24 Susman Godfrey L.L.P.
25 1901 Avenue of the Stars, Suite 950
26 Los Angeles, California 90067-6029
27 Telephone: (310) 789-3100
28 Facsimile: (310) 789-3150
smorrissey@susmangodfrey.com
ssklaver@susmangodfrey.com
ksrinivasan@susmangodfrey.com

For Sirius XM:

Daniel M. Petrocelli

1 Cassandra L. Seto
2 O'Melveny & Myers LLP
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5 Telephone: (310) 553-6700
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7 dpetrocelli@omm.com
8 cseto@omm.com

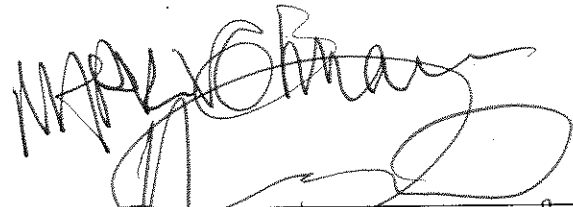
9 with a copy to:

10 Patrick L. Donnelly
11 Executive Vice President, General Counsel
12 and Secretary
13 Sirius XM Radio Inc.
14 1290 Avenue of the Americas
15 11th Floor
16 New York, New York 10104
17 Telephone: (212) 584-5180
18 Facsimile: (212) 584-5353
19 patrick.donnelly@siriusxm.com
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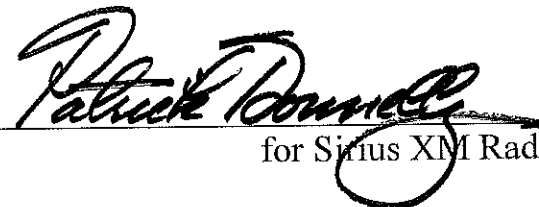
IN WITNESS WHEREOF, the parties hereto and their counsel of record have executed this Stipulation as of the dates set forth below.

dated: November 13, 2016



for the Plaintiff Class
to and from Sirius XM Radio Inc.

dated: November 13, 2016

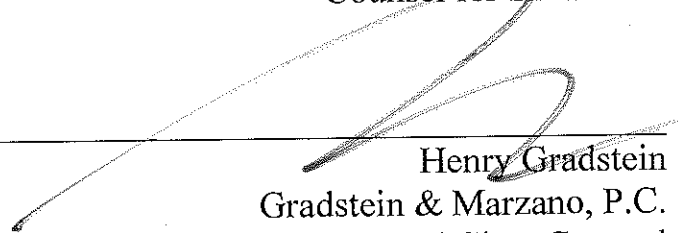


for Sirius XM Radio Inc.

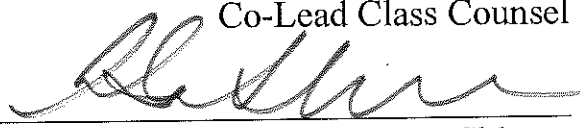
Approved as to form:



Daniel Petrocelli
O'Melveny & Myers LLP
Counsel for Sirius XM



Henry Gradstein
Gradstein & Marzano, P.C.
Co-Lead Class Counsel



Steven Sklaver
Susman Godfrey L.L.P.
Co-Lead Class Counsel

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24 Sirius XM Radio Inc.

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15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 FLO & EDDIE, INC., a
18 California corporation, individually and
19 on behalf of all others similarly situated,

20 Plaintiff,

21 v.

22 SIRIUS XM RADIO INC., a
23 Delaware corporation, and DOES 1
24 through 10,

25 Defendants.

Case No. 13-CV-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT,
APPROVING FORM AND
MANNER OF NOTICE, AND
SETTING DATE FOR HEARING
ON FINAL APPROVAL OF
SETTLEMENT**

1 The parties to the above-captioned action have entered into a Stipulation of
2 Class Action Settlement, dated November ____, 2016 (the “Stipulation”), together
3 with the Exhibits annexed thereto (the “Settlement”), to settle the above-captioned
4 class action in its entirety, and Plaintiff has applied for an order preliminarily
5 approving the terms and conditions of the Settlement, which Sirius XM supports.
6 All capitalized terms used in this Order have the meaning as defined in the
7 Stipulation, which is incorporated herein by reference.

8 The Court has read and considered the Stipulation, and all the Exhibits
9 thereto, including the proposed Class Notice, and good cause appearing therefor,

10 IT IS HEREBY ORDERED that:

11 1. The Court preliminarily finds the Settlement set forth in the Stipulation
12 to be fair, reasonable and adequate, subject to further consideration at the Final
13 Approval Hearing described below. The Court finds that the Stipulation was
14 entered into at arm’s length by highly experienced counsel and is sufficiently within
15 the range of reasonableness that notice of the Settlement should be given as
16 provided in the Stipulation.

17 2. Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure and
18 28 U.S.C. § 1715(d), the Final Approval Hearing shall be held on or around March
19 13, 2017, at 1:30 p.m. before the Court, for the purpose of (a) determining whether
20 the proposed Settlement is fair, reasonable, and adequate and should be approved
21 by the Court; (b) determining whether the proposed Order and Final Judgment
22 attached as Exhibit B to the Stipulation should be entered, and to determine whether
23 the covenant not to sue, as set forth in the Stipulation, should be approved; (c)
24 determining whether the proposed plan of allocation for the proceeds of the
25 Settlement is fair and reasonable and should be approved by the Court; (d)
26 considering Class Counsel’s application for an award and/or interim award of
27
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1 attorneys' fees, expense reimbursements, and incentive awards; and (e) ruling upon
2 such other matters as the Court may deem appropriate.

3 3. The Court may approve the Settlement with or without modification
4 and with or without further notice to the Settlement Class of any kind. The Court
5 may enter the Order and Final Judgment regardless of whether it has approved the
6 plan of allocation or awarded attorneys' fees, expense reimbursements, and
7 incentive awards. The Court may also adjourn the Final Approval Hearing or
8 modify any of the dates herein without further notice to members of the Settlement
9 Class.

10 4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court
11 conditionally certifies the following Settlement Class for purposes of the
12 Settlement:

13 All entities and natural persons, wherever situated, that
14 are owners of Pre-1972 Sound Recordings which have
15 been reproduced, performed, distributed or otherwise
16 exploited by Sirius XM in the United States without a
license or authorization to do so from August 1, 2009
through November 14, 2016.

17 5. Excluded from the Settlement Class are: (1) all federal court judges
18 who have presided over this case and any members of their immediate families; (2)
19 Direct Licensors; (3) Major Record Labels; and (4) Sirius XM's employees,
20 officers, directors, agents, and representatives, and their immediate family
21 members.

22 6. The Court finds that the certification of the Settlement Class for
23 purposes of the Settlement is warranted because: (i) the Settlement Class is so
24 numerous that joinder is impracticable; (ii) plaintiff's claims present common
25 issues that are typical of the Settlement Class; (iii) plaintiff and Class Counsel will
26 fairly and adequately represent the Settlement Class; and (iv) common issues
27 predominate over any individual issues affecting the Settlement Class Members.
28

1 The Court further finds that plaintiff's interests are aligned with the interests of all
2 other Settlement Class Members. The Court also finds that resolution of this action
3 on a class basis for purposes of the Settlement is superior to other means of
4 resolution.

5 7. The Court hereby appoints plaintiff Flo & Eddie, Inc. to serve as class
6 representative of the Settlement Class.

7 8. The Court hereby appoints the law firms of Gradstein & Marzano, P.C.
8 and Susman Godfrey L.L.P., to serve as Class Counsel for purposes of the
9 Settlement, having determined that the requirements of Rule 23(g) of the Federal
10 Rules of Civil Procedure are fully satisfied by this appointment.

11 9. The conditional certification of this Settlement Class is for settlement
12 purposes only without further force or effect and without prejudice to any party in
13 connection with any future proceedings in this action if the Court does not give
14 final approval to the Settlement or this Court's approval of the Settlement and/or
15 entry of the Order and Final Judgment are reversed on appeal.

16 10. Approval is hereby given to the form, substance, and requirements of
17 both the Short Form Class Notice and the Long Form Class Notice (together, the
18 "Class Notice"), attached to the Stipulation as Exhibit C, to Settlement Class
19 Members. The Court finds that the form and content of the notice program
20 described therein, and the methods set forth therein of notifying the Settlement
21 Class Members of the Settlement and its terms and conditions, meet the requires of
22 Rule 23 of the Federal Rules of Civil Procedures, constitutional due process,
23 constitute the best notice practicable under the circumstances, and shall constitute
24 due and sufficient notice to all persons entitled thereto.

25 11. Sirius XM shall pay for all reasonable notice and administrative costs,
26 up to \$500,000, but will not pay for any of the costs for the proceedings that are
27 appealed from the Special Master to the Court to resolve any ownership disputes
28

1 related to Pre-1972 Sound Recordings, unless appealed by Sirius XM who shall
2 bear its own attorneys' fees and costs. If Sirius XM wishes to challenge any notice
3 and administrative costs as being unreasonable, it shall first notify Class Counsel,
4 and if such challenge is not resolved within ten (10) business days of notice, Sirius
5 XM may file an application with the Court. Any such challenged costs will not be
6 due and payable unless and until the Court rules upon the application. Any unused
7 funds in the Settlement Administration Account shall be refunded to Sirius XM.

8 12. The Court hereby appoints Garden City Group LLC to serve as
9 Administrator to provide the Class Notice and, if the Settlement is approved, to
10 administer the Claim Program. The Court hereby appoints _____ to serve
11 as Royalty Administrator to, if the Settlement is approved, administer the Royalty
12 Program. The Administrator and Royalty Administrator shall have the
13 responsibilities enumerated in the Stipulation.

14 13. The Administrator shall provide the best notice practicable under the
15 circumstances to the Settlement Class using a three-part notice plan generally
16 consistent with the plan approved by the Court on June 16, 2016 (Doc. No. 317),
17 which shall include (1) a long form of class notice to be disseminated to all
18 prospective members of the Settlement Class who can be identified with reasonable
19 effort through direct mailing; (2) a short form of class notice for use in publications
20 and periodicals targeted to reach an audience likely to include members of the
21 Settlement Class; and (3) a press release and website setting forth essential details
22 concerning the settlement and opt-out requirements.

23 14. The Administrator shall cause the Class Notice to be mailed, by first-
24 class mail, postage prepaid, to all prospective Settlement Class members who can
25 be identified with reasonable effort no later than ten (10) days after entry of this
26 Order, and the opt-out and objection period will conclude thirty (30) days later.

27
28

1 Class Counsel shall, at or before the Final Approval Hearing, file with the Court
2 proof of mailing of the Class Notice.

3 15. No later than ten (10) days after the Motion for Preliminary Approval
4 has been filed with the Court, Sirius XM shall serve notices of the proposed
5 Settlement upon the appropriate officials in compliance with the requirements of
6 the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715. Thereafter, Sirius XM
7 will serve any supplemental CAFA notice to the extent required by law.

