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14  
15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**  
17 **WESTERN DIVISION**

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

20 Plaintiff,

21 v.

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

24 Defendants.

Case No. CV13-05693 PSG (GJSx)

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

Date: May 8, 2017

Time: 1:30 p.m.

Place: Courtroom 6A

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1 **I. INTRODUCTION**

2 After more than three years of hard-fought litigation, Plaintiffs agreed to  
3 settle this complex class action after securing an excellent result for the Class. The  
4 Settlement was reached on the eve of trial after class certification and  
5 decertification briefing and rulings, voluminous cross-motions for summary  
6 judgment and rulings, and the submission of the Pretrial Conference Order, exhibit  
7 and witness lists, objections, and deposition designations, motions *in limine*, voir  
8 dire questions, and proposed jury instructions. The Court granted preliminary  
9 approval of the Settlement on January 27, 2017, and Notice to the Class  
10 commenced shortly thereafter. Not a single objection to the Settlement was filed by  
11 a Class member. Only one request for exclusion was made.

12 The Settlement gives the Class an outstanding recovery. When the monetary  
13 benefits are combined, the Class will receive a guarantee of \$25,500,000 million in  
14 value, which could increase to over \$73 million. The guaranteed \$25.5 million in  
15 cash payments by Sirius XM could increase to \$35,500,000. The Settlement also  
16 creates a royalty program for Sirius XM to pay the Class up to an additional \$37.68  
17 million. The Settlement is the first and hence the largest amount ever recovered in a  
18 class action asserting claims by owners of pre-1972 sound recordings for  
19 unauthorized performances. This result is particularly impressive in light of the  
20 recent developments that occurred after the Settlement was reached—including the  
21 New York Court of Appeals ruling that a right of public performance *does not exist*  
22 under New York common law,<sup>1</sup> and the Ninth Circuit’s reference of the Pandora  
23

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24 <sup>1</sup> While the New York Appeal was pending, the Settlement provided a potential \$99  
25 million cash benefit. Dkt. 66-1 at 1. However, Flo & Eddie ultimately did not  
26 prevail on the New York Appeal, thus reducing the potential value of the  
27 Settlement. On February 16, 2017, the United States Court of Appeals for the  
28 Second Circuit issued an order instructing the district court to grant Sirius XM’s  
motion for summary judgment against Flo & Eddie, and on March 17, 2017, the  
district court entered judgment against Flo & Eddie. *See* Dkt. 678 at 405. Thus,  
under the terms of the Stipulation, the Class no longer has the potential of  
recovering the additional \$5 million Settlement Payment and 2% prospective

1 action to the California Supreme Court to address whether California law grants  
2 pre-1972 recording owners a right of public performance—which demonstrates the  
3 substantial risks faced by the novel claims at issue in this case.

4 The uncertainty of the various states' laws is reflected in the Settlement,  
5 which provides for additional benefit to the Settlement Class contingent upon the  
6 resolution of various appeals that address the extent of public performance rights  
7 afforded to pre-1972 recordings (three potential appeals existed at the time of the  
8 Settlement; one has since been resolved). For past relief, the Settlement Class will  
9 be paid \$25 million upon final approval, plus up to an additional \$500,000 in  
10 administration costs. Stip. at 15-16, Part IV.A.1; *id.* at 29, Part VII (Dkt. 666-4). By  
11 any measure, that compensation by itself is an excellent result. The Settlement  
12 Class will also receive an additional \$5 million—up to an additional \$10 million  
13 payment in light of the two appeals that remain outstanding in California and  
14 Florida—for each appeal in which Flo & Eddie prevails on the performance rights  
15 issue. On a per-play basis, and excluding the value of administration that Sirius XM  
16 has agreed to separately pay up to \$500,000, the minimum **guaranteed** \$25 million  
17 settlement represents approximately an award of \$15.68 per play; the current  
18 potential \$35 million payment represents approximately \$21.95 per play.  
19 Declaration of Michael Wallace (“Wallace Decl.”), filed concurrently herewith, ¶  
20 24. None of these funds revert back to Sirius XM. Stip. at 16, Part IV.A.1.

