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

10
11 FLO & EDDIE, INC., a California
corporation, individually and on behalf
12 of all others similarly situated,

13 Plaintiffs,

14 v.

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

16 Defendants.
17

Case No. CV 13-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**DEFENDANT SIRIUS XM RADIO
INC.'S OPPOSITION TO AMICI
CURIAE'S REQUEST FOR LEAVE
TO FILE BRIEF REGARDING
CLASS SETTLEMENT**

[DECLARATION OF VISION
WINTER FILED CONCURRENTLY
HEREWITH]

Hearing Date: May 1, 2017
Hearing Time: 1:30 p.m.
Courtroom: 6A

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1 **I. INTRODUCTION**

2 After three years of fiercely-contested litigation—and extensive, arms-length
3 negotiations—Flo & Eddie and Sirius XM reached a settlement agreement that
4 provided class members with up to \$40 million in past damages and ten years of
5 potential royalty payments for future performances of their pre-1972 recordings.
6 Doc. 666-4; Doc. 666-1 at 1. The maximum negotiated royalty rate exceeds the
7 highest rate paid to any of the thirty-plus independent record labels who entered
8 into direct licenses with Sirius XM covering pre-1972 recordings. *Id.* The
9 guaranteed past payment—coupled with potential royalties for future
10 performances—will provide class members with more than adequate compensation
11 concerning a performance right that never existed before this lawsuit was filed, and
12 is still being challenged to this day. Indeed, it is telling that *not one class member*
13 *filed an objection* to the proposed settlement terms, and the only opt-out is a party
14 with a separate lawsuit already pending in state court. The reality is that class
15 members want to share in the guaranteed multi-million dollar payout for past
16 performances, and look forward to potential future royalties.

17 Amici are not class members and have no legitimate interest in this matter.
18 They have not even argued that the settlement is unfair in any way to class
19 members. Instead, they wish to “express concerns” that the settlement (1) does not
20 reflect the “market rate” and (2) creates an improper compulsory license. But
21 neither of their “concerns” are legitimate, relevant, or helpful to the Court’s only
22 analysis at this point—*i.e.*, to determine whether the proposed settlement is “fair,
23 reasonable, and adequate” to class members. Fed. R. Civ. P. 23(e)(2).

24 Amici’s first concern is that the settlement agreement includes a recital
25 stating the objective and indisputable fact that “[t]he Parties agree that [the royalty
26 rate] represents the rate that has been established by negotiations between a willing
27 buyer and a willing seller in a competitive market” Doc. 681-1 at 4. Amici
28 argue that “the Court must insist upon the removal of any self-serving description

1 of the license terms as reflecting a market rate.” *Id.* at 8. Of course, no one can
2 change the facts of what the parties agreed to, and line-editing the settlement to hide
3 what the Amici would like to avoid as an inconvenient truth would be
4 unprecedented. The function of a settlement agreement is to objectively recite what
5 the parties agreed to during the settlement negotiations. Regardless of how
6 “concerning” these facts are to the Amici, what the parties agreed to are facts that
7 cannot be changed.

8 In addition to the blatant impropriety of asking a Court to line edit a
9 settlement agreement, there is no reason to prevent class members—most of whom
10 are sophisticated record labels—from freely entering into a prospective license with
11 Sirius XM. Far from being “compulsory,” class members were free during the
12 exclusion period to opt out and negotiate separate licenses with Sirius XM if they
13 wished. The fact that class members must forego certain claims in exchange for
14 settlement benefits is simply the nature of any settlement agreement. There is
15 nothing inherently improper with that arrangement. The only thing improper is
16 Amici’s attempt to deprive class members of their right to enter into such licenses,
17 have their recordings broadcast, and receive royalties that were established in a
18 willing buyer/willing seller negotiation.¹

19 **II. STATEMENT OF RELEVANT FACTS**

20 At the heart of this litigation is the exclusive right to publicly perform pre-
21 1972 recordings. Unlike *post*-1972 recordings—which enjoy a nationwide digital
22 performance right under federal law—*pre*-1972 recordings are governed by state
23 law and have never been treated the same by the parties or larger recording and
24 broadcasting industries. In fact, broadcasters like Sirius XM have regularly
25 performed pre-1972 recordings without paying royalties for decades, and recording

26 ¹ Should the Court grant Amici’s motion, Sirius XM reserves all rights and
27 respectfully requests the full opportunity to respond to the merits of the proposed
28 amicus brief.

1 owners have been well aware of that fact. Doc. 411 at 1. In fact, prior to this
2 lawsuit, no recording owner had asked any broadcaster to stop performing their pre-
3 1972 recordings. *Id.* It took this highly-contested lawsuit for any court to
4 recognize, for the first time, an exclusive right to control the public performances of
5 pre-1972 recordings. *Id.* at 2 (“Prior to this [Court’s] ruling, no court had ever
6 expressly recognized such a right.”). And even that ruling is currently on appeal in
7 a related matter before the Ninth Circuit and California Supreme Court. *Flo &*
8 *Eddie, Inc. v. Pandora Media, Inc.*, 2017 WL 992513 (9th Cir. Mar. 15, 2017).

9 Rather than awaiting the completion of trial and appeals with this continued
10 uncertainty, the parties reached a settlement agreement less than 48 hours before
11 trial was scheduled to start. *See* Doc. 666-1 at 1-2. The settlement contains
12 payments to class members for both past and future performances of their pre-1972
13 recordings. Even though no performance right existed until this Court recently
14 recognized one, the settlement nonetheless provided a payment of up to \$40 million
15 to class members for Sirius XM’s past performances. Doc. 666-4 at 15-16, 19. The
16 settlement also provides for a ten-year license to continue to perform class
17 members’ pre-1972 recordings in exchange for potential ongoing royalty payments
18 at up to a 5.5% royalty rate. *Id.* at 6-7, 19, 20-21. That rate exceeds the *highest* rate
19 negotiated by any of the independent record labels who entered into direct licenses
20 with Sirius XM concerning pre-1972 recordings. Doc. 666-1 at 1.² Indeed, the vast
21 majority of these licenses included royalty rates below 1%, and only a handful
22 included rates between 3% to 5%. Doc. 489-3 at Ex. 19.

23 On January 27, 2017, the Court granted preliminary approval of the proposed
24 settlement. Doc. 676. The opt-out period concluded on March 8, 2017, and the
25 objection period closed on March 24, 2017. *See id.* at 5-6. The only class member

26 _____
27 ² These direct licenses were entered into before the Court preliminarily approved a
28 settlement class. *See* Doc. 438 at 2, 4-5. Thus, the licensors are not members of the
class but are similarly situated owners of pre-1972 recordings.

1 to seek exclusion was Gusto Records, Inc., which had already initiated its own
2 copycat lawsuit against Sirius XM in California state court in May 2016.
3 Declaration of Vision Winter (“Winter Decl.”) Exhibits (“Ex.”) A, B; *Gusto*
4 *Records, Inc. v. Sirius XM Holdings Inc.*, Case No. BC 620374 (Los Angeles Sup.
5 Ct.).³ No class members have filed objections to any terms of the proposed
6 settlement. Winter Decl. ¶ 2.

7 On March 1, 2017, six organizations (“Amici”) jointly moved the Court for
8 leave to file a brief “regarding the parties’ proposed class settlement as amici
9 curiae.” Doc. 681 at 1.⁴ No other parties have sought to block or modify any terms
10 of the settlement agreement.