8 16. Settlement Class Members shall be bound by all orders,
9 determinations, and judgments in this action concerning the Settlement, whether
10 favorable or unfavorable, unless such persons request exclusion from the Settlement
11 Class in a timely and proper manner, as hereinafter provided. A person wishing to
12 be excluded from the Settlement Class shall complete a form or mail a request for
13 exclusion in written form by first-class mail to the address designated in the Class
14 Notice for such exclusions, such that it is postmarked on or before thirty (30) days
15 from the date Class Notice is sent. Such request for exclusion must state the name,
16 address, email address and telephone number of the person seeking exclusion, must
17 state that the sender requests to be “excluded from the Settlement Class in *Flo &*
18 *Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV 13-5693-PSG (GJSx)” and must
19 be signed by such person. Any person requesting exclusion shall also be required
20 to include all of the information requested in the Notice, including, but not limited
21 to, the requirement to Identify any and all Pre-1972 Sound Recordings they own
22 and/or have the right to control and represent and warrant that the person owns all
23 right, title and interest in and to those recordings and that such information is true
24 and correct in all respects. The request for exclusion shall not be effective unless it
25 provides all of the required information in the manner set forth above, and is made
26 within the time stated above, unless otherwise ordered by the Court.

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1 17. Persons requesting exclusion from the Settlement Class shall not be
2 eligible to receive any payment out of the Settlement Fund or Royalty Program as
3 described in the Stipulation and Class Notice.

4 18. The Administrator shall tabulate requests for exclusion from
5 prospective Settlement Class Members and shall report the names and addresses of
6 such persons to the Court, Sirius XM and to Class Counsel no less than seven (7)
7 days before the Final Approval Hearing.

8 19. Any Settlement Class Member who intends to object to the fairness of
9 the Settlement, the plan of allocation, or the application for an award and/or interim
10 award of attorneys' fees, expense reimbursements, and incentive awards must do so
11 within forty-five (45) calendar days before the Final Approval Hearing. Objecting
12 Settlement Class Members must file any such objection with the Court, and provide
13 copies of the objection to: (1) Henry Gradstein, Esq. of Gradstein & Marzano, P.C.
14 (Class Counsel), 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048; (2)
15 Steven G. Sklaver, Esq., of Susman Godfrey L.L.P. (Class Counsel), 1901 Avenue
16 of the Stars, Suite 950, Los Angeles, CA 90067-6029; and (3) Daniel M. Petrocelli,
17 Esq. of O'Melveny & Myers, LLP (Defendant's Counsel), 1999 Avenue of the
18 Stars, 8th Floor, Los Angeles, CA 90067-6035. The objection must:

- 19 a. Include the objector's full name, address, and telephone number;
20 b. Identify any and all Pre-1972 Sound Recording owned and
21 controlled by the Settlement Class Member and represent and
22 warrant that they own all right, title and interest in and to those
23 recordings and that such information is true and correct in all
24 respects;
25 c. Include a written statement of all grounds for the objection
26 accompanied by any legal support for such objection;

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- 1 d. Include copies of any papers, briefs, or other documents upon
- 2 which the objection is based;
- 3 e. Contain a list of all cases in which the objector and/or their counsel
- 4 has filed or in any way participated in—financially or otherwise—
- 5 objections to a class action settlement in the preceding five years;
- 6 f. Include the name, address, email address, and telephone number of
- 7 all attorneys representing the objector; and
- 8 g. Include a statement indicating whether the objector intends to
- 9 appear at the Final Approval Hearing, and if so, a list of all persons,
- 10 if any, who will be called to testify in support of the objection.

11 20. Any Settlement Class Member who does not make his, her, or its
12 objection in the manner provided for in the Class Notice shall be deemed to have
13 waived such objection and shall forever be foreclosed from making any objection to
14 any aspect of the Settlement, to the plan of allocation, or to the application for
15 attorneys' fees, expense reimbursements, and incentive awards, unless otherwise
16 ordered by the Court, but shall otherwise be bound by the Judgment to be entered in
17 the action and the covenant not to sue contained in the Stipulation. Attendance at
18 the Final Approval Hearing is not necessary; *however*, any Settlement Class
19 Members wishing to be heard orally in opposition to the approval of the Settlement,
20 the plan of allocation, or the application for an award of attorneys' fees, expense
21 reimbursements, and incentive awards are required to indicate in their written
22 objection their intention to appear at the hearing. Settlement Class Members who
23 intend to object to the Settlement, the plan of allocation, or the application for an
24 award of attorneys' fees, expense reimbursements, and incentive awards and desire
25 to present evidence at the Final Approval Hearing must include in their written
26 objections the identity of any witnesses they may call to testify and exhibits they
27 intend to introduce into evidence at the Final Approval Hearing. Settlement Class

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1 Members do not need to appear at the Final Approval Hearing or take any other
2 action to indicate their approval.

3 21. All papers in support of Class Counsel's Application for Final
4 Approval of Settlement, plan of allocation, including in response to any timely and
5 properly filed objections, shall be filed with the Court and served no later than
6 twenty-eight (28) days prior to the Final Approval Hearing. If reply papers are
7 necessary, they are to be filed with the Court no later than fourteen (14) calendar
8 days prior to the Final Approval Hearing. All papers in support of Class Counsel's
9 Application for an award of attorneys' fees, expense reimbursements, and incentive
10 awards, shall be filed with the Court and served no later than seventy (70) days
11 prior to the Final Approval Hearing. If reply papers are necessary, they are to be
12 filed with the Court no later than fourteen (14) calendar days prior to the Final
13 Approval Hearing.

14 22. Pending determination of whether the Settlement should be finally
15 approved by the Court, and with the exception of the California Action, New York
16 Action, and Florida Action (and any and all appeals related thereto), plaintiff and all
17 Settlement Class Members who do not validly and timely request exclusion from
18 the Settlement Class (with the exception of those entities that timely and validly
19 opted out of the California Class) shall not commence or prosecute any action, suit,
20 proceeding, claim, or cause of action in any court or before any tribunal against
21 Sirius XM that asserts any claims barred by the covenant not to sue in the
22 Stipulation.

23 23. The Stipulation shall be used for settlement purposes only. The fact
24 of, or any provision contained in, the Stipulation or any action taken pursuant to it
25 shall not constitute an admission of the validity of any claim or any factual
26 allegation that was or could have been made by plaintiff and Settlement Class
27 Members in the California, New York or Florida Actions, or of any wrongdoing or
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1 liability of any kind on the part of Sirius XM. The Stipulation shall not be offered
2 or be admissible in evidence by or against Plaintiff or Sirius XM or cited or referred
3 to in any other action or proceeding, except (a) in any action or proceeding brought
4 by or against the parties to enforce or otherwise implement the terms of the
5 Stipulation, (b) in any action involving plaintiff, Settlement Class Members, or any
6 of them, that asserts claims barred by the covenant not to sue in the Stipulation
7 against Sirius XM, to support a defense of *res judicata*, collateral estoppel, release,
8 or other theory of claim preclusion, issue preclusion, or similar defense, or (c) in
9 any action or proceeding involving Sirius XM to determine royalty rates for sound
10 recordings.

11 24. The conditional certification of the Settlement Class is for settlement
12 purposes only and the appointment of Class Counsel for the Settlement Class (but
13 not the prior appointment of Class Counsel for the California Class) shall be
14 terminated and without further force or effect and without prejudice to any party in
15 connection with any future proceedings in these actions, including any future
16 motion with respect to class certification, if:

- 17 a. The Court does not give final approval to the Settlement and enter
18 the Order and Final Judgment substantially in the form appended as
19 Exhibit B to the Stipulation; or
20 b. This Court's approval of the Settlement and/or entry of the Order
21 and Final Judgment are reversed on appeal; or
22 c. One of the parties elects to terminate the Settlement under the
23 conditions set forth under paragraph 2 of Section V.A of the
24 Stipulation; or
25 d. If a condition for termination is met pursuant to Section V of the
26 Stipulation.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FLO & EDDIE, INC., a
California corporation, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO INC., a
Delaware corporation, and DOES 1
through 10,

Defendants.

Case No. 13-CV-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**[PROPOSED] ORDER AND FINAL
JUDGMENT**

1 WHEREAS Plaintiff Flo & Eddie, Inc. (“Plaintiff,” for itself and on behalf of
2 the proposed Settlement Class, entered into a Stipulated Class Action Settlement
3 (the “Stipulation,” together with the Exhibits annexed thereto, the “Settlement”)
4 with Defendant Sirius XM Radio Inc. (“Sirius XM” or “Defendant”).

5 WHEREAS, on _____, 2016 the Court entered its Order granting
6 preliminary approval of the proposed settlement (“Preliminary Approval Order”)
7 (Dkt. # _____). The Preliminary Approval Order, among other things, authorized
8 Plaintiff to disseminate Notice of the Settlement, the Final Approval Hearing, and
9 related matters to the Class. Notice was provided to the Class pursuant to the
10 Preliminary Approval Order on _____, and the Court held a Final
11 Approval Hearing on _____, 2017 at 1:30 p.m., at which time all interested
12 persons were afforded the opportunity to be heard.

13 WHEREAS, this Court has duly considered Plaintiff’s motion, all papers and
14 evidence submitted in connection therewith, the Stipulation, and all of the
15 submissions and arguments presented at the Final Approval Hearing with respect to
16 the proposed Settlement.

17 **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND**
18 **DECREED** as follows:

19 1. The capitalized terms used herein shall have the meanings set forth in
20 the Settlement, Exhibit _____ to the Declaration of Steven G. Sklaver in Support
21 of Preliminary Approval of Settlement (Dkt. # _____).

22 2. This Court has jurisdiction over the subject matter of the above-
23 captioned action (“Action”) and over all settling Parties and all members of the
24 Settlement Class.

25 3. The Notice provided for and given to the Settlement Class: (i) was
26 provided and made in full compliance with the Preliminary Approval Order; (ii)
27 constituted the best notice practicable under the circumstances; (iii) constituted
28 notice that was reasonably calculated to apprise the Settlement Class of the terms of

1 Settlement, of the proposed distribution plan, of Class Counsel's application for an
2 award of attorney's fees, costs and expenses incurred in connection with the Action,
3 of Settlement Class Members' right either to request exclusion from the Settlement
4 Class or to object to the Settlement, the plan of allocation, or Class Counsel's
5 application for an award of attorney's fees, costs and expenses, and application for
6 an incentive award Plaintiff, and of the right of Settlement Class Members to
7 appear at the Final Approval Hearing; (iv) constituted due, adequate, and sufficient
8 notice to all persons entitled to receive notice of the proposed Settlement; (v) was
9 the best notice practicable under the circumstances; and (vi) fully satisfied the
10 notice requirements of Rule 23 of the Federal Rules of Civil Procedure, the United
11 States Constitution (including the Due Process Clause of the Fifth Amendment to
12 the Constitution), and all other applicable law and rules.

13 4. The Court has considered any objections to the Settlement submitted
14 pursuant to Rule 23(e)(5) of the Federal Rules of Civil Procedure. The Court finds
15 and concludes that each of the objections is without merit, and they are hereby
16 overruled.

17 5. In light of the substantial benefits provided to the Settlement Class by
18 the Settlement, the complexity, expense and possible duration of further litigation
19 of the Action, including any possible appeals, the risks of establishing liability and
20 damages, and the costs of continued litigation, the Court hereby fully and finally
21 approves the Settlement as set forth in the Stipulation in all respects, and finds that
22 the Settlement is in all respects fair, reasonable and adequate, and in the best
23 interests of Plaintiff, the Settlement Class, and the Settlement Class Members. This
24 Court further finds that the Settlement set forth in the Stipulation is the result of
25 arm's-length negotiations by highly experienced counsel representing the interests
26 of their respective settling Parties.