21 The Settlement also provides for an ongoing 10-year license through January  
22 1, 2028, which could include additional cash royalty payments by Sirius XM  
23 depending on the outcome of appellate proceedings—which currently amounts to  
24 up to a 3.5% royalty rate for each Settlement Class Member’s pro rata share of  
25 Sirius XM’s defined Gross Revenue. Plaintiffs’ damages expert estimates that a  
26 3.5% future license could generate between approximately \$28.94 million  
27

28 royalty contingent upon Flo & Eddie prevailing on the Performance Right Issue in  
the New York Court of Appeals. *See* Stip. at 19 ¶ IV.B.1-B.2 (Dkt. 666-4).

1 (assuming that Sirius XM has no annual revenue growth) to \$37.68 million  
2 (assuming continued annual revenue growth) in additional cash payments to the  
3 Class over the next 10 years. Wallace Decl. at ¶ 21. This portion of the Settlement  
4 represents a substantial benefit for the Class and provides the potential for  
5 substantial additional monetary relief that could not be obtained even if Plaintiffs  
6 were victorious at trial.

7       The Settlement is fair, reasonable, and adequate in light of the guarantee of a  
8 minimum recovery versus the risk of no recovery at trial and the serious risks of  
9 continued litigation—namely the range of potential damages, competing damages  
10 models, and adverse rulings on appeal on both the merits and on decertification in  
11 this and other jurisdictions. Of course, the Court is very familiar with the issues  
12 raised in this litigation and the claims and defenses of the Parties. The Settlement  
13 culminated less than 48 hours before the jury trial was set to commence and after  
14 all pretrial filings were complete and after more than three years of hotly contested  
15 litigation, and it resulted from an extensive, arm’s-length negotiation between the  
16 parties. Accordingly, Flo & Eddie respectfully requests that the Court give final  
17 approval to the terms of the Settlement.

18       Flo & Eddie also request that the Court deny the pending Motion for Leave  
19 to File Brief as Amici Curiae (Dkt. 684)—filed by entities *who are not class*  
20 *members* and have no standing to object to the proposed settlement—for the  
21 reasons set forth in Class Counsel’s opposition thereto, filed concurrently herewith.

## 22 **II. BACKGROUND**

### 23 **A. Procedural and Factual Background of the Litigation**

24       Flo & Eddie filed its Complaint in this action on August 1, 2013, in state  
25 court. Sirius XM removed the case to this Court on August 6, 2013. Dkt 1. Sirius  
26 XM then filed a Motion to Transfer Venue, Dkt. 30, and a Motion to Stay  
27 Proceedings, Dkt. 32. The Court denied both motions. Dkts. 42-43. Sirius XM also  
28 filed a Motion to Strike Class Allegations, which the Court denied. Dkt. 47, 56. The

1 Court bifurcated discovery into liability and damages phases. Dkt. 58. After  
2 conducting liability discovery, Plaintiffs moved for summary judgment on liability  
3 as to all of their claims, and substantial briefing followed. Dkt. 65, 86, 97, 106, 111.  
4 The Court heard oral argument on September 15, 2014. On September 22, 2014,  
5 the Court granted summary judgment against Sirius XM on liability based on the  
6 performance right issue, but not the reproduction issue. Dkt. 117.

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

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

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

23 Dkt. 180 at 2; *see* Dkt. 193 (opposition); Dkt. 200 (reply). The Court held a hearing  
24 on May 22, 2015. Dkt. 224. The Court entered an order certifying the class on May  
25 27, 2015. Dkt. 225.

26 Shortly thereafter, on June 2, 2015, Sirius XM filed an *Ex Parte* Application  
27 for Stay Pending Rule 23(f) Petition or, Alternatively, to Modify Scheduling Order,  
28 Dkt. 228, requesting the Court stay the case pending resolution of Sirius XM's



1 petition to the Ninth Circuit for permission to appeal the Court's order granting  
2 Plaintiff's motion for class certification. Dkt. 228; *see* Dkt. 230 (opposition), Dkt.  
3 232 (reply). The Court heard oral argument on June 8, 2015, Dkt. 236, and that  
4 same day entered an order granting the motion. Dkt. 237. Sirius XM filed its Rule  
5 23(f) petition to the Ninth Circuit on June 10, 2015, which Plaintiffs opposed. On  
6 August 10, 2015, the Ninth Circuit denied the petition. On August 24, 2015, Sirius  
7 XM filed a petition for rehearing or reconsideration *en banc*, which the Ninth  
8 Circuit denied on November 10, 2015. On November 25, 2015, Sirius XM filed a  
9 Motion to Continue Stay Pending Resolution of Related Appeal. Dkt. 264; *see* Dkt.  
10 269 (opposition), Dkt. 270 (reply). The Court denied Sirius XM's motion. Dkt. 271.