11 **III. AMICI LACK STANDING AND DO NOT PROVIDE USEFUL**
12 **INFORMATION**

13 Amici cannot object to the settlement agreement because only class members
14 have standing to object. Fed. R. Civ. P. 23(e)(5) (“Any class member may object to
15 the [settlement] proposal...”); *see also Hazlin v. Botanical Labs., Inc.*, 2015 WL
16 11237634, at *4 (S.D. Cal. May 20, 2015) (“The plain language of Rule 23(e)
17 clearly contemplates only allowing class members to object to settlement
18 proposals.”). “Non-class members”—like Amici here—“have no standing to

19 _____
20 ³ In what appears to be out of an abundance of caution, two exclusion forms were
21 submitted by recording owners who have previously entered into direct licenses
22 with Sirius XM concerning their pre-1972 recordings. Winter Decl. Exs. C, D.
23 Another exclusion form was submitted by one of the Major Record Labels. *Id.* Ex.
24 E. These recording owners are not settlement class members and did not need to
25 opt out. Doc. 666-4 at § I(A)(42) (excluding Major Record Labels and Direct
26 Licensors from definition of Settlement Class).

27 ⁴ The six organizations are American Association of Independent Music (“A2IM”),
28 American Federation of Musicians of the United States and Canada (“AFM”), AFM
& SAG-AFTRA Intellectual Property Rights Distribution Fund (“AFM& SAG-
AFTRA Fund”), Recording Industry Association of America (“RIAA”), Screen
Actors Guild – American Federation of Television and Radio Artists (“SAG-
AFTRA”), and SoundExchange, Inc. (“SoundExchange”).

1 object,” and “routinely allowing them to inject their concerns at the settlement stage
2 frustrates the goal of encouraging settlements.” *Id.* (internal quotations omitted).
3 That alone is enough reason for the Court to disregard Amici’s motion. *See In re*
4 *Hydroxycut Mktg. & Sales Practices Litig.*, 2013 WL 5275618, at *2 (S.D. Cal.
5 Sept. 17, 2013) (striking objections because objectors have no “standing to object to
6 the proposed class settlement” when they cannot “satisf[y] their burden of
7 establishing that they are class members”); *Gatdula v. CRST Int’l, Inc.*, 2015 WL
8 12697656, at *6 (C.D. Cal. Aug. 26, 2015) (“any objections” by non-class members
9 “would be meritless as they would lack standing to object”).

10 In addition to the standing defect, the motion should be denied because it
11 fails to provide “useful” and “unique” information that is “relevant to a pending
12 decision.” *Hazlin*, 2015 WL 11237634, at *4 (disregarding amicus brief at class
13 settlement final approval stage because it “failed to raise unique or helpful
14 information”); *Jamul Action Comm. v. Chaudhuri*, 2015 WL 1802813, at *2 (E.D.
15 Cal. Apr. 17, 2015) (denying leave to file amicus brief that is “unhelpful to resolve
16 any pending issue”).⁵ Here, Amici here do not provide any relevant help to the
17 Court’s only pending decision—whether the proposed settlement is “fair,
18 reasonable, and adequate,” warranting final approval. Fed. R. Civ. P. 23(e)(2).⁶

19 **IV. AMICI’S MISGUIDED OBJECTIONS DO NOT HELP THE COURT**
20 **EVALUATE THE FAIRNESS OF THE CLASS SETTLEMENT**

21 Amici’s “concerns” and “deep misgivings” about the settlement agreement—
22 the “market rate” language and the prospective license—are irrelevant to the
23

24 ⁵ This Court has already denied attempts by other non-parties to interject as amici
25 curiae on unrelated issues when they failed to meet this standard. *See Doc. 152.*

26 ⁶ “Fairness” compares treatment of class members with each other and similar non-
27 class members, “reasonableness” measures how responsive the settlement is to class
28 claims, and “adequacy” compares settlement relief to potential relief outside the
class action. Federal Judicial Center, *Manual for Complex Litig.* § 21.62 (4th ed.).

1 Court's analysis and are legally and factually incorrect. Both objections falsely
2 assume that *pre-1972* recordings must be treated the same as *post-1972* recordings
3 and fail to consider the full nature of the parties' dispute and the settlement
4 agreement.

5 **A. The Parties' Agreement Regarding The "Market Rate" For Pre-**
6 **1972 Recordings Is Immaterial To The Court's Analysis.**

7 The parties have agreed to enter into a prospective license expressly granting
8 Sirius XM the right to perform the class members' *pre-1972* recordings at a set
9 royalty rate. Doc. 666-4 § IV(C). Amici never once argue that the negotiated
10 royalty rates are "unfair, unreasonable, or inadequate" under the Court's Rule
11 23(e)(2) analysis. Instead, Amici quibble over the specific wording of one part of
12 the agreement: "the Parties agree that [the royalty rate] represents the rate that has
13 been established by negotiations between a willing buyer and willing seller in a
14 competitive market for *Pre-1972* Sound Recordings." Doc. 681-1 at 4. While that
15 statement by the parties is unquestionably true, the Amici's objection is irrelevant
16 to the Court's analysis and should be disregarded entirely.

17 **1. The Court is not determining the "market rate."**

18 The Court's only task at this juncture is to determine whether the parties'
19 overall settlement is "fair, reasonable, and adequate" in light of the nature of this
20 dispute. *See* Fed. R. Civ. P. 23(e)(2). In other words, the Court should evaluate
21 whether the negotiated royalty rate provides fair and adequate compensation for
22 Sirius XM's ongoing performance of the class members' *pre-1972* recordings. The
23 challenged language provides that "*the Parties* agree" the negotiated royalty rate
24 reflects the realities of the market in light of all applicable facts.

25 The Court should also not be asked to line edit an arms-length settlement
26 agreement entered into between litigants. Fairness, reasonableness, and adequacy
27 must be evaluated by considering the "overall" proposed class settlement "taken as
28 a whole." *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1026 (9th Cir. 1998). The

1 Court should not evaluate “the individual component parts” in isolation, and is “not
2 free to redraft the agreement, or strike out certain parts” it finds to “be
3 problematic.” *Id.* at 1028. But Amici are asking the Court to do just that—to strike
4 specific language that even Amici seem to acknowledge is immaterial to the overall
5 fairness of the settlement. *See* Doc. 681-1 at 8 (Amici argue that “the Court must
6 insist upon the removal of any self-serving description of the license terms as
7 reflecting a market rate.”).

8 *Hanlon*—Amici’s leading case—is instructive. In *Hanlon*, several state
9 Attorneys General appeared as amici curiae to contest one paragraph of a proposed
10 nationwide settlement concerning defective minivans. 150 F.3d at 1028. The
11 Attorneys General argued that the challenged paragraph was “unfair and
12 unreasonable” because it would have a “chilling effect” on state enforcement of
13 auto safety rules. *Id.* The Ninth Circuit rejected that argument and affirmed the
14 district court’s final approval of the settlement. *Id.* at 1028, 1030. It ruled that
15 class members had adequate “notice” and a fair opportunity to review the
16 paragraph—which had been included in the agreement “from the beginning”—and
17 “the vast majority of the class” nonetheless agreed to “exchang[e] their state rights
18 for the contractual promises of the Agreement.” *Id.* at 1028. The inclusion of that
19 paragraph did not “warrant[] rejection of the agreement.” *Id.*

20 Amici’s line-item “objections” are even weaker here. Like the Attorneys
21 General in *Hanlon*, Amici contest only one provision in the proposed settlement
22 that has been a part of the agreement “from the beginning.” *Id.* Class members
23 have had full “notice” and opportunity to scrutinize the language regarding market
24 rates, but not one has filed an objection. Instead, they have decided to “exchang[e]
25 their” rights to negotiate different royalty rates “for the contractual promises of the
26 Agreement.” *Id.*

27 Amici also raise concerns that any references to the “market rate” for *pre-*
28 1972 recordings would determine future rate-setting proceedings for *post-1972*

1 recordings. Doc. 681-1 at 6-7. The settlement only states that “the *Parties*” agreed
2 on a market rate for *pre-1972* recordings. It does not mention post-1972
3 recordings, let alone mandate what the Copyright Royalty Board should determine
4 is the appropriate rate for post-1972 recordings.⁷ The argument that this Court
5 should line-edit a settlement agreement because an unrelated third party (*Amici*) is
6 “concerned” that the settlement agreement may be cited in a separate proceeding
7 (the Copyright Royalty Board proceeding) to set rates for a separate class of sound
8 recordings (post-1972 sound recordings) is not persuasive. And those concerns are
9 irrelevant and immaterial to the fairness, reasonableness, and adequacy of
10 compensating the *pre-1972* recording owners that have an interest in the settlement
11 agreement.⁸