27 6. The _____ individuals and entities who timely and validly
28 requested exclusion from the Settlement Class identified in the Declaration of

1 _____, filed _____, 2017, are excluded. The individuals and entities are
2 not included in or bound by this Order and Final Judgment and are not entitled to
3 any recovery from the settlement proceeds (including not from the Settlement Fund
4 nor the Royalty Program) obtained through this Settlement.

5 7. With the exception of the California Appeal, New York Appeal, and
6 Florida Appeal and for any actions necessary to enforce the Settlement, during the
7 Term, the institution and prosecution, by any Settlement Class Member, either
8 directly, individually, representatively, derivatively or in any other capacity, by
9 whatever means, of any other action against the Covenantees in any court, or in any
10 agency or other authority or arbitral or other forum wherever located, asserting any
11 of the claims in Paragraph III.D (Covenant Not to Sue) of the Stipulation is barred,
12 enjoined and restrained.

13 8. The Administrator is authorized to distribute from the Settlement Fund
14 to Settlement Class Members the amounts that Class Counsel and the Administrator
15 have determined are owed to each Settlement Class Member under the terms of the
16 approved plan of allocation.

17 9. The Royalty Administrator is authorized to distribute from the Royalty
18 Fund to Settlement Class Members from time to time the amounts that Class
19 Counsel and the Royalty Administrator have determined are owed to each
20 Settlement Class Member under the terms of the approved Royalty Program.

21 10. Settlement Class Members are permanently barred, enjoined and
22 restrained from making any claims against the Settlement Fund and Royalty Fund,
23 and all persons, including the Administrator, Royalty Administrator, Plaintiff and
24 Class Counsel and Defendant and Defendants' counsel, involved in the processing
25 of distributions from the Settlement Fund and Royalty Program are released and
26 discharged from any claims arising out of such involvement.

27 11. Pursuant to Federal Rule of Civil Procedure 53, the Court hereby
28 appoints Magistrate Judge _____ to serve as Special Master for the

1 specific role provided for in Section ____ of the Stipulation. Any specific
2 challenge to ownership or control must be brought within one hundred and twenty
3 (120) days after a claimant has made a claim to a specific Identified Pre-1972
4 Sound Recording(s) or one hundred and twenty (120) days after another party has
5 made a conflicting claim to specific Identified Pre-1972 Sound Recording,
6 whichever comes later. All decisions by the Special Master may be appealed to the
7 Court.

8 12. Neither the Settlement, nor any act performed or document executed
9 pursuant to the Settlement, may be deemed or used as an admission of wrongdoing
10 in any civil, criminal, administrative, or other proceeding in any jurisdiction.

11 13. The Settlement Fund Escrow Account and Royalty Fund Escrow
12 Account established by Plaintiff and Sirius XM, are each approved as a Qualified
13 Settlement Fund pursuant to Internal Revenue Code Section 468B and the Treasury
14 Regulations promulgated thereunder.

15 14. Plaintiffs are authorized to pay from the escrow account established in
16 Section VII of the Stipulation all reasonable Notice and administrative costs to the
17 Administrator and Royalty Administrator, including all costs and expenses incurred
18 and expected to be incurred by the Administrator and Royalty Administrator, and
19 all costs and expenses incurred to date.

20 15. In the event that the Settlement does not become effective in
21 accordance with the terms of the Stipulation, then this Judgment shall be rendered
22 null and void to the extent provided by and in accordance with the Stipulation and
23 shall be vacated; and in such event, all orders entered and covenants delivered in
24 connection herewith shall be null and void to the extent provided by and in
25 accordance with the Stipulation.

26 16. The Action is dismissed with prejudice as to Sirius XM and, except as
27 provided in § _____ of the Stipulation, without costs to either party.
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1 17. This Court has previously granted summary judgment in favor of
2 Plaintiff and against Sirius XM on the Performance Right Issue and the Commerce
3 Clause Issue. *See e.g.*, Dkt. 117 (Order granting Plaintiff's Motion for Summary
4 Judgment); Dkt. 175 (Order denying Motion for Reconsideration). A bona fide
5 justiciable dispute remains between the Parties as to the Performance Right Issue
6 and the Commerce Clause Issue, that neither Party has waived by entering into the
7 Settlement. The Parties retain all procedural and substantive rights to proceed with
8 the New York Appeal and Florida Appeal and any further proceedings to the United
9 States Supreme Court, and, except for Sirius XM's agreement not to appeal this
10 Court's class certification rulings, to proceed with the California Appeal and any
11 further proceedings to the United States Supreme Court, to resolve those two
12 discrete issues. This limited agreement gives both Sirius XM and Plaintiff a
13 considerable financial stake in the appellate resolution of these two questions.

14 a. In the event that Plaintiff Prevails on the Performance Right
15 Issue in the California Appeal, New York Appeal, and/or Florida Appeal, Sirius
16 XM shall pay into the Settlement Fund Escrow Account an additional five million
17 dollars (\$5 million) per appeal, for a total up to fifteen million (\$15 million) dollars.

18 b. In the event that Sirius XM Prevails on the Performance Right
19 Issue in the California Appeal, New York Appeal, and/or Florida Appeal, the
20 royalty rate that Sirius XM must pay pursuant to the Royalty Program shall be
21 reduced by 2% points per appeal (e.g., from 5.5% to 3.5%), except that the
22 reduction shall be 1.5% for the Florida Appeal (e.g., from 5.5% to 4%).

23 c. In the event that Sirius XM Prevails on the Commerce Clause
24 Issue in the Second Circuit, Eleventh Circuit, Ninth Circuit, or United States
25 Supreme Court, then Sirius XM's going-forward royalty obligations to eligible
26 Settlement Class Members pursuant to the Royalty Program shall immediately
27 terminate. In such an event, the termination of Sirius XM's royalty obligation shall
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1 be prospective only and no funds previously disbursed to Settlement Class
2 Members under the Royalty Program shall revert back to Sirius XM.

3 d. In the event that Sirius XM Prevails on the Commerce Clause
4 Issue in the Second Circuit, Eleventh Circuit, or Ninth Circuit, but Plaintiff Prevails
5 in the United States Supreme Court on the Commerce Clause Issue, then the
6 termination of Sirius XM's royalty obligation shall be null and void and Sirius XM
7 shall pay all royalty obligations owed to eligible Class Members under the Royalty
8 Program from January 1, 2018 through January 1, 2028.

9 18. The resolution of the Performance Right Issue and/or Commerce
10 Clause Issue in the California Appeal, New York Appeal and/or Florida Appeal,
11 shall not operate to terminate the Settlement and, regardless of the pendency and
12 outcome of those two issues in these appeals, Sirius XM's obligation to fund the
13 \$25 million Settlement Payment shall be in full force and effect as set forth in the
14 Stipulation and those funds may be disbursed from the Settlement Fund Escrow
15 Account pursuant to its terms.

16 19. A separate order shall be entered regarding Class Counsel's
17 application for attorneys' fees and payment of expenses and incentive awards as
18 allowed by the Court. A separate order shall be entered regarding the proposed
19 plan of allocation. Such orders shall in no way disturb or affect this Judgment and
20 shall be considered separate and apart from this Judgment.

21 20. Without further order of the Court, the settling Parties may agree to
22 reasonable extensions of time to carry out any of the provisions of the Settlement.

23 21. Without affecting the finality of this Judgment in any way, this Court
24 hereby retains continuing jurisdiction over: (i) implementation of the Settlement;
25 (ii) the allowance, disallowance or adjustment of any Class Member's claim and
26 any award or distribution of the Settlement Fund and/or the Royalty Program; (iii)
27 disposition of the Settlement Fund and Royalty Fund; (iv) hearing and determining
28 applications for attorneys' fees, costs, interest and payment of expenses in the

1 Action; (v) all settling Parties for the purpose of construing, enforcing and
2 administering the Settlement and this Judgment; and (vi) other matters related or
3 ancillary to the foregoing.

4 22. The Court finds that this Judgment adjudicates all the claims, rights
5 and liabilities of the Parties, is final and shall be immediately appealable.

6 23. There is no just reason for delay in the entry of this Judgment and the
7 Court directs immediate entry by the Clerk of the Court.

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10 **IT IS SO ORDERED.**

11 Dated:

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By: _____
PHILIP S. GUTIERREZ
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF PENDENCY OF CLASS ACTION SETTLEMENT

A federal court authorized this notice. This notice is not an endorsement of plaintiff's claims or an attorney solicitation. Distribution of this notice does not guarantee that you will recover money. Please read this notice carefully; it affects your legal rights.

If You Are An Owner Of A Sound Recording(s) Fixed Prior To February 15, 1972 (“Pre-1972 Sound Recording”) Which Has Been Performed, Distributed, Reproduced, Or Otherwise Exploited By Sirius XM in the United States Without A License Or Authorization To Do So From August 1, 2009 Through November 14, 2016, You Could Get Benefits From a Class Action Settlement.

If you are an owner of a Pre-1972 Sound Recording performed, distributed, reproduced, or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016 (“Class Period”), you may be a member of a proposed nationwide Settlement Class and entitled to payments and future royalties.

If the Court approves the proposed settlement, Sirius XM will pay the Settlement Class:

- \$25 million for past performances,
- if Sirius XM loses certain appeals, up to an additional \$15 million, for a total of \$40 million, for past performances, and
- a royalty rate of up to 5.5% on future performances of Pre-1972 Sound Recordings owned by Settlement Class Members who make valid claims.

If Sirius XM wins certain appeals, the royalty rate on future performances will be reduced, possibly to zero, but at a minimum, the \$25 million payment for past performances will still be paid.

Your legal rights are affected even if you do nothing. Please read this notice carefully.

1. THE LITIGATION

On August 1, 2013, Plaintiff Flo & Eddie, Inc. (“Flo & Eddie” or “Plaintiff”) filed a lawsuit against Defendant Sirius XM Radio Inc. (“Sirius XM”), alleging on behalf of itself and a putative class of owners of Pre-1972 Sound Recordings that Sirius XM, without a license or authorization, was performing, distributing, and reproducing those Pre-1972 Sound Recordings as part of its satellite and internet radio services (the “Lawsuit”).

The Lawsuit is known as *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV13- 05693, and is pending in the United States District Court for the Central District of California before the Honorable Philip S. Gutierrez. Information and documents regarding the case can be found at: <http://www.pre1972soundrecordings.com>

In the Lawsuit, Flo & Eddie alleged that Sirius XM has violated California Civil Code

Section 980(a)(2) and is liable for conversion, misappropriation, and unfair competition. Flo & Eddie sought damages, restitution, and injunctive relief on behalf of itself and the putative class.

On September 22, 2014, the Court found Sirius XM liable to Flo & Eddie for the unauthorized public performance of Pre-1972 Sound Recordings in California. On May 27, 2015, the Court certified a class of owners of Pre-1972 Sound Recordings which have been performed, distributed, reproduced, or otherwise exploited by Sirius XM in California without a license or authorization to do so from August 21, 2009 to August 24, 2016.

2. SIRIUS XM'S POSITION

Sirius XM denies any wrongdoing and contends that no state law, including California, New York, and Florida law, provides owners of Pre-1972 Sound Recordings a right to control performances of those recordings. Sirius XM continues to assert various affirmative defenses (including laches, waiver, estoppel, license, fair use, statute of limitations, lack of harm, and lack of ownership).

3. NOTICE

This Notice informs Class Members of the proposed settlement and describes their rights and options.