11       Thereafter, the Court entered an order permitting Plaintiffs to conduct limited  
12 damages-related discovery on Sirius XM and Sirius XM to conduct absent class  
13 member discovery. Dkt. 272. Such discovery involved numerous in-person meet  
14 and confer sessions as well as motion practice. Sirius XM served subpoenas on  
15 absent class members across the country and took 19 depositions, with absent class  
16 members collectively producing thousands of pages of documents.

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

21       On July 6, 2016, Sirius XM filed a motion for partial summary judgment,  
22 seeking judgment against Plaintiffs' claims for punitive damages, disgorgement,  
23 and common law unfair competition. Dkt. 335. On September 8, 2016, the Court  
24 granted Sirius XM's motion in part, granting Sirius XM judgment as a matter of  
25 law on Plaintiffs' punitive damages and common law unfair competition claim.  
26 Dkt. 411. On July 29, 2016, Sirius XM filed a Motion for Decertification. Dkt. 345;  
27 *see* Dkt. 396 (opposition); Dkt. 424 (reply). The Court denied Sirius XM's motion  
28 on September 20, 2016. Dkt. 432.

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

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

19 In parallel with the litigation in this Court, Class Counsel on behalf of Flo &  
20 Eddie pursued litigation in Florida and New York against Sirius XM relating to the  
21 Class claims under those states' laws. The proceedings in those courts likewise  
22 have involved extensive motion practice, appellate proceedings, hard-fought  
23 litigation, and coordination with the proceedings in this action. Since filing for  
24 preliminary approval, the New York proceeding has culminated with the New York  
25 Court of Appeal finding no performance right and the Second Circuit directing  
26 summary judgment be granted in Sirius XM's favor on liability. That outcome  
27 underscores the uncertain landscape against which this settlement was achieved.

28 Sirius XM has denied and continues to deny each and all of the claims and

1 contentions alleged by Plaintiffs. Sirius XM has expressly denied and continues to  
2 deny all charges of wrongdoing or liability arising out of any of the conduct,  
3 statements, acts or omissions alleged, or that could have been alleged, in this action  
4 and explicitly denies that it has committed the alleged infringement, violations of  
5 law or breaches of duty to Plaintiffs, the Settlement Class, or anyone else.

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

16 **B. Terms of the Settlement**

17 The Stipulation and the exhibits thereto (Dkt. 666-4) provide all of the  
18 material details of the Settlement terms. Flo & Eddie approved the terms of the  
19 Settlement, and Class Counsel deems such settlement to be fair, reasonable, and  
20 adequate to, and in the best interests of the members of the Settlement Class.

21 ***1. The Settlement Class***

22 The Settlement Class, as conditionally certified by this Court on January 27,  
23 2017, is defined as follows:

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

1 Dkt. 676 at 3 ¶ 4.<sup>2</sup> 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. *Id.* ¶ 5.

6 As explained in Plaintiffs’ Motion for Preliminary Approval (Dkt. 666-1), the  
7 Certified Class differs only slightly from the Settlement Class, in that the Certified  
8 Class was limited to Pre-1972 Recordings that Sirius XM exploited in California,  
9 whereas the Settlement Class broadens the territory to the United States.  
10 Importantly, all members of the Settlement Class are members of the Certified  
11 Class because Sirius XM broadcasts the recordings nation-wide, and because the  
12 Settlement also reflects a compromise and release of Plaintiffs’ claims under other  
13 states’ laws. The change from California to the United States does not alter who is  
14 eligible to participate in the Settlement Class (other than the stated exclusions from  
15 the Settlement Class); nor does it alter the Pre-1972 Sound Recordings at issue.