12 **2. The royalty rate is a fair outcome from market negotiations.**

13 Even if the Court determines that it should examine the market rate, the
14 negotiated rate reflects the realities of the market concerning pre-1972 recordings.
15 In fact, the proposed rate is the *highest* pre-1972 rate negotiated by any of the
16 independent record labels who entered into licenses with Sirius XM. Doc. 666-1 at
17 1. The vast majority of those licenses included rates below 1%, and only a handful
18 included rates between 3% to 5%. Doc. 489-3 at Ex. 19. This comparison

19 ⁷ *Amici* also mention that other “copyright owners and performing artists” could be
20 affected if the settlement somehow lowers rates for *post-1972* recordings. Doc.
21 681-1 at 8. But this case only involves the rights of pre-1972 recording owners, all
22 of whom are class members or opt-outs from the *Flo & Eddie* California Class
23 and/or the Settlement Class. Other copyright owners and performing artists have
no property interest in pre-1972 recordings at stake here.

24 ⁸ *Amici* also argue that a “ten-year license” is “inconceivable as the product of a
25 transaction between a willing buyer and willing seller.” Doc. 681-1 at 5. That is
26 plainly wrong and beside the point. *Amici* have not argued or provided any support
27 that a duration of ten years is unfair. Instead, the parties reasonably sought a ten-
28 year license to secure potential long-term payment for recording owners in light of
the uncertainty that a performance right would even be recognized for pre-1972
sound recordings.

1 confirms that the proposed rate is a fair and adequate outcome reflecting market
2 negotiations. *See Manual for Complex Litig.* § 21.62 (“fairness” requires
3 comparing treatment of class members “vis-à-vis each other and ... similar
4 individuals” outside the class, and “adequacy” involves comparing settlement terms
5 to what class members might have obtained outside the class action process).

6 Amici’s argument that the royalty rate “does not remotely reflect the
7 marketplace” is wrong. Doc. 681-1 at 5. Amici nakedly assert that “when pre-72
8 recordings are licensed in the free market, they generally are licensed on the same
9 financial terms as post-72 recordings, not at a deep discount.” *Id.* Not so. Pre- and
10 post-1972 recordings have been treated differently under the law for decades.
11 There is no historical market for pre-1972 recordings, and it took this litigation for
12 *any court* to recognize a pre-1972 performance right.⁹ This backdrop of “costly and
13 uncertain prospects of multiple state court litigations” is exactly what defines the
14 market for pre-1972 recordings. *Id.* at 2. Thus, the current 11% statutory rate for
15 *post-1972* recordings is not the proper benchmark to use. That rate reflects the fact
16 that Congress has already established a digital performance right for post-1972
17 recordings. *Pre-1972* recordings, however, are subject to willing buyer/willing
18 seller negotiations, fixed in number, and declining in popularity. *See* Doc. 489-3 ¶
19 105, Ex. 20.

21 ⁹ This is just one of many lawsuits involving the novel performance-right issue.
22 New York’s highest court recently confirmed that no performance right exists under
23 New York law, reversing a previous decision by a New York federal district court.
24 *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 28 N.Y. 3d 583 (2016). Florida’s
25 Supreme Court will soon decide whether to affirm a Florida federal district court’s
26 holding that no performance right exists under Florida law. *Flo & Eddie, Inc. v.*
27 *Sirius XM Radio Inc.*, 827 F.3d 1016 (11th Cir. 2016). And New Jersey and Illinois
28 federal courts are awaiting resolution of these related appeals before deciding
whether those states should recognize a performance right. *Sheridan v. Sirius XM*
Radio Inc., 2016 WL 1060361 (D.N.J. Mar. 16, 2016); *Sheridan v. Sirius XM Radio*
Inc., Case No. 15-cv-9236 (N.D. Ill.), Dkt. 42, 48, 60.

1 **B. The Prospective Class License Provides Fair, Reasonable, And**
2 **Adequate Compensation For Class Members.**

3 It is well-established that this Court has the authority to provide prospective
4 relief to class members. *Local Number 93, Int’l Assoc. of Firefighters v. City of*
5 *Cleveland*, 478 U.S. 501, 525 (1986) (district court can enter “a consent decree”
6 that “provides broader relief than the court could have awarded after a trial”).
7 Courts routinely approve class settlements providing prospective relief. *See, e.g.,*
8 *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 247-249
9 (2d Cir. 2011) (approving class settlement permitting publishers to continue selling
10 and licensing class members’ copyrighted works); *Uhl v. Thoroughbred Tech. &*
11 *Tele., Inc.*, 309 F.3d 978, 982 (7th Cir. 2002) (approving class settlement granting
12 defendant future rights in class members’ real property); *Robertson v. Nat’l*
13 *Basketball Ass’n*, 72 F.R.D. 64, 69-70 (S.D.N.Y. 1976) (approving settlement
14 establishing new rules for future NBA draftees); *White v. Nat’l Football League*,
15 822 F. Supp. 1389, 1407-08 (D. Minn. 1993) (approving settlement that provided
16 “monetary relief for alleged past liability” as well as “structural” relief “that will
17 govern [NFL] players in future years”).

18 Despite this clear law, Amici objects that the Court cannot approve *any*
19 prospective class license involving pre-1972 recordings. Doc. 681-1 at 9. That is
20 plainly wrong under the law and the facts of this case, and must be disregarded as
21 unhelpful to the Court’s Rule 23(e)(2) analysis.

22 **1. This lawsuit contemplated a prospective license releasing**
23 **claims against future infringement.**

24 As a preliminary matter, Amici’s objection is premised on the erroneous
25 assumption that the “prospective aspect of the settlement is outside the scope of this
26 litigation” because the case is only “about Sirius XM’s past unauthorized use of
27 pre-1972 recordings.” Doc. 681-1 at 9. Not so. Each and every cause of action
28 sought injunctive relief addressing Sirius XM’s *future* uses of the class members’

1 pre-1972 recordings, and necessarily contemplated the possibility of prospective
2 relief beyond mere cessation of the challenged conduct. Doc. 1-1 at 10-12.

3 The Second Circuit has already rejected an identical objection to a similarly
4 structured class settlement. In *In re Literary Works*, freelance writers filed a class
5 action against publishers when the publishers began licensing their articles to
6 electronic databases, seeking both compensatory damages for past harm as well as
7 injunctive relief. 654 F.3d at 245, 248. Under the proposed settlement, class
8 members would release defendants from past and future claims in exchange for
9 compensation for the future use of their works. *Id.* at 246. Objectors claimed that
10 the court could not approve a settlement releasing future claims, arguing that
11 “future infringements are distinct harms giving rise to independent claims for relief,
12 with factual predicates that are different from authors’ past infringement claims.”
13 *Id.* at 248. The Second Circuit disagreed:

14 Objectors ... fail[] to recognize that the ... complaint seeks
15 injunctive relief for future uses, and therefore *contemplates*
16 *these alleged future injuries*. Put another way, a trial of this
17 case would determine whether it is permissible for publishers
18 to continue to sell and license the works. Accordingly ... the
19 Settlement’s release of claims regarding future infringements
20 is not improper.

21 *Id.* (emphasis added). *Cf. also Hesse v. Sprint Corp.*, 598 F.3d 581, 590-91 (9th
22 Cir. 2010) (courts can “properly release[] claims” not before them if those claims
23 depend “on the same set of facts as the claims” in the complaint); *Class Plaintiffs v.*
24 *City of Seattle*, 955 F.2d 1268, 1288 (9th Cir. 1992) (same).