4. SETTLEMENT CLASS

The Court has conditionally certified the following nationwide "Settlement Class":

All entities and natural persons, wherever situated, who are owners of Pre-1972 Sound Recordings which have been reproduced, performed, distributed or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016.

Excluded from the Settlement Class are: (1) all federal court judges who have presided over this case and any members of their immediate families; (2) Direct Licensors; (3) Major Record Labels; and (4) Sirius XM's employees, officers, directors, agents, and representatives, and their immediate family members.

For purposes of this Settlement Class definition:

- "Major Record Labels" means Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records, Inc., and their respective subsidiaries and affiliates, which entered into a separate settlement agreement with Sirius XM and opted out of the California Class.
- "Direct Licensors" means the persons and/or entities, other than the Major Record Labels, that have entered into written licenses or other written agreements or instruments with Sirius XM to perform, reproduce, distribute, or otherwise exploit Pre-1972 Sound Recordings.

The Court has appointed the law firms of Gradstein & Marzano, P.C. and Susman Godfrey L.L.P., to serve as Class Counsel.

5. SETTLEMENT BENEFITS

If the Court approves the proposed Settlement at the Final Approval Hearing that is scheduled for _____, 2017, Sirius XM will provide the following benefits to members of the Settlement Class:

Payments from a Settlement Fund: All members of the Settlement Class who have established their entitlement to participate in the Settlement will be entitled to a pro rata share of a \$25 million settlement fund based on the number of historical plays of the Settlement Class Members' Pre-1972 Sound Recordings. There will no reversion to Sirius XM of any payments made to the Settlement Fund. If a substantial number of members of the Settlement Class or a substantial number of historical plays that members of the Settlement Class own opt out of the Settlement, both parties will have the option to terminate the Settlement no later than ten days after the close of the opt-out period.

Royalty payments and license: Members of the Settlement Class will license to Sirius XM the right to publicly perform, reproduce, distribute, or otherwise exploit their Pre-1972 Sound Recordings through January 1, 2028, and will be eligible to receive monthly royalty payments from January 1, 2018 through January 1, 2028, at a royalty rate as high as 5.5% depending on certain appellate outcomes described next.

Additional payment terms contingent on appellate outcomes. The Lawsuit, as well as related lawsuits in New York, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on August 16, 2013 in the United States District Court for the Southern District of New York, Case No. 13-CV-5784 (CM), appealed to the United States Court of Appeals for the Second Circuit, Appeal No. 15-1164, and certified to the New York Court of Appeals on April 13, 2016, Appeal No. CTQ-2016-00001, and Florida, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on September 3, 2013 in the United States District Court for the Southern District of Florida, Case No. 13-CV-23182, appealed to the United States Court of Appeals for the Eleventh Circuit, Appeal No. 15-13100, and certified to the Florida Supreme Court on June 29, 2016, Appeal No. SC16-1161, are predicated on the view that California, New York, and Florida law grant owners of Pre-1972 Sound Recordings a right to control performances of those recordings. However, this legal question remains unsettled and appellate courts are or will be considering that question and related questions. Absent this Settlement, depending on how the appellate courts rule, it is possible that Sirius XM would be required to pay members of the Settlement Class nothing (\$0) for the public performance of any Pre-1972 Sound Recordings. In light of this uncertainty, the parties have agreed to additional payment terms contingent on the outcomes of those appeals.

- For each of the three appellate courts in which Plaintiff prevails on the performance right issue, Sirius XM will pay the Settlement Class an additional \$5 million dollars. In other words, if Plaintiff prevails on this issue in all three appeals, Sirius XM will pay a total of \$40 million dollars (the original \$25 million plus an additional \$15 million). If Plaintiff prevails on this issue in two appeals, Sirius XM will pay a total of \$35 million dollars (the original \$25 million plus an additional \$10 million). If Plaintiff prevails on this issue in one appeal, Sirius XM will pay a total of \$30 million dollars (the original \$25 million plus an additional \$5 million). Even if Sirius XM prevails in all three appeals, the Settlement Class will still receive the original \$25 million.
- For each of the three appellate courts in which Sirius XM prevails on the performance right issue, the 5.5% royalty rate will be reduced going forward. If

Sirius XM prevails in the California and New York appeals, the royalty rate will be reduced by 2% points each (e.g., from 5.5% to 3.5%); if Sirius XM prevails in the Florida appeal, the royalty rate will be reduced by 1.5% points (e.g., if not previously reduced, from 5.5% to 4%). If Sirius XM prevails in all three appellate courts, Sirius XM will not be required to make any prospective royalty payments to members of the Settlement Class, and the Settlement Class will keep all royalties previously paid.

- Sirius XM has also challenged these lawsuits based on the Commerce Clause of the United States Constitution. If Sirius XM prevails on this Commerce Clause issue in the U.S. Courts of Appeal for the Second, Ninth, or Eleventh Circuits, or in the United States Supreme Court, Sirius XM will not be required to make any prospective royalty payments to members of the Settlement Class, and the Settlement Class will keep all royalties previously paid.
- Sirius XM will pay for the reasonable costs of administering the Settlement Fund and this Notice up to \$500,000. Sirius XM will not be responsible for paying other costs, including the costs of ascertaining ownership of each Pre-1972 Sound Recording or administering and distributing any royalty payments.

Participating in the Benefits of the Settlement: To participate in the benefits of the Class Settlement as to the Settlement Fund, you will be required to identify all of the Pre-1972 Sound Recordings that you own. You will be able to visit a website to complete a form to identify any and all Pre-1972 Sound Recordings you represent and warrant that you own or control. You will be required to provide, among other information, the title, artist, album and/or label. To participate in the Royalty Program, you will be required to provide title, artist, album, label, ISRC (if known), and date first fixed, in each case for each applicable Pre-1972 Sound Recording and a representation and warranty that you own all right, title, and interest in such recording(s). Any unresolved disputes over ownership and control will be determined by a Special Master appointed by the Court, with a right to appeal the Special Master's ownership determination to the District Court.

You will receive these benefits only if the Court approves the proposed Settlement following the Final Approval Hearing on _____, 2017, and only if you remain a member of the Settlement Class. If you exclude yourself from the Settlement Class, you will not receive any benefits.

To monitor the status of the proposed Settlement, to learn if and when it is approved, and to obtain claims forms, you may visit www.____.com or call _____. (Claim forms may not be available unless and until the Settlement is approved.)

6. COURT APPROVAL OF ATTORNEYS' FEES AND EXPENSES

The Court will determine how much Class Counsel will be paid for fees and expenses. Class Counsel has pursued the Lawsuit on a contingent basis, meaning Class Counsel has not been paid at all or recovered any of their expenses. As part of the proposed Settlement, Class Counsel will seek an award of attorney's fees of up to one-third from the Settlement Fund and royalty payments, reimbursement of expenses, and service award payments not to exceed \$25,000 for each for the two principals of the Plaintiff to be paid from the Settlement Fund for their services as representatives on behalf of the Class; their deadline to do so is _____, 2017. The Court will decide the amount of the fee, expense, and service award

at the Final Approval Hearing. These payments will reduce the benefits that you, as a member of the Settlement Class, will receive because they will be deducted from the Settlement Fund and, where applicable, the royalties you receive. If you wish to retain your own attorney for any reason, including to represent you at the final Fairness Hearing, then you will be individually responsible for that attorney's fees and costs.

7. RESULT IF COURT APPROVES SETTLEMENT

Any relief to Settlement Class Members is contingent on the Court's final approval of the proposed Settlement. If the Court approves the proposed Settlement, Sirius XM will provide the benefits described above to the Settlement Class Members who have not properly excluded themselves from the Class. Settlement Class Members will be barred during the applicable term from pursuing their own lawsuits based on Sirius XM's performance, distribution, reproduction, or other exploitation of their Pre-1972 Sound Recordings in the United States. Therefore, if you want to bring your own lawsuit against Sirius XM, you must properly exclude yourself from this Settlement Class. Any judgment entered, whether favorable or unfavorable to the Settlement Class, shall include, and be binding on, all Settlement Class Members, even if they object to the proposed Settlement.

8. RESULT OF FAILURE TO OPT OUT

Unless you exclude yourself from the Settlement, you will be covenanting not to sue Sirius XM and all related people as provided in Section III.D of the Settlement and will be bound by the terms of the performance license provided for in Section IV.C of the Settlement.

9. TAX CONSEQUENCES OF SETTLEMENT

A Settlement Class Member should consult their own tax advisors regarding the tax consequences of the proposed Settlement, including but not limited to, any payments, credits, royalties, and payment periods provided hereunder, and any tax reporting obligations they may have with respect thereto.

10. YOUR OPTIONS

If you are a member of the Settlement Class, you have the following three options (you may only choose one option):

YOUR LEGAL RIGHTS AND OPTIONS	
DO NOTHING NOW	<p>Stay in the Lawsuit. Await the outcome. Receive the benefits of this Settlement if it is approved.</p> <p>By doing nothing, you will remain part of the Settlement, and do not need to take any immediate action. If the Settlement is approved, you may receive the benefits of the Settlement if you submit a claim to the Administrator and it is valid, complete, and timely submitted. In exchange for the benefits you receive, you will give up your rights during the applicable term to sue Sirius XM separately based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control.</p> <p>You may, if you wish, comment in favor of the Settlement by sending your comment to Class Counsel: Henry Gradstein, Gradstein & Marzano P.C., 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048, hgradstein@gradstein.com; or Steven Sklaver, Susman Godfrey L.L.P., 1901 Avenue of the Stars, Suite 950, Los Angeles, CA 90067-6029, ssklaver@susmangodfrey.com.</p>
EXCLUDE YOURSELF	<p>Get out of this Lawsuit. Get no benefits from this Settlement Class. Keep certain rights. To exclude yourself, the Administrator must receive a completed opt out request by mail to the Administrator by __, 2017.</p> <p>Settlement Class Members who wish to opt out of the Settlement Class will be required to identify all of the Pre-1972 Sound Recordings they represent and warrant that they own or control. That request will require, at a minimum, the following fields: title; artist; album; ISRC (if known); and date first fixed.</p> <p>You may exclude yourself with a written request sent that is received no later than __, 2016, <i>i.e.</i>, 30 days from the beginning of the Notice period, that is sent to:</p> <p>Flo & Eddie v. Sirius XM _____</p> <p>Your written request for exclusion must contain: (1) the name of this Lawsuit, "Flo & Eddie, Inc. v. Sirius XM Radio Inc., Case No. CV13-05693"; (2) your full name and current address; (3) a clear statement of intention to exclude yourself such as: "I wish to be excluded from the Class"; (4) your signature to the address above, and (5) a fully and properly completed exclusion request that identifies all of the Pre-1972 Sound Recording(s) that you own and other related information. That request will require, at a minimum, the following fields: title; artist; album; ISRC (if known); and date first fixed for all of the Pre-1972 Sound Recording(s) you own.</p> <p>If your exclusion request is properly submitted and received before the</p>