16 **2. The Right to Appeal**

17 In exchange for a contingent payment of an additional \$5 million to the  
18 Settlement Class and a 2% increase in the royalty rate otherwise owed, the  
19 Settlement provides that Sirius XM preserves its right to appeal the Court’s final  
20 judgment of liability on the performance right issue and Commerce Clause issue in  
21 this Action, but Sirius XM agreed it will not appeal the Court’s class certification  
22 rulings. Stip. at 14 ¶ II.A (Dkt. 666-4).

23 For similar potential additional financial benefits to the Settlement Class (\$5  
24 million and 1.5% royalty payment currently remaining at issue in Florida), the  
25 Stipulation preserves the parties’ respective rights to proceed with the appeal of a

26 \_\_\_\_\_  
27 <sup>2</sup> “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 (Dkt. 666-  
4).

1 related Florida Action.<sup>3</sup> *Id.* ¶ II.C. The Florida Action was appealed to the Eleventh  
2 Circuit and certified to the Florida Supreme Court on June 29, 2016, Appeal No.  
3 SC16-1161, on the underlying question of whether Sirius XM is entitled to publicly  
4 perform Pre-1972 Sound Recordings owned by Plaintiff without having to obtain  
5 permission from and pay compensation to Plaintiff (the “Performance Right Issue”)  
6 under Florida law. *Id.* at 3-4 ¶ I.A.20. The briefing is complete and oral argument  
7 took place on April 6, 2017.

8 Also provided in the Stipulation, but no longer an issue due to the dismissal  
9 of the case with prejudice, is the Parties’ respective rights to proceed with the  
10 appeal of the related New York Action.<sup>4</sup> *Id.* at 14 ¶ II.B. The Stipulation, entered  
11 into when the New York Appeal remained unresolved, provides for potential  
12 additional financial benefits to the Settlement Class (\$5 million and 2.0% royalty  
13 payment) if Flo & Eddie were to prevail on the New York Appeal.

14 **3. Settlement Benefits**

15 The Settlement, if approved by the Court, will establish a guaranteed cash  
16 settlement fund of \$25 million for past Performances through December 31, 2017.  
17 Stip. at 15-16 ¶ IV.A.1. The Settlement will also establish a cash settlement fund of  
18 what currently amounts to up to an additional \$10 million for past Performances,  
19 contingent on the two appellate outcomes that currently remain unresolved:

- 20 • If Plaintiff prevails on appeal of the Performance Right Issue in the

21  
22 <sup>3</sup> The Stipulation defines the Florida Action as:  
23 the putative class action captioned *Flo & Eddie Inc. v. Sirius XM*  
24 *Radio Inc.*, filed on September 3, 2013 in the United States District  
25 Court for the Southern District of Florida (the “Florida Court”), Case  
26 No. 13-CV-21382.

27 Stip. at 3 ¶ I.A.19 (Dkt. 666-4).

28 <sup>4</sup> The Stipulation defines the New York Action as:  
the putative class action captioned *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 (the “New York Court”),  
case No. 13-CV-5784 (CM).

Stip. at 5 ¶ I.A. 25 (Dkt. 666-4).

1 Florida Action in the Florida Supreme Court, Sirius XM will pay into the  
2 Settlement Fund an additional \$5 million. *Id.* at 19 ¶ IV.B.3.

- 3 • If Plaintiff prevails on appeal of the Performance Right Issue in this  
4 Action, Sirius XM will pay into the Settlement Fund an additional \$5  
5 million. *Id.* at 19 ¶ IV.B.5.

6 The Settlement Payment, together with all interest accruing thereon, the  
7 potential amounts of up to \$10 million in additional bonus payments (contingent on  
8 appellate outcomes as described above) and all interest accruing thereon, are  
9 collectively referred to as the “Settlement Fund.” Stip. at 8 ¶ I.43. There will be no  
10 reversion to Sirius XM of the Settlement Fund. *Id.* at 15-16 ¶ IV.A.1.