25 Similarly here, Flo & Eddie’s complaint seeks both compensatory damages
26 and injunctive relief, Doc. 1-1 at 10-12, and a “trial of this case would determine
27 whether it is permissible” for Sirius XM to “continue to” perform class members’
28 pre-1972 recordings without compensation. *See In re Literary Works*, 654 F.3d at

1 248. The settlement’s provision allowing for potential future compensation simply
2 confirms that “it is permissible for [Sirius XM] to continue to [use] the works” as it
3 has in the past, and is entirely within the scope of this lawsuit and the Court’s
4 authority to approve. *See id.* A release of “claims regarding future infringements”
5 is appropriate under these circumstances. *Id.*

6 Amici’s sole reliance on *Authors Guild v. Google, Inc.* is misplaced. Doc.
7 681-1 at 10-11. The proposed settlement in *Authors Guild* was improper because it
8 involved a sweeping license between Google and “hundreds of thousands[] or
9 millions of class members,” 770 F. Supp. 2d 666, 673 n.6 (S.D.N.Y. 2011), that
10 would have granted Google rights to exploit class members’ books “well into the
11 twenty-second century.” *See* James Grimmelman, *Future Conduct and the Limits*
12 *of Class-Action Settlements*, 91 N.C. L. REV. 387, 390 (2013). Hundreds of class
13 members objected to the proposed settlement, and the United States Department of
14 Justice expressed concerns about it. *Authors Guild*, 770 F. Supp. 2d at 671. The
15 proposed settlement not only permitted Google to continue copying books and
16 displaying “snippets” of text—the subject of the lawsuit—but also permitted
17 Google to engage in *additional* conduct outside the scope of the lawsuit, including
18 selling access to digital copies of entire books. *Id.* Indeed, the settlement “would
19 have established the world’s largest bookstore” controlled by one company, “bound
20 millions of class members[,] and [made] payments to copyright owners [that] could
21 have reached into the billions of dollars.” *See* Grimmelman, *supra* at 394.

22 Here, the proposed prospective license encompasses a much smaller class
23 and is limited to only ten years. No class members have objected to any terms of
24 the settlement, including its prospective license. And notably, the proposed
25 settlement merely permits Sirius XM to continue its *current* use of class members’
26 pre-1972 recordings in the *same manner* it has done for years—*e.g.*, to “broadcast
27 and publicly perform ... and to make [necessary] reproductions” of class members’
28

1 pre-1972 recordings. *See* Doc. 666-4 IV.C.1. In other words, unlike *Authors Guild*,
2 the release of future claims is limited to the conduct at issue in this lawsuit.¹⁰

3 **2. Class members were free to opt out or release certain claims**
4 **in exchange for settlement relief.**

5 Class members have had a full and fair opportunity to object to or opt out of
6 the settlement if they were not satisfied with the prospective relief, including if they
7 did not believe it was the product of a negotiation between a willing buyer and a
8 willing seller. Amici do not dispute that, and never argued that the opt-out
9 procedure has been unfair or that the robust Court-approved notice plan failed to
10 protect the class members' interests. And yet, Amici mischaracterizes the
11 settlement as a "compulsory license that binds all members of the class" as if this
12 were a mandatory class. Doc. 681-1 at 2. Amici suggest that the class members
13 "have so little at stake" and are "so ignorant" that they lack the "motivation,
14 knowledge, and resources" to understand the class notice or settlement terms. *See*
15 Doc. 681-1 at 8. That is wrong. Unlike the class actions Amici reference, most
16 class members here are sophisticated record companies with a clear understanding
17 of their rights. *Eighteen* were deposed in this lawsuit about the very issues and
18 risks at stake here, and nearly all were represented by counsel. Doc. 424 at 5.
19 Others have brought their own lawsuits against Sirius XM in California, New York,
20 New Jersey, and Illinois. *See* Case No. 3:15-cv-04081 (N.D. Cal.); Case 1:15-cv-
21 07056 (S.D.N.Y.); Case No. 2:15-cv-07576 (D.N.J.); Case No. 1:15-cv-9236 (N.D.

22 ¹⁰ Amici's related argument that a prospective license would improperly place on
23 class members the "burden of coming forward to preserve their rights in the future,"
24 also fails. Doc. 681-1 at 10-11. It is not improper to require class members to
25 release certain rights in exchange for prospective compensation. Intrinsic to every
26 class action settlement is the requirement that a class member either affirmatively
27 opt out, or agree to release their rights according to the settlement terms. That is
28 the nature of class actions, and exactly why courts—like the Second Circuit in *In re*
Literary Works—routinely approve releasing similar future-conduct claims. *See*
supra at 10-12.

1 Ill.). It is clear that class members were fully aware of their right to object, opt out,
2 or pursue separate negotiations at their own expense.

3 Yet, no class members have objected to the settlement and only has one
4 opted out to pursue a separate lawsuit. *Supra* at 3-4. The reality is that class
5 members want Sirius XM to broadcast their recordings and want to receive
6 royalties, but do not want to incur expenses negotiating separate licenses. Instead,
7 the proposed class license—which resulted from fiercely contested litigation and an
8 arm’s length negotiation—is a fair means of resolving how to compensate them for
9 future uses of their pre-1972 recordings, particularly in light of the uncertainties
10 surrounding the performance-right issue nationwide. *See Hanlon*, 150 F.3d at 1026
11 (“the reaction of the class members to the proposed settlement” is an important
12 factor in considering fairness); *Manual for Complex Litig.* § 21.62 (“the number
13 and force of objections by class members” is indicative of fairness). It is telling
14 that the only objection has come from Amici, who are not class members and have
15 no legitimate interest in this lawsuit.

16 **3. Differences between the federal scheme for post-1972**
17 **recordings and the settlement are irrelevant.**

18 Any differences between pre- and post-1972 recordings should not give the
19 Court pause in granting final approval of the settlement. It is undisputed that pre-
20 and post-1972 recordings are fundamentally different under the law. Owners of
21 post-1972 recordings have enjoyed an antitrust exemption and nationwide digital
22 performance right under federal law since 1995, and Congress has put in place a
23 comprehensive system to set royalty rates and administer royalty payments for
24 post-1972 recordings. *See* 17 U.S.C. § 114(e)-(f). On the other hand, owners of
25 pre-1972 recordings have never possessed a performance right in any state until this
26 Court recognized one for the first time. As a result, there is no parallel system to
27 set rates or administer payments for pre-1972 recordings, and it is still uncertain
28

1 whether *any* state will ultimately find that a performance right exists in the first
2 place.¹¹

3 Yet, Amici’s true complaint appears to be that the prospective license treats
4 pre-1972 recordings differently from how post-1972 recordings are treated under
5 the Federal Copyright Act. There is no basis for why this would be unfair to
6 settlement class members. Amici’s list of differences between the federal
7 regulatory scheme for post-1972 recordings and the proposed settlement should be
8 disregarded as irrelevant to the Court’s analysis:

- 9 • Amici point out that federal rates are set through litigated proceedings
10 before the Copyright Royalty Board (“CRB”), while the rate here is set
11 “in a private deal.” Doc. 681-1 at 11. That makes no difference. Even
12 post-1972 recording owners can—and frequently do—enter into direct
13 licenses with Sirius XM outside of the CRB proceedings. Amicus-
14 SoundExchange’s website explicitly acknowledges this: “It is completely
15 within your rights [as recording owners] to negotiate directly with
16 webcasters should you decide that is best.” Winter Decl. Ex. F.
- 17 • Amici note that performance royalties under the federal system “are split
18 equally between copyright owners and recording artists,” while the
19 “settlement requires no [such] split.” Doc. 681-1 at 11. But Sirius XM is
20 under no obligation to pay recording artists here. This is a lawsuit
21 involving *sound recording owners*, not artists who have no property
22 interest in the recordings themselves. *See* Doc. 1-1.
- 23 • Amici argue that federal royalties are paid to SoundExchange, “a
24 nonprofit collective,” while the royalties here would be paid to an a “for-

25 ¹¹ This Court’s decision is currently on appeal before the Ninth Circuit in a related
26 matter. At least three states have definitively declared that *no* such performance
27 right exists under their respective laws, and the issue is currently being litigated in
28 three other states. N.C. GEN. STAT. § 66-28 (2015); S.C. CODE ANN. § 39-3-
510 (2015); *supra* at n.9.