	<p>deadline, you will not be bound by the terms of the Settlement, and you will be free, if you choose, to pursue your own lawsuit against Sirius XM based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control. If you do not submit a clear and timely request for exclusion to the Administrator, you will be bound by the Settlement, entitled to receive the benefits of the Settlement, and covenant not to sue Sirius XM during the applicable term for any claims based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control.</p>
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<p>OBJECT</p>	<p>If you are a member of the Settlement Class, you may object to the Settlement.</p> <p>You may, but need not, select an attorney to appear at the Final Approval Hearing on your behalf. If you do, you will be responsible for your own attorney's fees and costs.</p> <ul style="list-style-type: none">• If you object to the proposed Settlement, you must do so in writing on or before __, 2017, <i>i.e.</i>, 30 days from the beginning of the notice period. If you object to Class Counsel's application for attorneys' fees and expense reimbursement, you must do so in writing on or before _____, 2017, <i>i.e.</i>, 45 days before the Final Approval Hearing. Class Counsel's application will be filed no later than _____, 2017, <i>i.e.</i>, 70 days before the Final Approval Hearing and will also be posted on the settlement website. <p>Your written objection must include: (a) your full name, address, and telephone number; (b) identification of the Pre-1972 Sound Recordings performed by Sirius XM without your permission, and a representation that you are the legal owner of those Sound Recordings; (c) a written statement of all reasons for your objection accompanied by any legal support; (d) copies of any papers, briefs, or other documents on which your objection is based; (e) a list of other cases in which you or your counsel have filed or in any way participated in—financially or otherwise—objections to a class settlement in the preceding five years; (f) the name, address, email address, and telephone number of all attorneys representing you; (g) a statement indicating whether you and/or your counsel intend to appear at the Fairness Hearing, and if so, a list of any persons you will call to testify in support of the objection; and (h) your signature (and your lawyer's signature if you are represented by counsel).</p> <p>Your written objection must also be filed with the Clerk of the U.S. District Court for the Central District of California, and served upon all three of: (1) Henry Gradstein, Esq. of Gradstein & Marzano, P.C. (Class Counsel), 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048; (2) Steven G. Sklaver, Esq., of Susman Godfrey L.L.P. (Class Counsel), 1901 Avenue of the Stars, Suite 950, Los Angeles, CA 90067-6029 ; and (3) Daniel M. Petrocelli, Esq. of O'Melveny & Myers, LLP (Sirius XM Counsel), 1999 Avenue of the Stars, 8th Floor, Los Angeles, CA 90067-6035.</p> <p>Class Members who do not make their objections in a timely manner will waive all objections, their right to comment at the Fairness</p>
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11. FINAL APPROVAL HEARING

A hearing will be held before Judge Philip Gutierrez of the U.S. District Court for the Central District of California, Roybal Federal Building and United States Courthouse, 255 E. Temple Street, Los Angeles, CA 90012, Courtroom 880, 8th Floor, on __, 2017 at __: __.m. At the

hearing, the Court will hear argument about whether the proposed Settlement is fair, reasonable, and adequate, and whether it should be approved and, if so, what fees and expenses should be awarded to Class Counsel, and what service award, if any, should be awarded to the Plaintiff in this case, Flo & Eddie, and the planned allocation of the Settlement Fund. The time, date, and location of the hearing may change without further notice to you. If you plan to attend the hearing, you should confirm its time, date, and location before making any plans.

12. ADDITIONAL INFORMATION

For additional information and/or for a copy of the full Settlement; the request for attorneys' fees, costs, and the service award; and other key Court documents, you may visit www.____.com or call the Administrator at ____ or Class Counsel at ____.

PLEASE DO NOT CALL OR WRITE TO THE COURT FOR

INFORMATION OR ADVICE. DATED: _____, 2016 BY

ORDER OF THE UNITED STATES

**DISTRICT COURT FOR
THE CENTRAL
DISTRICT OF
CALIFORNIA**

If You Are An Owner Of A Sound Recording(s) Fixed Prior To February 15, 1972 Which Have Been Performed, Distributed, Reproduced, Or Otherwise Exploited By Sirius XM in the United States Without A License Or Authorization To Do So From August 1, 2009 through November 14, 2016, You Could Get Benefits From a Class Action Settlement.

What is this case about?

On August 1, 2013, Plaintiff Flo & Eddie, Inc. ("Flo & Eddie") filed a lawsuit in California against Defendant Sirius XM Radio Inc. on behalf of itself and a putative class of owners of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"), alleging that Sirius XM, without a license or authorization, was performing, distributing, reproducing, and otherwise exploiting those pre-1972 recordings in California as part of its satellite and Internet radio services (the "Lawsuit"). The Lawsuit is known as *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV13-05693. The parties have entered into a settlement to resolve the Lawsuit, and any and all actual and potential claims by members of the Settlement Class.

Am I in the Settlement Class?

You qualify as a member of the Settlement Class if you are an owner of a pre-1972 recording which has been performed, distributed, reproduced, or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016.

What are the Settlement Benefits?

If the Court approves the proposed Settlement, you will be eligible to receive a share of a \$25 million settlement fund, and a royalty rate of 5.5% on future performances for a period of 10 years. If Sirius XM loses certain appeals, Sirius XM will pay more money into the settlement fund (up to \$15 million more to be distributed to Settlement Class Members); if Sirius XM wins those appeals, the royalty rate on future performances will be reduced, possibly to zero. All Settlement Class Members who do not properly exclude themselves from the

Settlement Class will be barred from pursuing lawsuits against Sirius XM for claims arising from its performance, reproduction, distribution, or other exploitation of their pre-1972 recordings during the Class Period.

What are my Options?

You have to decide now whether to stay in the Settlement Class or ask to be excluded.

- If you do nothing, you are staying in the Settlement Class. As a member of the Settlement Class, you will keep the possibility of getting money or benefits that may come from the settlement. But, you will give up any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings.
- If you ask to be excluded, you won't share in the money and benefits of the Class Settlement. But you keep any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings. If you retain an individual attorney, you may need to pay for that attorney. For more information on how to exclude yourself, visit www.____.com.
- If you wish to object to the settlement, you must do so in writing before __, 2017. If you wish to object to Class Counsel's request for attorney's fees and expenses, you must do so in writing before __, 2017.

Where Can I get More Information?

This is only a summary. For more information about the Settlement, visit www.____.com.

PLEASE DO NOT CALL OR WRITE TO THE COURT FOR INFORMATION OR ADVICE.

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF PENDENCY OF CLASS ACTION SETTLEMENT

A federal court authorized this notice. This notice is not an endorsement of plaintiff's claims or an attorney solicitation. Distribution of this notice does not guarantee that you will recover money. Please read this notice carefully; it affects your legal rights.

If You Are An Owner Of A Sound Recording(s) Fixed Prior To February 15, 1972 (“Pre-1972 Sound Recording”) Which Has Been Performed, Distributed, Reproduced, Or Otherwise Exploited By Sirius XM in the United States Without A License Or Authorization To Do So From August 1, 2009 Through November 14, 2016, You Could Get Benefits From a Class Action Settlement.

If you are an owner of a Pre-1972 Sound Recording performed, distributed, reproduced, or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016 (“Class Period”), you may be a member of a proposed nationwide Settlement Class and entitled to payments and future royalties.

- If the Court approves the proposed settlement, Sirius XM will pay the Settlement Class:
- \$25 million for past performances,
- if Sirius XM loses certain appeals, up to an additional \$15 million, for a total of \$40 million, for past performances, and
- a royalty rate of up to 5.5% on future performances of Pre-1972 Sound Recordings owned by Settlement Class Members who make valid claims.

If Sirius XM wins certain appeals, the royalty rate on future performances will be reduced, possibly to zero, but at a minimum, the \$25 million payment for past performances will still be paid.

Your legal rights are affected even if you do nothing. Please read this notice carefully.

1. THE LITIGATION

On August 1, 2013, Plaintiff Flo & Eddie, Inc. (“Flo & Eddie” or “Plaintiff”) filed a lawsuit against Defendant Sirius XM Radio Inc. (“Sirius XM”), alleging on behalf of itself and a putative class of owners of Pre-1972 Sound Recordings that Sirius XM, without a license or authorization, was performing, distributing, and reproducing those Pre-1972 Sound Recordings as part of its satellite and internet radio services (the “Lawsuit”).

The Lawsuit is known as *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV13- 05693, and is pending in the United States District Court for the Central District of California before the Honorable Philip S. Gutierrez. Information and documents regarding the case can be found at: www.pre1972soundrecordings.com.

In the Lawsuit, Flo & Eddie alleged that Sirius XM has violated California Civil Code Section 980(a)(2) and is liable for conversion, misappropriation, and unfair competition. Flo & Eddie sought damages, restitution, and injunctive relief on behalf of itself and the putative class.

On September 22, 2014, the Court found Sirius XM liable to Flo & Eddie for the unauthorized public performance of Pre-1972 Sound Recordings in California. On May 27, 2015, the Court certified a class of owners of Pre-1972 Sound Recordings which have been performed, distributed, reproduced, or otherwise exploited by Sirius XM in California without a license or authorization to do so from August 21, 2009 to August 24, 2016.

2. SIRIUS XM'S POSITION

Sirius XM denies any wrongdoing and contends that no state law, including California, New York, and Florida law, provides owners of Pre-1972 Sound Recordings a right to control performances of those recordings. Sirius XM continues to assert various affirmative defenses (including laches, waiver, estoppel, license, fair use, statute of limitations, lack of harm, and lack of ownership).

3. NOTICE

This Notice informs Class Members of the proposed settlement and describes their rights and options.

4. SETTLEMENT CLASS

The Court has conditionally certified the following nationwide "Settlement Class":

All entities and natural persons, wherever situated, who are owners of Pre-1972 Sound Recordings which have been reproduced, performed, distributed or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016.

Excluded from the Settlement Class are: (1) all federal court judges who have presided over this case and any members of their immediate families; (2) Direct Licensors; (3) Major Record Labels; and (4) Sirius XM's employees, officers, directors, agents, and representatives, and their immediate family members.

For purposes of this Settlement Class definition:

- "Major Record Labels" means Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records, Inc., and their respective subsidiaries and affiliates, which entered into a separate settlement agreement with Sirius XM and opted out of the California Class.
- "Direct Licensors" means the persons and/or entities, other than the Major Record Labels, that have entered into written licenses or other written agreements or instruments with Sirius XM to perform, reproduce, distribute, or otherwise exploit Pre-1972 Sound Recordings.

The Court has appointed the law firms of Gradstein & Marzano, P.C. and Susman Godfrey L.L.P., to serve as Class Counsel.

5. SETTLEMENT BENEFITS

If the Court approves the proposed Settlement at the Final Approval Hearing that is scheduled for ____, Sirius XM will provide the following benefits to members of the Settlement Class:

Payments from a Settlement Fund: All members of the Settlement Class who have established their entitlement to participate in the Settlement will be entitled to a pro rata share of a \$25 million settlement fund based on the number of historical plays of the Settlement Class Members' Pre-1972 Sound Recordings. There will no reversion to Sirius XM of any payments made to the Settlement Fund. If a substantial number of members of the Settlement Class or a substantial number of historical plays that members of the Settlement Class own opt out of the Settlement, both parties will have the option to terminate the Settlement no later than ten days after the close of the opt-out period.

Royalty payments and license: Members of the Settlement Class will license to Sirius XM the right to publicly perform, reproduce, distribute, or otherwise exploit their Pre-1972 Sound Recordings through January 1, 2028, and will be eligible to receive monthly royalty payments from January 1, 2018 through January 1, 2028, at a royalty rate as high as 5.5% depending on certain appellate outcomes described next.