11 As part of the Settlement, members of the Settlement Class will also license  
12 to Sirius XM the right to publicly perform, reproduce, distribute, or otherwise  
13 exploit their Pre-1972 Sound Recordings for a ten-year period from January 1,  
14 2018, through January 1, 2028, and will be eligible to receive monthly royalty  
15 payments during that time period at a royalty rate as high as 3.5%, depending on  
16 the appellate outcomes that currently remain unresolved:

- 17 • In the event Sirius XM prevails on the Performance Right Issue in the  
18 Florida Supreme Court, the prospective royalty rate is reduced by 1.5%.
- 19 • In the event Sirius XM prevails on the Performance Right Issue in an  
20 appeal of this Action, the prospective royalty rate is reduced by 2%.
- 21 • If Sirius XM prevails regarding its appeal in the U.S. Courts of Appeal for  
22 the Ninth, or Eleventh Circuits, or in the United States Supreme Court  
23 based on the question of whether it would violate the Commerce Clause  
24 of the United States Constitution to apply a state-law right to control  
25 and/or demand compensation for the public performance of Pre-1972  
26 Sound Recordings, Sirius XM will not be required to make any  
27 prospective royalty payments, but the Settlement Class will keep all  
28 royalties previously paid.

1 *Id.* at 19 ¶ IV.B.

2 Sirius XM’s payment of royalties pursuant to Paragraph IV.C.2-9 of the  
3 Stipulation is referred to as the “Royalty Program.” *Id.* at 7 ¶ I.A.36. The future  
4 license—which currently has a potential maximum value of 3.5% (reduced from a  
5 potential maximum of 5.5%, in light of the New York Appeal outcome)—has  
6 significant value with estimated potential future royalties between \$28.4 million  
7 (assuming no revenue growth) and \$37.68 million (assuming continued annual  
8 revenue growth) in royalties over the next 10 years based on the assumption that  
9 15% of Sirius XM’s future plays are of Pre-72 Sound Recordings owned by the  
10 Settlement Class. Wallace Decl. ¶ 20.

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

13 **4. Settlement Fund Distribution Plan**

14 To qualify for a payment from the Settlement Fund, a Settlement Class  
15 Member must timely and validly submit a completed Proof of Claim, which will (1)  
16 identify each Pre-1972 Sound Recording owned by providing the (i) title, (ii) artist,  
17 and (iii) album and/or label; and (2) represent and warrant that the Settlement Class  
18 Member owns all right, title, and interest in such recording(s). The Proof of Claim  
19 will be distributed to the Class via first class mail. Any Class Member may also  
20 obtain a Proof of Claim on the Internet at the website maintained by the  
21 Administrator: [www.pre1972soundrecordings.com](http://www.pre1972soundrecordings.com). All members of the Settlement  
22 Class who establish their entitlement to participate in the Settlement will be entitled  
23 to a pro rata share of the Settlement Payment based on the number of historical  
24 plays of the Settlement Class Members’ Pre-1972 Sound Recordings.

25 Any disputes concerning ownership or control that cannot be resolved will be  
26 referred to a magistrate judge appointed by the Court. Stip. at 9 ¶ 47 (Dkt. 666-4).  
27 The Special Master will resolve disputes regarding the ownership and/or control of  
28 Pre-1972 Sound Recordings between, amongst, or involving Settlement Class

1 Members who submit a timely, valid, and properly completed claim for payment  
2 from the Settlement Fund. *Id.* All decisions by the Special Master concerning  
3 ownership or control may be appealed to the Court. *Id.* at 28 ¶ VI.C.

4 **5. Royalty Program Distribution Plan**

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

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

26 Claim forms for participating in the Royalty Program will be distributed to  
27 the Settlement Class via first class mail. Any Class Member may also obtain a  
28 Royalty Program claim form on the Internet at the website maintained by the



1 Administrator: *www.pre1972soundrecordings.com*. The Administrator will also  
2 maintain a toll-free number that Class Members can use to ask questions.

3 Sirius XM will account for the “Pro Rata Share” of royalties allocable to its  
4 use of Identified Pre-1972 Sound Recordings owned by Bona Fide Claimants,  
5 calculated as follows:

6 for any particular sound recording and for any applicable accounting  
7 period, a fraction of which the numerator is the total number of  
8 Performances of that particular Pre-1972 Sound Recordings in that  
9 accounting period on the Reference Channels, and the denominator of  
10 which is the total number of Performances of all sound recordings  
11 broadcast by Sirius XM in that accounting period on the Reference  
12 Channels.