1 profit administrator.” *Id.* at 12. To the extent Amici are implying that
2 SoundExchange is more effective, they have provided no support for that
3 argument. Administration of royalties by SoundExchange is not
4 necessarily better than administration by an impartial administrator. And
5 neither is SoundExchange any more “impartial.” It also charges a fee for
6 its services, and can keep—and reportedly has kept—any unclaimed
7 royalties for itself. Winter Decl. Ex. G.

- 8 • Amici suggest that class members “have the burden of declaring
9 themselves to the administrator,” while post-1972 recording owners need
10 to do nothing. *Id.* at 12. This is neither correct nor relevant to the Court’s
11 analysis. There is nothing inherently wrong with requiring class members
12 to declare themselves in order to receive compensation. That is exactly
13 how the claims administration process works in class actions. Moreover,
14 Sirius XM is providing a list of the pre-1972 sound recordings to the class
15 to help members identify which recordings they own. Doc. 666-4 §
16 IV(C)(4). SoundExchange is no different. It also requires owners of post-
17 1972 recordings to register for a fee in order to collect any royalties.¹²

18 **4. Class members should not have to wait for Congress to act.**

19 Remarkably, Amici’s only proposed alternative to a prospective license is to
20 have class members do nothing but hope that our inefficient Congress will
21 eventually regulate pre-1972 recordings in the same manner as post-1972
22 recordings. *See* Doc. 681-1 at 13-14. Such a proposal does not further class
23 members’ interests in receiving “fair, reasonable, and adequate” compensation.
24

25 ¹² Amici also suggest that Sirius XM should pay for all pre-1972 recordings it
26 performs, even if no class members claim to own them. Doc. 681-1 at 13. This
27 would only punish Sirius XM without any benefit to class members, forcing Sirius
28 XM to pay for abandoned recordings. This in no way furthers the Court’s task of
ensuring fair, reasonable, and adequate compensation for the class.

1 Class members should not be forced to sit on their rights when they have the
2 opportunity to enter into a license with Sirius XM on market terms to receive
3 royalties now. Any current legislative efforts are uncertain at best, and Amici have
4 not, and cannot, provide any evidence that such efforts would ever come to
5 fruition—let alone that Congress would ever create a system that is more beneficial
6 than the proposed settlement.

7 In recognizing a performance right for the first time, the Court knew that the
8 parties would need to enter into a “private” license because no analog to the federal
9 statutory scheme exists for pre-1972 recordings. Far from being a “quasi-
10 legislative” solution, Doc. 681-1 at 11, the proposed settlement represents a fair
11 result from a negotiated transaction between represented parties faced with the
12 realities of a newly-recognized right (and one that is still being challenged today).
13 Class members are primarily sophisticated recording owners who understood those
14 risks and accepted these terms. Similar contracts between recording owners and
15 broadcasters are not uncommon, and no one would challenge them on the grounds
16 that they interfere with “work” properly left to the legislature. Even the Copyright
17 Act expressly allows post-1972 recording owners to contract around the statutory
18 rates and terms. 17 U.S.C. § 114(e)(1). The Court should disregard Amici’s
19 attempt to protect their monopoly in the area of sound recordings and to deprive
20 class members of their fundamental right to enter into such licenses.

21 **V. CONCLUSION**

22 For the foregoing reasons, the Court should deny Amici’s request for leave to
23 file a brief regarding the class settlement.

24
25 Dated: April 10, 2017

O’MELVENY & MYERS LLP

26 By: /s/ Daniel M. Petrocelli
27 Daniel M. Petrocelli

28 Attorneys for Sirius XM Radio Inc.

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Facsimile: (310) 246-6779
6 Attorneys for Defendant
7 Sirius XM Radio Inc.

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

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

12 Plaintiffs,

13 v.

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

16 Defendants.

Case No. CV 13-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**DECLARATION OF VISION
WINTER IN SUPPORT OF
DEFENDANT SIRIUS XM RADIO
INC.'S OPPOSITION TO AMICI
CURIAE'S REQUEST FOR
LEAVE TO FILE BRIEF
REGARDING CLASS
SETTLEMENT**

Hearing Date: May 1, 2017

Hearing Time: 1:30 p.m.

Courtroom: 6A

DECLARATION OF VISION WINTER

I, Vision Winter, declare and state:

1. I am a partner at the law firm of O’Melveny & Myers LLP, counsel of record for defendant Sirius XM Radio Inc. (“Sirius XM”) in the above-entitled action. I make this declaration in support of Sirius XM’s Opposition to Amici Curiae’s Request For Leave to File Brief Regarding Class Settlement. I have personal knowledge of the matters set forth in this declaration, and if called to testify thereto, I could and would do so competently.

2. To date, counsel for Sirius XM has not received any objections from class members to the proposed settlement agreement. On March 30, 2017, class counsel similarly confirmed that they have not received any objections from class members.

3. Attached hereto as **Exhibit A** is a true and correct copy of a February 28, 2017 letter from Gusto Records, Inc.’s counsel to the Administrator and Class Counsel (attachments omitted).

4. Attached hereto as **Exhibit B** is a true and correct copy of a March 6, 2017 letter from Gusto Records, Inc.’s counsel to the Administrator and Class Counsel (attachments omitted).

5. Attached hereto as **Exhibit C** is a true and correct copy of an Exclusion Request Form from BMG AM Pty Limited (Formerly J. Albert & Son Pty Ltd) (attachments omitted).

6. Attached hereto as **Exhibit D** are true and correct copies of February 28, 2017 letters from BMG to the Administrator (attachments omitted).

7. Attached hereto as **Exhibit E** is true and correct copy of a March 6, 2017 letter from ABCKO Music & Records, Inc. to the Administrator (attachments omitted).

1 8. Attached hereto as **Exhibit F** is a true and correct copy of a print out
2 from SoundExchange’s website, available at [https://www.soundexchange.com/](https://www.soundexchange.com/about/general-faq/)
3 [about/general-faq/](https://www.soundexchange.com/about/general-faq/).

4 9. Attached hereto as **Exhibit G** is a true and correct copy of a January
5 31, 2014 article titled “SoundExchange Finally Releases Old, Unclaimed
6 Royalties,” available at [http://www.billboard.com/biz/articles/news/5893782/](http://www.billboard.com/biz/articles/news/5893782/soundexchange-finally-releases-old-unclaimed-royalties)
7 [soundexchange-finally-releases-old-unclaimed-royalties](http://www.billboard.com/biz/articles/news/5893782/soundexchange-finally-releases-old-unclaimed-royalties).

8 I declare under penalty of perjury under the laws of the United States that the
9 foregoing is true and correct and that this declaration is executed on this 10th day of
10 April 2017 in Menlo Park, California.

11 

12
13 Vision Winter

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EXHIBIT

A

LAW OFFICES OF ROBERT S. BESSER

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Pacific Palisades, California 90272
Tel: (310) 394-6611 Fax: (310) 394-6612
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212-599-0777
slevy@etllaw.com

Christopher Chapin
San Rafael, CA 94903
415-578-2364
christopherchapin@aol.com

February 28, 2017

Via U.S. Mail

Flo & Eddie v. Sirius XM
c/o GCG
P.O. Box 35131
Seattle, WA 98124-5131

Via Fedex

Flo & Eddie v. Sirius XM
c/o GCG
1531 Utah Ave. S., Suite 600
Seattle, WA 98134

Re: Settlement opt out by Gusto Records, Inc. from settlement in Flo & Eddie, Inc. v Sirius XM Radio Inc., Case No. CV13-05693

To whom it may concern:

I have been retained by Gusto Records, Inc ("Gusto") for the specific purpose of communicating Gusto's decision to opt out of the settlement and the Class in the above referenced action. Accordingly, I state the following on behalf of Gusto:

1. The name of the lawsuit is Flo & Eddie, Inc. v. Sirius XM Radio Inc., Case No. CV13-05693.
2. Gusto Records, Inc. : 1900 Elm Hill Pike, Nashville, TN 37219.
3. Gusto wishes to be excluded from the Class.
4. My signature is below. A duly executed warranty by an officer of Gusto is included.