Additional payment terms contingent on appellate outcomes. The Lawsuit, as well as related lawsuits in New York, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on August 16, 2013 in the United States District Court for the Southern District of New York, Case No. 13-CV-5784 (CM), appealed to the United States Court of Appeals for the Second Circuit, Appeal No. 15-1164, and certified to the New York Court of Appeals on April 13, 2016, Appeal No. CTQ-2016-00001, and Florida, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on September 3, 2013 in the United States District Court for the Southern District of Florida, Case No. 13-CV-23182, appealed to the United States Court of Appeals for the Eleventh Circuit, Appeal No. 15-13100, and certified to the Florida Supreme Court on June 29, 2016, Appeal No. SC16-1161, are predicated on the view that California, New York, and Florida law grant owners of Pre-1972 Sound Recordings a right to control performances of those recordings. However, this legal question remains unsettled and appellate courts are or will be considering that question and related questions. Absent this Settlement, depending on how the appellate courts rule, it is possible that Sirius XM would be required to pay members of the Settlement Class nothing (\$0) for the public performance of any Pre-1972 Sound Recordings. In light of this uncertainty, the parties have agreed to additional payment terms contingent on the outcomes of those appeals.

- For each of the three appellate courts in which Plaintiff prevails on the performance right issue, Sirius XM will pay the Settlement Class an additional \$5 million dollars. In other words, if Plaintiff prevails on this issue in all three appeals, Sirius XM will pay a total of \$40 million dollars (the original \$25 million plus an additional \$15 million). If Plaintiff prevails on this issue in two appeals, Sirius XM will pay a total of \$35 million dollars (the original \$25 million plus an additional \$10 million). If Plaintiff prevails on this issue in one appeal, Sirius XM will pay a total of \$30 million dollars (the original \$25 million plus an additional \$5 million). Even if Sirius XM prevails in all three appeals, the Settlement Class will still receive the original \$25 million.
- For each of the three appellate courts in which Sirius XM prevails on the performance right issue, the 5.5% royalty rate will be reduced going forward. If Sirius XM prevails in the California and New York appeals, the royalty rate will be reduced by 2% points each (e.g., from 5.5% to 3.5%); if Sirius XM prevails in the Florida appeal, the royalty rate will be reduced by 1.5% points (e.g., if not previously reduced, from 5.5% to 4%). If Sirius XM prevails in all three appellate courts, Sirius XM will not be required to make any prospective royalty payments to members of the Settlement Class, and the Settlement Class will keep all royalties previously paid.
- Sirius XM has also challenged these lawsuits based on the Commerce Clause of the United States Constitution. If Sirius XM prevails on this Commerce Clause issue in the U.S. Courts of Appeal for the Second, Ninth, or Eleventh Circuits, or in the United States Supreme Court, Sirius XM will not be required to make any prospective royalty payments to members of the Settlement Class, and the Settlement Class will keep all royalties previously paid.
- Sirius XM will pay for the reasonable costs of administering the Settlement Fund and this Notice up to \$500,000. Sirius XM will not be responsible for paying other costs, including the costs of ascertaining ownership of each Pre-1972 Sound Recording or administering and distributing any royalty payments.

Participating in the Benefits of the Settlement: To participate in the benefits of the Class Settlement as to the Settlement Fund, you will be required to identify all of the Pre-1972 Sound Recordings that you own. You will be able to visit a website to complete a form to identify any and all Pre-1972 Sound Recordings you represent and warrant that you own or control. You will be required to provide, among other information, the title, artist, album and/or label. To participate in the Royalty Program, you will be required to provide title, artist, album, label, ISRC (if known), and date first fixed, in each case for each applicable Pre-1972 Sound Recording and a representation and warranty that you own all right, title, and interest in such recording(s). Any unresolved disputes over ownership and control will be determined by a Special Master appointed by the Court, with a right to appeal the Special Master's ownership determination to the District Court.

You will receive these benefits only if the Court approves the proposed Settlement following the Final Approval Hearing on ____, and only if you remain a member of the Settlement Class. If you exclude yourself from the Settlement Class, you will not receive any benefits.

To monitor the status of the proposed Settlement, to learn if and when it is approved, and to obtain claims forms, you may visit www.pre1972soundrecordings.com or call 1 (855) 720-2382. (Claim forms may not be available unless and until the Settlement is approved.)

6. COURT APPROVAL OF ATTORNEYS' FEES AND EXPENSES

The Court will determine how much Class Counsel will be paid for fees and expenses. Class Counsel has pursued the Lawsuit on a contingent basis, meaning Class Counsel has not been paid at all or recovered any of their expenses. As part of the proposed Settlement, Class Counsel will seek an award of attorney's fees of up to one-third from the Settlement Fund and royalty payments, reimbursement of expenses, and service award payments not to exceed \$25,000 for each for the two principals of the Plaintiff to be paid from the Settlement Fund for their services as representatives on behalf of the Class; their deadline to do so is _____. The Court will decide the amount of the fee, expense, and service award at the Final Approval Hearing. These payments will reduce the benefits that you, as a member of the Settlement Class, will receive because they will be deducted from the Settlement Fund and, where applicable, the royalties you receive. If you wish to retain your own attorney for any reason, including to represent you at the final Fairness Hearing, then you will be individually responsible for that attorney's fees and costs.

7. RESULT IF COURT APPROVES SETTLEMENT

Any relief to Settlement Class Members is contingent on the Court's final approval of the proposed Settlement. If the Court approves the proposed Settlement, Sirius XM will provide the benefits described above to the Settlement Class Members who have not properly excluded themselves from the Class. Settlement Class Members will be barred during the applicable term from pursuing their own lawsuits based on Sirius XM's performance, distribution, reproduction, or other exploitation of their Pre-1972 Sound Recordings in the United States. Therefore, if you want to bring your own lawsuit against Sirius XM, you must properly exclude yourself from this Settlement Class. Any judgment entered, whether favorable or unfavorable to the Settlement Class, shall include, and be binding on, all Settlement Class Members, even if they object to the proposed Settlement.

8. RESULT OF FAILURE TO OPT OUT

Unless you exclude yourself from the Settlement, you will be covenanting not to sue Sirius XM and all related people as provided in Section III.D of the Settlement and will be bound by the terms of the performance license provided for in Section IV.C of the Settlement.

9. TAX CONSEQUENCES OF SETTLEMENT

A Settlement Class Member should consult their own tax advisors regarding the tax consequences of the proposed Settlement, including but not limited to, any payments, credits, royalties, and payment periods provided hereunder, and any tax reporting obligations they may have with respect thereto.

10. YOUR OPTIONS

If you are a member of the Settlement Class, you have the following three options (you may only choose one option):

YOUR LEGAL RIGHTS AND OPTIONS IN THE SETTLEMENT:	
DO NOTHING NOW	<p>Stay in the Lawsuit. Await the outcome. Receive the benefits of this Settlement if it is approved.</p> <p>By doing nothing, you will remain part of the Settlement, and do not need to take any immediate action. If the Settlement is approved, you may receive the benefits of the Settlement if you submit a claim to the Administrator and it is valid, complete, and timely submitted. In exchange for the benefits you receive, you will give up your rights during the applicable term to sue Sirius XM separately based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control.</p> <p>You may, if you wish, comment in favor of the Settlement by sending your comment to Class Counsel: Henry Gradstein, Gradstein & Marzano P.C., 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048, hgradstein@gradstein.com; or Steven Sklaver, Susman Godfrey L.L.P., 1901 Avenue of the Stars, Suite 950, Los Angeles, CA 90067-6029, ssklaver@susgmangodfrey.com.</p>
EXCLUDE YOURSELF	<p>Get out of this Lawsuit. Get no benefits from this Settlement Class. Keep certain rights. To exclude yourself, the Administrator must receive a completed opt out request by mail to the Administrator by ____, 2017.</p> <p>Settlement Class Members who wish to opt out of the Settlement Class will be required to identify all of the Pre-1972 Sound Recordings they represent and warrant that they own or control. That request will require, at a minimum, the following fields: title; artist; album; ISRC (if known); and date first fixed.</p> <p>You may exclude yourself with a written request sent that is received no later than ____, 2016, <i>i.e.</i>, 30 days from the beginning of the Notice period, that is sent to:</p> <p style="text-align: center;">Flo & Eddie v. Sirius XM c/o GCG PO Box 35131 Seattle, WA 98124-5131</p> <p>Your written request for exclusion must contain: (1) the name of this Lawsuit, “Flo & Eddie, Inc. v. Sirius XM Radio Inc., Case No. CV13-05693”; (2) your full name and current address; (3) a clear statement of intention to exclude yourself such as: “I wish to be excluded from the Class”; (4) your signature to the address above, and (5) a fully and properly completed exclusion request that identifies all of the Pre-1972 Sound Recording(s) that you own and other related information. That request will require, at a minimum, the following fields: title; artist; album; ISRC (if known); and date first fixed for all of the Pre-1972 Sound Recording(s) you own.</p> <p>If your exclusion request is properly submitted and received before the deadline, you will not be bound by the terms of the Settlement, and you will be free, if you choose, to pursue your own lawsuit against Sirius XM based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control. If you do not submit a clear and timely request for exclusion to the Administrator, you will be bound by the Settlement, entitled to receive the benefits of the Settlement, and covenant not to sue Sirius XM during the applicable term for any claims based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control.</p>
OBJECT	<p>If you are a member of the Settlement Class, you may object to the Settlement.</p> <p>You may, but need not, select an attorney to appear at the Final Approval Hearing on your behalf. If you do, you will be responsible for your own attorney’s fees and costs.</p> <ul style="list-style-type: none"> • If you object to the proposed Settlement, you must do so in writing on or before ____, 2017, <i>i.e.</i>, 30 days from the beginning of the notice period. If you object to Class Counsel’s application for

attorneys' fees and expense reimbursement, you must do so in writing on or before January 27, 2017, *i.e.*, 45 days before the Final Approval Hearing. Class Counsel's application will be filed no later than December 30, 2016, *i.e.*, 70 days before the Final Approval Hearing and will also be posted on the settlement website.

Your written objection must include: (a) your full name, address, and telephone number; (b) identification of the Pre-1972 Sound Recordings performed by Sirius XM without your permission, and a representation that you are the legal owner of those Sound Recordings; (c) a written statement of all reasons for your objection accompanied by any legal support; (d) copies of any papers, briefs, or other documents on which your objection is based; (e) a list of other cases in which you or your counsel have filed or in any way participated in—financially or otherwise—objections to a class settlement in the preceding five years; (f) the name, address, email address, and telephone number of all attorneys representing you; (g) a statement indicating whether you and/or your counsel intend to appear at the Fairness Hearing, and if so, a list of any persons you will call to testify in support of the objection; and (h) your signature (and your lawyer's signature if you are represented by counsel).

Your written objection must also be filed with the Clerk of the U.S. District Court for the Central District of California, and served upon all three of: (1) Henry Gradstein, Esq. of Gradstein & Marzano, P.C. (Class Counsel), 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048; (2) Steven G. Sklaver, Esq., of Susman Godfrey L.L.P. (Class Counsel), 1901 Avenue of the Stars, Suite 950, Los Angeles, CA 90067-6029 ; and (3) Daniel M. Petrocelli, Esq. of O'Melveny & Myers, LLP (Sirius XM Counsel), 1999 Avenue of the Stars, 8th Floor, Los Angeles, CA 90067-6035.

Class Members who do not make their objections in a timely manner will waive all objections, their right to comment at the Fairness Hearing, and their right to appeal approval of the Settlement.