13 *Id.* at 7 ¶ I.A.34.

14 The parties have selected Music Reports Inc. (“MRI”) to serve as the Royalty  
15 Administrator. Under the Stipulation, the Royalty Administrator will develop and  
16 maintain a Royalty Claims Website, calculate, prepare, and distribute royalty  
17 statements based on the usage information provided by Sirius XM, and distribute  
18 payments to Bona Fide Claimants and any applicable Court-approved fees to Class  
19 Counsel from the Royalty Program. The Royalty Administrator has audit rights to  
20 examine the books and records of Sirius XM to verify the accuracy of royalty  
21 accountings, with any disputes to be resolved by the Court.

22 **6. 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. Stip. at 20-21  
7 ¶ IV.C.1. Upon final approval, Plaintiff and each and every other Settlement Class  
8 Member covenant not to sue and will be barred through January 1, 2028, from  
9 pursuing their own lawsuits based on Sirius XM’s performance, distribution,  
10 reproduction, or other exploitation of their Pre-1972 Sound Recordings in the  
11 United States, with the exception of pursuing the appeals related to the millions in  
12 additional cash payments provided for in the Settlement.

13 **7. Fees and Costs**

14 The Settlement provides that Class Counsel may seek reimbursement of  
15 expenses and an award of up to one-third of the total cash benefits conferred by the  
16 Settlement from the Settlement Fund and Royalty Program.<sup>5</sup> *Id.* Additionally, the  
17 Settlement provides that Sirius XM will pay up to \$500,000 in notice and  
18 administration costs of the Settlement, and that a portion of the Settlement amount  
19 may be used to pay for any additional notice and administration costs. Stip. at 29 ¶  
20 VII. The Settlement provides that Class Counsel may request incentive awards to  
21 be paid from the Settlement Fund of up to \$25,000 each for the two Flo & Eddie  
22 principals for their services as representatives on behalf of the Class. *Id.* at 30 ¶ VII.

23 **C. Preliminary Approval**

24 On January 27, 2017, this Court entered an Order Granting Preliminary

25 \_\_\_\_\_  
26 <sup>5</sup> Class Counsel filed such a motion seeking reimbursement of their costs, counsel  
27 fees, and incentive awards on December 30, 2016. *See* Dkt. 670. Plaintiff’s Motion  
28 for an Award of Attorneys’ Fees and Costs (“Plaintiff’s Fee and Cost Motion”) is  
scheduled to be heard at the same time as the final approval hearing—on May 8,  
2017. Class members were given notice of Plaintiff’s Fee and Cost Motion, and  
were given opportunity to object to that application.

1 Approval of Class Action Settlement, Approving Form and Manner of Notice, and  
2 Setting Date for Hearing on Final Approval of Settlement (“Preliminary Approval  
3 Order”). Dkt. 676. The Court found the Settlement to be fair, reasonable, and  
4 adequate, and found that it was entered into at arm’s length by highly experienced  
5 counsel, and sufficiently within the range of reasonableness that notice of the  
6 Settlement should proceed. *Id.* ¶ 1.

7 The Court conditionally certified the Settlement Class for purposes of the  
8 Settlement and appointed plaintiff Flo & Eddie to serve as class representative of  
9 the Settlement Class. *Id.* ¶¶4-7. The Court appointed the law firms of Gradstein &  
10 Marzano, P.C. and Susman Godfrey L.L.P. to serve as Class Counsel for purposes  
11 of the Settlement. *Id.* ¶ 8.