Flo & Eddie v. Sirius XM
c/o GCG
February 28, 2017
Page 2

5. A list of selected artists and label's owned by Gusto is included.

You also are advised as follows:

1. The list of artists and labels included is not intended to be, and is not, a complete listing of all sound recordings in the Gusto catalog. It does, however, include the majority of the artists that had chart hits. Gusto believes that the list includes very close to 100% of all Gusto owned artists' songs that were played by Sirius during the relevant period.
2. There should be no question as to Gusto's intent to opt out as it has done so twice before in this action. The first time was in response to the deposition subpoena received by Gusto last year, in response to which Gusto filed an opt out notice with the court which was served on all counsel. As a result, the deposition was canceled. The second time was the notice sent by Gusto in August of 2106. The Class rejected the second notice as untimely, but Gusto disagrees with that position and sends this opt out notice without waiving its contention that the prior two notices were effective.
3. The specific requirements to opt out set forth in the Notice Of Pendency Of Class Action Settlement (the "Notice") are burdensome and unconscionable as applied to Gusto. The Gusto catalog consists of more than 15 significant record labels with a total of more than 300,000 sound recordings, the majority of which were recorded prior to 1972. It would take months of work and tens of thousands of dollars to produce the information that exists which would still not comply with the technical requirements requested by the Notice. The Notice asks for "albums," but thousands of the recordings have been on more than one album and many have never appeared on any album. In many cases it also would be impossible to determine the exact "date first fixed."
4. Gusto filed its own lawsuit against Sirius last year. This was done to be able to protect and control the future of its catalog.
5. Additionally, Gusto is not willing to be represented by current Class counsel because of conflicts that exist from prior litigation.

Flo & Eddie v. Sirius XM
c/o GCG
February 28, 2017
Page 3

Please advise the undersigned immediately if this opt out notice is not accepted and state the reasons, if any, for its rejection.

Nothing contained herein is intended as a waiver of any of Gusto's rights and remedies, all of which are reserved.

Sincerely yours,

A handwritten signature in black ink, appearing to read "R. S. Besser", with a horizontal line extending to the right.

ROBERT S. BESSER

encl.

cc: Class Counsel via e-mail
Client

WARRANTY

In support of the request of Gusto Records, Inc. ("Gusto") to be excluded from the Class and the pending settlement in the case of *Flo & Eddie v. Sirius XM, Case No. CV13-05693* and for the purpose of complying with the Notice Of Pendency Of Class Action Settlement, Gusto hereby represents and warrants that it owns and controls all of the artists and labels reflected on the enclosed List of Selected Artists along with all of their pre-1972 sound recordings. Gusto further warrants that Robert S. Besser has been duly retained and appointed to serve the opt out notice on behalf of Gusto.

GUSTO RECORDS, INC.

By 
STEPHEN HAWKINS
Vice President

EXHIBIT

B

LAW OFFICES OF ROBERT S. BESSER
17383 Sunset Boulevard Suite A-350
Pacific Palisades, California 90272
Tel: (310) 394-6611 Fax: (310) 394-6612
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Of Counsel:
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Christopher Chapin
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415-578-2364
christopherchapin@aol.com

March 6, 2017

VIA U.S. Mail; FEDEX
AND EMAIL

Flo & Eddie v. Sirius XM
C/O GCG
P.O. Box 35131
Seattle, WA 98124-5131

To the Administrator and Class Counsel:

This is in reply to the Administrator's email and letter of March 1, 2017.

All Class Counsel are copied on this reply in a request that one or more of you meet and confer with me pursuant to Local Rules. Unless Gusto is allowed to withdraw from the Class immediately, we will seek Court approval of the withdrawal and opt-out of the proposed settlement.

Gusto provides the attached list (the "Gusto List") showing approximately 8,800 pre-1972 sound recordings. Gusto represents and warrants that it owns and/or controls all recordings on the Gusto List. The Gusto List shows the Artist, Recording Title, Label and ISRC Code for each sound recording. This list should be sufficient to satisfy the opt-out requirements.

With respect to this list, be advised as follows:

1. The Gusto List is proprietary information and it must be treated as confidential and not distributed or filed with the Court unless there is a protective order requiring it to be filed under seal in place.
2. The Gusto List does not, and cannot for reasons explained below, include every pre-1972 sound recording owned by Gusto. It is not the entirety of the Gusto Catalog and should not be regarded as such.

EXHIBIT B

Flo & Eddie v. Sirius XM
C/O GCG
March 6, 2017
Page Two

3. The Gusto List includes the vast majority of Gusto's pre-1972 sound recordings that have been digitalized and therefore almost certainly includes all but a very few of the Gusto recordings played by Sirius during the operable period.
4. The purpose for requiring a listing of "album" for each song is not clear. Many of the recordings on the Gusto List have appeared on multiple albums over the years, either on Gusto released product, on albums released by one of Gusto's many licensees or by inclusion on unauthorized albums sold by bootleggers. Others have not appeared on any album.
5. The Gusto List does not include a date on which the recording was "fixed." This was not something that was relevant to the record business prior to 1972 and the documentation maintained by the original record labels regarding recording dates is often non-existent, incomplete or incorrect. Despite these inherent problems in tracking down original recording dates, which occurred up to 70 years ago, Gusto is confident that the Gusto List includes only sound recordings that were made prior to February 1, 1972.
6. Gusto started issuing IRSC codes in 2005 and to the best of Gusto's knowledge an IRSC code has not been allocated to any Gusto owned pre-1972 recording that is not on the Gusto List.

Gusto is unable to provide some of the information specified by the opt-out requirements because:

1. The Gusto Catalog consists of over 100,000 individual sound recordings, the majority of which were recorded prior to 1972.
2. The Gusto Catalog was built by the acquisition of record labels as well as by a significant amount of in house recording. The labels acquired include King Records, Federal Records, Deluxe Records, Starday Records, Scepter Records, Wand Records, Musicor Records, Dynamo Records, Chart Records and Stop Records, among many others, all of which encompass a significant number of pre-1972 recordings.
3. Gusto does not maintain a single comprehensive list of every sound recording it owns.

Flo & Eddie v. Sirius XM
C/O GCG
March 6, 2017
Page Two

The insistence by Class Counsel that Gusto can be drafted into the Class over its objections creates an irreconcilable conflict of interest between Gusto and Class Counsel.

Gusto does not want to be part of the Class or the proposed settlement. Class Counsel has refused to acknowledge the conflict, instead taking actions to benefit the Class at the expense of Gusto. Class Counsel did not inform Gusto in a timely manner that the Class had rejected its earlier opt-out notice because according to the Administrator and/or Class Counsel it was received one day late. Gusto reserves the right to dispute that this was in fact the case.

Class Counsel brought a motion without notice to Gusto that asked the Court to reject Gusto's attempts to opt out. These actions were designed to enlarge the Class recovery to the detriment of Gusto.

Gusto has now provided all reasonable information and made it abundantly clear that there are no circumstances under which it will agree to be part of the Class or a participant in the settlement. To avoid further costs and claims against the Class and/or its counsel, please acknowledge the validity of Gusto's opt-out immediately.

This communication is made without waiver of any of my client's rights or remedies, all of which are hereby reserved.