11. FINAL APPROVAL HEARING

A hearing will be held before Judge Philip Gutierrez of the U.S. District Court for the Central District of California, Roybal Federal Building and United States Courthouse, 255 E. Temple Street, Los Angeles, CA 90012, Courtroom 880, 8th Floor, on _____. At the hearing, the Court will hear argument about whether the proposed Settlement is fair, reasonable, and adequate, and whether it should be approved and, if so, what fees and expenses should be awarded to Class Counsel, and what service award, if any, should be awarded to the Plaintiff in this case, Flo & Eddie, and the planned allocation of the Settlement Fund. The time, date, and location of the hearing may change without further notice to you. If you plan to attend the hearing, you should confirm its time, date, and location before making any plans.

12. ADDITIONAL INFORMATION

For additional information and/or for a copy of the full Settlement; the request for attorneys' fees, costs, and the service award; and other key Court documents, you may visit www.pre1972soundrecordings.com or call the Administrator at 1 (855) 720-2382 or Class Counsel at : Henry Gradstein, Gradstein & Marzano P.C., 323-776-3100 or hgradstein@gradstein.com; or Steven Sklaver, Susman Godfrey L.L.P., 310-789-3100 or ssklaver@susgmangodfrey.com.

PLEASE DO NOT CALL OR WRITE TO THE COURT FOR INFORMATION ORADVICE.

DATED: _____, 2016

**BY ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

Exhibit 3

If You Are An Owner Of A Sound Recording(s) Fixed Prior To February 15, 1972 Which Have Been Performed, Distributed, Reproduced, Or Otherwise Exploited By Sirius XM in the United States Without A License Or Authorization To Do So From August 1, 2009 through November 14, 2016, You Could Get Benefits From a Class Action Settlement.

What is this case about?

On August 1, 2013, Plaintiff Flo & Eddie, Inc. ("Flo & Eddie") filed a lawsuit in California against Defendant Sirius XM Radio Inc. on behalf of itself and a putative class of owners of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"), alleging that Sirius XM, without a license or authorization, was performing, distributing, reproducing, and otherwise exploiting those pre-1972 recordings in California as part of its satellite and Internet radio services (the "Lawsuit"). The Lawsuit is known as *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV13-05693. The parties have entered into a settlement to resolve the Lawsuit, and any and all actual and potential claims by members of the Settlement Class.

Am I in the Settlement Class?

You qualify as a member of the Settlement Class if you are an owner of a pre-1972 recording which has been performed, distributed, reproduced, or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016.

What are the Settlement Benefits?

If the Court approves the proposed Settlement, you will be eligible to receive a share of a \$25 million settlement fund, and a royalty rate of 5.5% on future performances for a period of 10 years. If Sirius XM loses certain appeals, Sirius XM will pay more money into the settlement fund (up to \$15 million more to be distributed to Settlement Class Members); if Sirius XM wins those appeals, the royalty rate on future performances will be reduced, possibly to zero. All Settlement Class Members who do not properly exclude themselves from the Settlement Class will be barred from pursuing lawsuits against Sirius XM for claims arising from its performance, reproduction, distribution, or other exploitation of their pre-1972 recordings during the Class Period.

What are my Options?

You have to decide now whether to stay in the Settlement Class or ask to be excluded.

- If you do nothing, you are staying in the Settlement Class. As a member of the Settlement Class, you will keep the possibility of getting money or benefits that may come from the settlement. But, you will give up any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings.
- If you ask to be excluded, you won't share in the money and benefits of the Class Settlement. But you keep any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings. If you retain an individual attorney, you may need to pay for that attorney. For more information on how to exclude yourself, visit www.pre1972soundrecordings.com.
- If you wish to object to the settlement, you must do so in writing before ___, 2017. If you wish to object to Class Counsel's request for attorney's fees and expenses, you must do so in writing before January 27, 2017.

Where Can I get More Information?

This is only a summary. For more information about the Settlement, visit www.pre1972soundrecordings.com. PLEASE DO NOT CALL OR WRITE TO THE COURT FOR INFORMATION OR ADVICE.

If You Are An Owner Of A Sound Recording(s) Fixed Prior To February 15, 1972 Which Have Been Performed, Distributed, Reproduced, Or Otherwise Exploited By Sirius XM in the United States Without A License Or Authorization To Do So From August 1, 2009 through November 14, 2016, You Could Get Benefits From a Class Action Settlement.

What is this case about?

On August 1, 2013, Plaintiff Flo & Eddie, Inc. ("Flo & Eddie") filed a lawsuit in California against Defendant Sirius XM Radio Inc. on behalf of itself and a putative class of owners of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"), alleging that Sirius XM, without a license or authorization, was performing, distributing, reproducing, and otherwise exploiting those pre-1972 recordings in California as part of its satellite and Internet radio services (the "Lawsuit"). The Lawsuit is known as *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV13-05693. The parties have entered into a settlement to resolve the Lawsuit, and any and all actual and potential claims by members of the Settlement Class.

Am I in the Settlement Class?

You qualify as a member of the Settlement Class if you are an owner of a pre-1972 recording which has been performed, distributed, reproduced, or otherwise exploited by Sirius XM in the United States without a license or authorization to do so from August 1, 2009 through November 14, 2016.

What are the Settlement Benefits?

If the Court approves the proposed Settlement, you will be eligible to receive a share of a \$25 million settlement fund, and a royalty rate of 5.5% on future performances for a period of 10 years. If Sirius XM loses certain appeals, Sirius XM will pay more money into the settlement fund (up to \$15 million more to be distributed to Settlement Class Members); if Sirius XM wins those appeals, the royalty rate on future performances will be reduced, possibly to zero. All Settlement Class Members who do not properly exclude themselves from the Settlement Class will be barred from pursuing lawsuits against Sirius XM for claims arising from its performance, reproduction, distribution, or other exploitation of their pre-1972 recordings during the Class Period.

What are my Options?

You have to decide now whether to stay in the Settlement Class or ask to be excluded.

- If you do nothing, you are staying in the Settlement Class. As a member of the Settlement Class, you will keep the possibility of getting money or benefits that may come from the settlement. But, you will give up any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings.
- If you ask to be excluded, you won't share in the money and benefits of the Class Settlement. But you keep any rights to sue Sirius XM separately over its performance, reproduction, distribution, or other exploitation of your pre-1972 recordings. If you retain an individual attorney, you may need to pay for that attorney. For more information on how to exclude yourself, visit www.pre1972soundrecordings.com.
- If you wish to object to the settlement, you must do so in writing before __, 2017 . If you wish to object to Class Counsel's request for attorney's fees and expenses, you must do so in writing before January 27, 2017.

Where Can I get More Information?

This is only a summary. For more information about the Settlement, visit www.pre1972soundrecordings.com. PLEASE DO NOT CALL OR WRITE TO THE COURT FOR INFORMATION OR ADVICE.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO INC., a Delaware corporation, and DOES 1 through 10,

Defendants.

Case No. 13-CV-05693 PSG (GJS)

Hon. Philip S. Gutierrez

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPROVING FORM AND MANNER OF NOTICE, AND SETTING DATE FOR HEARING ON FINAL APPROVAL OF SETTLEMENT

1 The parties to the above-captioned action have entered into a Stipulation of
2 Class Action Settlement, dated November 13, 2016 (the “Stipulation”), together
3 with the Exhibits annexed thereto (the “Settlement”), to settle the above-captioned
4 class action in its entirety, and Plaintiff has applied for an order preliminarily
5 approving the terms and conditions of the Settlement, which Sirius XM supports.
6 All capitalized terms used in this Order have the meaning as defined in the
7 Stipulation, which is incorporated herein by reference.

8 The Court has read and considered the Stipulation, and all the Exhibits
9 thereto, including the proposed Class Notice, and good cause appearing therefor,

10 IT IS HEREBY ORDERED that:

11 1. The Court preliminarily finds the Settlement set forth in the Stipulation
12 to be fair, reasonable and adequate, subject to further consideration at the Final
13 Approval Hearing described below. The Court finds that the Stipulation was
14 entered into at arm’s length by highly experienced counsel and is sufficiently within
15 the range of reasonableness that notice of the Settlement should be given as
16 provided in the Stipulation.

17 2. Pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure and
18 28 U.S.C. § 1715(d), the Final Approval Hearing shall be held on or around March
19 13, 2017, at 1:30 p.m. before the Court, for the purpose of (a) determining whether
20 the proposed Settlement is fair, reasonable, and adequate and should be approved
21 by the Court; (b) determining whether the proposed Order and Final Judgment
22 attached as Exhibit B to the Stipulation should be entered, and to determine whether
23 the covenant not to sue, as set forth in the Stipulation, should be approved; (c)
24 determining whether the proposed plan of allocation for the proceeds of the
25 Settlement is fair and reasonable and should be approved by the Court; (d)
26 considering Class Counsel’s application for an award and/or interim award of
27 attorneys’ fees, expense reimbursements, and incentive awards; and (e) ruling upon
28 such other matters as the Court may deem appropriate.

1 3. The Court may approve the Settlement with or without modification
2 and with or without further notice to the Settlement Class of any kind. The Court
3 may enter the Order and Final Judgment regardless of whether it has approved the
4 plan of allocation or awarded attorneys' fees, expense reimbursements, and
5 incentive awards. The Court may also adjourn the Final Approval Hearing or
6 modify any of the dates herein without further notice to members of the Settlement
7 Class.

8 4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court
9 conditionally certifies the following Settlement Class for purposes of the
10 Settlement:

11 All entities and natural persons, wherever situated, that
12 are owners of Pre-1972 Sound Recordings which have
13 been reproduced, performed, distributed or otherwise
14 exploited by Sirius XM in the United States without a
 license or authorization to do so from August 1, 2009
 through November 14, 2016.

15 5. Excluded from the Settlement Class are: (1) all federal court judges
16 who have presided over this case and any members of their immediate families; (2)
17 Direct Licensors; (3) Major Record Labels; and (4) Sirius XM's employees,
18 officers, directors, agents, and representatives, and their immediate family
19 members.

20 6. The Court finds that the certification of the Settlement Class for
21 purposes of the Settlement is warranted because: (i) the Settlement Class is so
22 numerous that joinder is impracticable; (ii) plaintiff's claims present common
23 issues that are typical of the Settlement Class; (iii) plaintiff and Class Counsel will
24 fairly and adequately represent the Settlement Class; and (iv) common issues
25 predominate over any individual issues affecting the Settlement Class Members.
26 The Court further finds that plaintiff's interests are aligned with the interests of all
27 other Settlement Class Members. The Court also finds that resolution of this action
28

1 on a class basis for purposes of the Settlement is superior to other means of
2 resolution.

3 7. The Court hereby appoints plaintiff Flo & Eddie, Inc. to serve as class
4 representative of the Settlement Class.

5 8. The Court hereby appoints the law firms of Gradstein & Marzano, P.C.
6 and Susman Godfrey L.L.P., to serve as Class Counsel for purposes of the
7 Settlement, having determined that the requirements of Rule 23(g) of the Federal
8 Rules of Civil Procedure are fully satisfied by this appointment.

9 9. The conditional certification of this Settlement Class is for settlement
10 purposes only without further force or effect and without prejudice to any party in
11 connection with any future proceedings in this action if the Court does not give
12 final approval to the Settlement or this Court's approval of the Settlement and/or
13 entry of the Order and Final Judgment are reversed on appeal.