Sincerely,



ROBERT S. BESSER

encl.

cc: Client

EXHIBIT

C

Flo & Eddie, Inc. v. Sirius XM Radio, Inc., Case No. CV13-05693

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

EXCLUSION REQUEST FORM

If you want to exclude yourself from this class action, you may print and complete this form and mail it to the address below. Information you provide on this form will be used only to exclude you from the class action. If you exclude yourself—which is sometimes called ‘opting-out’ of the Class—and the Class receives a recovery through judgment or settlement, you won’t be entitled to a share of the recovery.

The Exclusion Request must be submitted so that it is **RECEIVED** no later than August 30, 2016.

Please Mail To: *Flo & Eddie v. Sirius XM*
c/o GCG
PO Box 35131
Seattle, WA 98124-5131

REQUIRED INFORMATION

* BMG AM Pty Limited (formerly J. Albert & Son Pty Ltd)

Name (First, Middle, Last; or Name of Corporation, Partnership or Other Entity)

* Individual Corporation Sole Proprietorship Partnership Other

* Cameela Ketheeswaran

Contact Person (if applicable)

* Level 3, 268A Devonshire St

Street Address

*City: Surry Hills *State: NSW *Zip: 2010



(ATTACHMENT A MUST ALSO BE FULLY COMPLETED AND SENT WITH THIS FORM)

REQUEST FOR EXCLUSION

I do not want to participate in the class action described above. Instead, I want to be excluded. I understand that by excluding myself, I will not be entitled to receive any benefits from it and/or any settlement that may ultimately be negotiated.

Date: 21/02/2017

Signature: C. Ketheeswaran

Title: Legal & Business Affairs
Manager / Director.

EXHIBIT

D

BMG

February 28, 2017

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED

Flo & Eddie v. Sirius XM
c/o GCG
P.O. Box 35131
Seattle, WA 98124-5131

Re: **Flo & Eddie, Inc. v. Sirius XM Radio Inc., U.S. District Court for the Central District of California, Case No. CV13-05693// Opt-Out Notice**

Dear Gentlepersons:

Reference is made to the above referenced pending Class Action Lawsuit. Enclosed you'll find: (i) 2 opt-out letters from both BMG Rights Management (US) and BMG Rights Management (UK) Limited, (collectively "BMG"); and (ii) two separate lists of applicable pre-1972 sound recordings. As BMG wishes to be excluded from the class in the above referenced lawsuit, this letter is to submit the required notice to opt-out from the class.

If there any questions about this issue, you may contact me at (212) 561-3014 or at danielle.harrison@bmg.com. Thank you for courtesies on this matter

Best,


Danielle Harrison, Esq.
Associate Director,
Business & Legal Affairs



CC: Mark Robinson, Esq.

BMG

February 28, 2017

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED

Flo & Eddie v. Sirius XM
c/o GCG
P.O. Box 35131
Seattle, WA 98124-5131

Re: **Flo & Eddie, Inc. v. Sirius XM Radio Inc., U.S. District Court for the Central District of California, Case No. CV13-05693// Opt-Out Notice**

Dear Gentlepersons:

Reference is made to the above referenced pending Class Action Lawsuit. BMG Rights Management (US) LLC ("**BMG**") warrants and represents that it is owner of certain pre-1972 sound recordings (attached herein under Schedule A). As BMG wishes to be excluded from the class in the above referenced lawsuit, this letter is to submit the required notice to opt-out from the class.

BMG's US and UK filings will feature the many of same recordings attached as Schedule A to this letter. This is because we are an international company, and so our list of pre-1972 recordings crosses borders. We wanted to alert you as to this duplicate submission so as to avoid any confusion.

If there any questions about this issue, you may contact me at (212) 561-3014 or at danielle.harrison@bmg.com. Thank you for courtesies on this matter

Best,



Danielle Harrison, Esq.
Associate Director,
Business & Legal Affairs

CC: Mark Robinson, Esq.



February 28, 2017

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED

Flo & Eddie v. Sirius XM
c/o GCG
P.O. Box 35131
Seattle, WA 98124-5131

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If there any questions about this issue, you may contact me at (212) 561-3014 or at danielle.harrison@bmg.com. Thank you for courtesies on this matter

Best,

A handwritten signature in black ink, appearing to read 'Danielle Harrison', is written over a horizontal line.

Danielle Harrison, Esq.
Associate Director,
Business & Legal Affairs

CC: Mark Robinson, Esq.



BMG

8th Floor, 5 Merchant Square
London W2 1AS
Tel.: +44 (0) 20 3214 1349
E-mail: simon.lindsay@bmg.com

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Flo & Eddle v Sirius XM
c/o GCG
PO Box 35131
Seattle WA 98124

Date: 28 February 2017

Re. Flo & Eddie Inc v Sirius XM Music Inc case no. CV13-05 693 – Settlement Class Exclusion

To whom it might concern

My name is Simon Lindsay and I am Legal & Business Affairs Manager at BMG Rights Management (UK) Limited ("BMG"). This letter is to confirm BMG's wish to be excluded from the Settlement Class and I am attaching a list of applicable recordings (as previously supplied in August 2016).

Please note that BMG's UK and US filings will feature many of the same recordings in our exclusion requests. This is because we are an international company and so our list of pre-1972 recordings crosses borders. We wanted to alert you to this duplicate submission so as to avoid any confusion. Please also note that BMG UK's submission includes recordings that form part of the catalogues of Sanctuar Records Group Limited, Union Square Music Limited and Chrysalis Copyrights Limited. Where there is missing information it is because we do not have full details of the recording in question.

If you have any further questions about this issue, you can contact me on the number above or at simon.lindsay@bmg.com

Kind regards



Simon Lindsay
Legal & Business Affairs Manager

BMG Rights Management (UK) Limited

8th Floor
5 Merchant Square
London W2 1AS
United Kingdom

Phone: + 44 203 214 1200
Fax: + 44 203 214 1201
Mail: info.uk@bmg.com
Internet: www.bmg.co.uk

Registered in England and Wales
Registered number: 06705101

EXHIBIT

E

abkco MUSIC & RECORDS, INC.
85 FIFTH AVENUE, NEW YORK, NY 10003-3019

March 6, 2017

jklein@abkco.com

Via UPS

Flo & Eddie v. Sirius XM
c/o GCG
P.O. Box 35131
Seattle, WA 98124-5131



RE: Flo & Eddie, Inc. v. Sirius XM Radio, Inc., Case No. CV13-05693 – Exclusion Request of ABKCO MUSIC & RECORDS, INC.

To Whom It May Concern,

I am writing in response to your notice of January 27, 2017, a copy of which is attached hereto. You are hereby notified that ABKCO Music & Records, Inc. ("AMR") wishes to be excluded from the Settlement Class. This exclusion request is made without prejudice to the exclusion requests previously made by AMR on August 15, 2016 and August 24, 2015 which shall remain in effect, copies of which are also attached hereto.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jody H. Klein".

Jody H. Klein
CEO

Enclosure

cc: Michael B. Kramer, Esq.
William A. Pittenger, Esq.

EXHIBIT E

EXHIBIT

F



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What licenses does SoundExchange administer/what royalties does SX administer?

SoundExchange administers the statutory license, which allows services to stream artistic content while paying a fixed rate for each play. SoundExchange collects and distributes royalties for the featured artist and the sound recording copyright owner when content is played on a non-interactive digital source.

What royalties does SoundExchange NOT administer/Does SX cover downloads?

Royalties for songwriting, publishing and composition are covered by organizations such as ASCAP, BMI and SESAC. Royalties for downloads are covered directly by the services that offer downloads.

How are royalties distributed to the right person?

SoundExchange takes great care to ensure that royalties are distributed to the correct person(s). Our Data Management team focuses entirely on ensuring that the millions of lines of data received from service providers is clean and matched correctly in our expansive database. Our Claims Department is solely dedicated to ensuring that repertoire is properly claimed by artists and labels.