14 10. Approval is hereby given to the form, substance, and requirements of
15 both the Short Form Class Notice and the Long Form Class Notice (together, the
16 "Class Notice"), attached to the Stipulation as Exhibit C, to Settlement Class
17 Members. The Court finds that the form and content of the notice program
18 described therein, and the methods set forth therein of notifying the Settlement
19 Class Members of the Settlement and its terms and conditions, meet the requires of
20 Rule 23 of the Federal Rules of Civil Procedures, constitutional due process,
21 constitute the best notice practicable under the circumstances, and shall constitute
22 due and sufficient notice to all persons entitled thereto.

23 11. Sirius XM shall pay for all reasonable notice and administrative costs,
24 up to \$500,000, but will not pay for any of the costs for the proceedings that are
25 appealed from the Special Master to the Court to resolve any ownership disputes
26 related to Pre-1972 Sound Recordings, unless appealed by Sirius XM who shall
27 bear its own attorneys' fees and costs. If Sirius XM wishes to challenge any notice
28 and administrative costs as being unreasonable, it shall first notify Class Counsel,

1 and if such challenge is not resolved within ten (10) business days of notice, Sirius
2 XM may file an application with the Court. Any such challenged costs will not be
3 due and payable unless and until the Court rules upon the application. Any unused
4 funds in the Settlement Administration Account shall be refunded to Sirius XM.

5 12. The Court hereby appoints Garden City Group LLC to serve as
6 Administrator to provide the Class Notice and, if the Settlement is approved, to
7 administer the Claim Program. The Court hereby appoints _____ to serve
8 as Royalty Administrator to, if the Settlement is approved, administer the Royalty
9 Program. The Administrator and Royalty Administrator shall have the
10 responsibilities enumerated in the Stipulation.

11 13. The Administrator shall provide the best notice practicable under the
12 circumstances to the Settlement Class using a three-part notice plan generally
13 consistent with the plan approved by the Court on June 16, 2016 (Doc. No. 317),
14 which shall include (1) a long form of class notice to be disseminated to all
15 prospective members of the Settlement Class who can be identified with reasonable
16 effort through direct mailing; (2) a short form of class notice for use in publications
17 and periodicals targeted to reach an audience likely to include members of the
18 Settlement Class; and (3) a press release and website setting forth essential details
19 concerning the settlement and opt-out requirements.

20 14. The Administrator shall cause the Class Notice to be mailed, by first-
21 class mail, postage prepaid, to all prospective Settlement Class members who can
22 be identified with reasonable effort no later than ten (10) days after entry of this
23 Order, and the opt-out and objection period will conclude thirty (30) days later.
24 Class Counsel shall, at or before the Final Approval Hearing, file with the Court
25 proof of mailing of the Class Notice.

26 15. No later than ten (10) days after the Motion for Preliminary Approval
27 has been filed with the Court, Sirius XM shall serve notices of the proposed
28 Settlement upon the appropriate officials in compliance with the requirements of

1 the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1715. Thereafter, Sirius XM
2 will serve any supplemental CAFA notice to the extent required by law.

3 16. Settlement Class Members shall be bound by all orders,
4 determinations, and judgments in this action concerning the Settlement, whether
5 favorable or unfavorable, unless such persons request exclusion from the Settlement
6 Class in a timely and proper manner, as hereinafter provided. A person wishing to
7 be excluded from the Settlement Class shall complete a form or mail a request for
8 exclusion in written form by first-class mail to the address designated in the Class
9 Notice for such exclusions, such that it is postmarked on or before thirty (30) days
10 from the date Class Notice is sent. Such request for exclusion must state the name,
11 address, email address and telephone number of the person seeking exclusion, must
12 state that the sender requests to be “excluded from the Settlement Class in *Flo &*
13 *Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. CV 13-5693-PSG (GJSx)” and must
14 be signed by such person. Any person requesting exclusion shall also be required
15 to include all of the information requested in the Notice, including, but not limited
16 to, the requirement to Identify any and all Pre-1972 Sound Recordings they own
17 and/or have the right to control and represent and warrant that the person owns all
18 right, title and interest in and to those recordings and that such information is true
19 and correct in all respects. The request for exclusion shall not be effective unless it
20 provides all of the required information in the manner set forth above, and is made
21 within the time stated above, unless otherwise ordered by the Court.

22 17. Persons requesting exclusion from the Settlement Class shall not be
23 eligible to receive any payment out of the Settlement Fund or Royalty Program as
24 described in the Stipulation and Class Notice.

25 18. The Administrator shall tabulate requests for exclusion from
26 prospective Settlement Class Members and shall report the names and addresses of
27 such persons to the Court, Sirius XM and to Class Counsel no less than seven (7)
28 days before the Final Approval Hearing.

1 19. Any Settlement Class Member who intends to object to the fairness of
2 the Settlement, the plan of allocation, or the application for an award and/or interim
3 award of attorneys' fees, expense reimbursements, and incentive awards must do so
4 within forty-five (45) calendar days before the Final Approval Hearing. Objecting
5 Settlement Class Members must file any such objection with the Court, and provide
6 copies of the objection to: (1) Henry Gradstein, Esq. of Gradstein & Marzano, P.C.
7 (Class Counsel), 6310 San Vicente Blvd., Suite 510, Los Angeles, CA 90048; (2)
8 Steven G. Sklaver, Esq., of Susman Godfrey L.L.P. (Class Counsel), 1901 Avenue
9 of the Stars, Suite 950, Los Angeles, CA 90067-6029; and (3) Daniel M. Petrocelli,
10 Esq. of O'Melveny & Myers, LLP (Defendant's Counsel), 1999 Avenue of the
11 Stars, 8th Floor, Los Angeles, CA 90067-6035. The objection must:

- 12 a. Include the objector's full name, address, and telephone number;
- 13 b. Identify any and all Pre-1972 Sound Recording owned and
14 controlled by the Settlement Class Member and represent and
15 warrant that they own all right, title and interest in and to those
16 recordings and that such information is true and correct in all
17 respects;
- 18 c. Include a written statement of all grounds for the objection
19 accompanied by any legal support for such objection;
- 20 d. Include copies of any papers, briefs, or other documents upon
21 which the objection is based;
- 22 e. Contain a list of all cases in which the objector and/or their counsel
23 has filed or in any way participated in—financially or otherwise—
24 objections to a class action settlement in the preceding five years;
- 25 f. Include the name, address, email address, and telephone number of
26 all attorneys representing the objector; and

1 g. Include a statement indicating whether the objector intends to
2 appear at the Final Approval Hearing, and if so, a list of all persons,
3 if any, who will be called to testify in support of the objection.

4 20. Any Settlement Class Member who does not make his, her, or its
5 objection in the manner provided for in the Class Notice shall be deemed to have
6 waived such objection and shall forever be foreclosed from making any objection to
7 any aspect of the Settlement, to the plan of allocation, or to the application for
8 attorneys' fees, expense reimbursements, and incentive awards, unless otherwise
9 ordered by the Court, but shall otherwise be bound by the Judgment to be entered in
10 the action and the covenant not to sue contained in the Stipulation. Attendance at
11 the Final Approval Hearing is not necessary; *however*, any Settlement Class
12 Members wishing to be heard orally in opposition to the approval of the Settlement,
13 the plan of allocation, or the application for an award of attorneys' fees, expense
14 reimbursements, and incentive awards are required to indicate in their written
15 objection their intention to appear at the hearing. Settlement Class Members who
16 intend to object to the Settlement, the plan of allocation, or the application for an
17 award of attorneys' fees, expense reimbursements, and incentive awards and desire
18 to present evidence at the Final Approval Hearing must include in their written
19 objections the identity of any witnesses they may call to testify and exhibits they
20 intend to introduce into evidence at the Final Approval Hearing. Settlement Class
21 Members do not need to appear at the Final Approval Hearing or take any other
22 action to indicate their approval.

23 21. All papers in support of Class Counsel's Application for Final
24 Approval of Settlement, plan of allocation, including in response to any timely and
25 properly filed objections, shall be filed with the Court and served no later than
26 twenty-eight (28) days prior to the Final Approval Hearing. If reply papers are
27 necessary, they are to be filed with the Court no later than fourteen (14) calendar
28 days prior to the Final Approval Hearing. All papers in support of Class Counsel's

1 Application for an award of attorneys' fees, expense reimbursements, and incentive
2 awards, shall be filed with the Court and served no later than seventy (70) days
3 prior to the Final Approval Hearing. If reply papers are necessary, they are to be
4 filed with the Court no later than fourteen (14) calendar days prior to the Final
5 Approval Hearing.

6 22. Pending determination of whether the Settlement should be finally
7 approved by the Court, and with the exception of the California Action, New York
8 Action, and Florida Action (and any and all appeals related thereto), plaintiff and all
9 Settlement Class Members who do not validly and timely request exclusion from
10 the Settlement Class (with the exception of those entities that timely and validly
11 opted out of the California Class) shall not commence or prosecute any action, suit,
12 proceeding, claim, or cause of action in any court or before any tribunal against
13 Sirius XM that asserts any claims barred by the covenant not to sue in the
14 Stipulation.

15 23. The Stipulation shall be used for settlement purposes only. The fact
16 of, or any provision contained in, the Stipulation or any action taken pursuant to it
17 shall not constitute an admission of the validity of any claim or any factual
18 allegation that was or could have been made by plaintiff and Settlement Class
19 Members in the California, New York or Florida Actions, or of any wrongdoing or
20 liability of any kind on the part of Sirius XM. The Stipulation shall not be offered
21 or be admissible in evidence by or against Plaintiff or Sirius XM or cited or referred
22 to in any other action or proceeding, except (a) in any action or proceeding brought
23 by or against the parties to enforce or otherwise implement the terms of the
24 Stipulation, (b) in any action involving plaintiff, Settlement Class Members, or any
25 of them, that asserts claims barred by the covenant not to sue in the Stipulation
26 against Sirius XM, to support a defense of *res judicata*, collateral estoppel, release,
27 or other theory of claim preclusion, issue preclusion, or similar defense, or (c) in
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1 any action or proceeding involving Sirius XM to determine royalty rates for sound
2 recordings.

3 24. The conditional certification of the Settlement Class is for settlement
4 purposes only and the appointment of Class Counsel for the Settlement Class (but
5 not the prior appointment of Class Counsel for the California Class) shall be
6 terminated and without further force or effect and without prejudice to any party in
7 connection with any future proceedings in these actions, including any future
8 motion with respect to class certification, if:

- 9 a. The Court does not give final approval to the Settlement and enter
10 the Order and Final Judgment substantially in the form appended as
11 Exhibit B to the Stipulation; or
12 b. This Court's approval of the Settlement and/or entry of the Order
13 and Final Judgment are reversed on appeal; or
14 c. One of the parties elects to terminate the Settlement under the
15 conditions set forth under paragraph 2 of Section V.A of the
16 Stipulation; or
17 d. If a condition for termination is met pursuant to Section V of the
18 Stipulation.

19 25. All funds held in escrow shall be deemed and considered to be in
20 *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court
21 until such time as such funds shall be disbursed pursuant to the Stipulation or
22 further order of the Court.

23 26. The Court hereby retains exclusive continuing jurisdiction over the
24 Action, the parties, the Settlement Class, the Settlement Fund, and the Royalty
25 Program to consider all further matters arising out of or connected with the
26 Settlement.

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IT IS SO ORDERED.

Dated: _____

By: _____
PHILIP S. GUTIERREZ
United States District Judge