Is there a performance right for traditional over-the-air radio broadcasts too?

SoundExchange has been at the forefront in the fight for performance royalties for traditional terrestrial radio. Currently, there is no performance right for over-the-air broadcasts. Artists and record labels are not compensated when their creative works are used by traditional radio.

Is there an administrative fee?

SoundExchange has the lowest administrative fee of any major collective management organization in the world.

SoundExchange operates with the utmost efficiency, which allows the administrative fee to remain so low.

What is a sound recording copyright owner (SRCO)?

An SRCO is a person(s) who own(s) the master recording to recorded artistic content.

I'm already a member of ASCAP, BMI or SESAC. Don't they cover this for me? What is the difference?

The royalties that SoundExchange collects and distributes are for the featured artist and the sound recording copyright owner. ASCAP, BMI and SESAC collect and distribute royalties for the songwriter, composer and publisher. Both satellite radio providers and webcasters pay SoundExchange when they stream music due to their utilization of the statutory license.

If I join SoundExchange can I still negotiate a license with a webcaster if I want to?

Absolutely. The statutory license was created as a benefit for service providers to ease the process of operation and allow open access to musicians' full catalog of creative work. That

said, it is completely within your rights to negotiate directly with webcasters should you decide that is best.

What are the benefits of becoming a member/is there a membership fee?

There is absolutely no fee when becoming a member with SoundExchange. Current benefits include:

1. Maximize your revenue through foreign royalty collections. SoundExchange has more than 20 collection agreements with counterparts in other countries worldwide. When your music is played in their territory, they send your royalties to us, and we send it to you.
2. Join effort to fight for long-term value of music. Hundreds of artists, thousands of other companies and record labels are working with SoundExchange to fight for your performance rights.
3. Conference and Equipment Discounts. SoundExchange has started to offer discounts to conferences and equipment exclusively for our members.

What reports are provided with each payment/why did my statement contain so many different versions of one recording?

When you receive a payment from SoundExchange, you will also receive a statement that will detail the money you have earned for each track that has been played by various service providers. If the same song appears more than once on your detailed statement, it is simply the result of an instance of unique reporting by individual webcasters.

What is a featured artist/are artists receiving direct payments from SX?

A featured artist is an artist that is prominently featured on a track or album. A non-featured artist is an artist who is not prominently featured on a track or album (i.e. a session

musician or a backup vocalist). Royalties for non-featured artists are covered by organizations such as the American Federation of Musicians (AFM) and the Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA). Visit [Recording Artist Royalties](#) to learn more. Featured artists are receiving direct payments from SoundExchange.

What if there is more than one artist or a guest artist who performed on a song?

If you collaborate with another artist and they are featured on a recording, SoundExchange would treat that as a 50/50 collaboration unless directed otherwise by the two collaborators.

I registered, but I haven't received any money yet. What happened?

SoundExchange offers a monthly royalty payment program for 1) those that are signed up to receive electronic payments, 2) and have royalties due of at least \$250.

Artists and labels that do not meet the minimum monthly threshold will continue to be paid on our regular, quarterly schedule (March, June, September, and December) under the organization's existing guidelines. In order to receive a quarterly payment, you must have accrued at least \$10 (\$100 for a paper check) in royalties before a scheduled distribution. If you are under the threshold, SoundExchange will hold your royalties until you accrue enough royalties.

Do unclaimed royalties expire? Do I run the risk of losing my royalties if I do not register to receive them within a given amount of time?

SoundExchange is authorized by regulation to release older, unclaimed royalties to offset our costs. We have rarely exercised this authority, but we need your help to spread the

word and get 25000. Registering artists and record labels to register with us.

Who pays SoundExchange? Can I get a list of services that report to SoundExchange?

More than 2,500 services are now paying SoundExchange and that number continues to grow every quarter. These services include satellite radio providers, webcasters and digital cable music providers.

Currently, you can find a full list of service providers paying SoundExchange [here](#).

The artist on your unregistered list is no longer alive. What can be done to claim these funds?

When an artist passes away, his/her heirs are eligible to claim those royalties. Registering to receive royalties for a deceased artist requires one additional form and a copy of the will for the deceased. Please call our Customer Care team at 202-640-5858 for more information.

Does SoundExchange collect royalties for actors and comedians?

SoundExchange collects royalties for ALL sound recordings played on non-interactive digital radio. This includes recordings and soundtracks made by actors, comedians, and spoken word artists in addition to musicians. For clarification, SoundExchange does not collect royalties for videos or other visual media (including YouTube and VEVO).

While SoundExchange is primarily associated with the music community, an important part of our registrant base is made up of actors, comedians, and spoken word artists (including those who are already members of SAG-AFTRA).

733 10th Street NW 10th Floor Washington, D.C. 20001
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SoundExchange Finally Releases Old, Unclaimed Royalties

By [Glenn Peoples](#), Nashville | January 31, 2014 3:10 PM EST

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SoundExchange has finally done something it put off for years. The performing rights organization for digital performances of sound recordings has released royalties that had not been claimed by record labels and artists.

Called a pool release, the distribution of unclaimed royalties will appear on SoundExchange's fourth quarter of 2013 royalty statements as an administrative rate adjustment. Sound recording owners or performing artists who hadn't signed up prior to October will not receive their unclaimed royalties from 2004 to 2008 -- although SoundExchange could have released royalties collected through the end of 2010.

The pool release cleared the relatively small sum of \$9.3 million from SoundExchange's books. To put that in perspective, its 2013 distributions should be in the neighborhood of \$300 million.

The Copyright Royalty Board, the three-judge body best known for setting the statutory royalty rates paid to SoundExchange, created the regulations for unclaimed funds under Section 114 of the Copyright Act. The rule directs SoundExchange to hold for a period of three years any royalties if it cannot identify or locate a copyright owner or performing artist. After three years, SoundExchange may apply the unclaimed funds to offset administrative costs.

SoundExchange President and CEO Mike Huppe tells Billboard the organization repeatedly delayed releasing unclaimed royalties for a number of reasons. "I think part of it was we were dealing with some of the backlogs that we cleaned up several years ago. Part of it is trying to get the data issues with the services, get them to be reporting and cleaning up their data better. But I think the biggest reason was we just kept wanting to give people a little more time to sign up."

Unregistered labels and artists had been warned a pool release was imminent. In August 2012, SoundExchange [released a list](#), in the form of a searchable database, of 50,000 sound recording owners and performing artists that had not registered and were eligible to receive \$31 million of unclaimed royalties. At the time SoundExchange warned unregistered parties they had until mid-October -- two months later -- to register and claim royalties from previous years. "We ultimately gave people most of the next year to still submit their registrations,"

EXHIBIT G

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SoundExchange to Make Monthly Royalty Distributions

The Ongoing Royalty Rate Battle



Morning Fix: Rob Stringer on Columbia Records' Fourth Quarter, Dark Horses; SoundExchange's Explosive Ten Years; Celia Cruz, Queen of Salsa and Google Doodle

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Clearing out unclaimed royalties hasn't been easy. In the three years prior to the pool release, SoundExchange engaged in over 150 programs with outside parties.

A matching program literally matches names on SoundExchange's unclaimed royalty list to uses a third party's membership list. CD Baby, MySpace, BandPage, ReverbNation, SAG-AFTRA, AFM and others helped SoundExchange locate royalty recipients. SoundExchange also used internal staff and conference appearances to help locate unregistered artists. Huppe those efforts resulted in 40,000 registrations in the last three years.

SoundExchange acknowledges the pool release may receive criticism. Indeed, SoundExchange's handling of its data, royalties and membership has been a touchy subject over the years. Critics have blamed the organization's efforts to locate unregistered parties as well as its unclaimed balances.

But freeing up unclaimed and unaccounted royalties is a standard procedure at performing rights societies, and Huppe says there will be more pool releases in the future. "It's definitely our intention to make it more regular because it's just good business practice."



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