12 The Court approved the form, substance, and requirements of the Short Form  
13 Class Notice and the Long Form Class Notice, attached to the Stipulation as Exhibit  
14 C, to Settlement Class Members. *Id.* ¶ 10. The Court found that the form and  
15 content of the notice program and the methods of notifying the Settlement Class  
16 Members of the Settlement and its terms and conditions met the requirements of  
17 Rule 23 of the Federal Rules of Civil Procedure, Constitutional due process,  
18 constituted the best notice practicable under the circumstances, and constituted due  
19 and sufficient notice to all persons entitled thereto. *Id.*

20 The Court ordered that Sirius XM shall pay for all reasonable notice and  
21 administrative costs, up to \$500,000. *Id.* ¶ 11. The Court appointed Garden City  
22 Group LLC to serve as the Administrator to provide the Class Notice and, if the  
23 Settlement receives final approval, to administer the Claim Program. *Id.* ¶ 12. The  
24 Court ordered the Administrator to cause the Class Notice to be mailed by first-  
25 class mail to all reasonably identifiable prospective Settlement Class members no  
26 later than February 6, 2017. *Id.* ¶ 15.

27 The Court ordered that Persons requesting exclusion from the Class must  
28 mail their request for exclusion by first-class mail such that it is postmarked on or

1 before thirty days from the date Class Notices is sent (that is, by March 8, 2017).  
2 *Id.* ¶ 16. In a subsequent order, the Court ordered that any objections to the  
3 Settlement, plan of allocation, or the application for fees and costs must be filed by  
4 March 24, 2017. Dkt. 677 at ¶3(a). No objections were filed.

5 **D. Notice to the Class**

6 Class notice was disseminated pursuant to this Court’s Preliminary Approval  
7 Order. Dkt. 676. On February 6, 2017, the Administrator distributed via First Class  
8 Mail to 330 potential members of the Class (as identified through a variety of  
9 sources, including Sirius XM) the Long Form Class Notice, substantially in the  
10 form attached as Exhibit C to the Stipulation (Dkt. 666-4 at 59-67). *See* Decl. of  
11 Eric Kierkegaard, filed concurrently herewith, ¶ 3 & Ex. A (Long Form Class  
12 Notice). The Administrator also posted on a website,  
13 www.pre1972soundrecordings.com, the Long Form Class Notice, the Preliminary  
14 Approval Order, the Settlement Agreement, information setting forth the exclusion  
15 and objection deadlines, and other essential details concerning the settlement and  
16 opt-out requirements. *Id.* ¶ 4. The Administrator also issued a press release, *see id.*  
17 ¶ 7 & Ex. D, and published the Short Form Class Notice in the following  
18 periodicals: The Tennessean (issue sale dates February 15 and 19, 2017); Billboard  
19 Magazine (issue sale dates February 17, 2017, and March 3, 2017, and publication  
20 dates February 25, 2017, and March 11, 2017); and Music Connection (publication  
21 dates February 22, 2017, and March 29, 2017). *Id.* ¶ 5 & Ex. B (Short Form Class  
22 Notice) & Ex. C (tear sheets).

23 The Court-approved notice fully comports with the requirements of Federal  
24 Rules of Civil Procedure 23(c)(2) and 23(e) and due process because it constitutes  
25 the best notice practicable under the circumstances. It fairly apprises the members  
26 of the Class of the essential terms of the Settlement and advises members of the  
27 Class of their rights thereunder. It advises Class Members of the pendency of this  
28 action, the proposed settlement, and Class Counsel’s application for a fee and

1 expense award and for incentive compensation awards to Flo & Eddie’s principals;  
2 describes the facts underlying this action; states who members of the Class are;  
3 provides information regarding attorneys’ fees and how Class Members may object  
4 to the proposed settlement; and clearly indicates contact information for Class  
5 Counsel. *Id.* ¶ 4 & Exs. A-C. This is more than adequate notice under the  
6 circumstances. *See White v. NFL*, 822 F. Supp. 1389, 1400 (D. Minn. 1993) (notice  
7 by mail to identified Class members and publication once in *USA Today* “clearly  
8 satisfy both Rule 23 and due process requirements”); *Lake v. First Nationwide*  
9 *Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (approving as reasonable notice by third  
10 class mail to identified Class members and publication two times in the national  
11 edition of *USA Today*); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57,  
12 60 (S.D.N.Y. 1993) (notice by mail to identified Class members and publication in  
13 *USA Today*); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317  
14 (1950) (“This Court has not hesitated to approve of resort to publication as a  
15 customary substitute in another class of cases where it is not reasonably possible or  
16 practicable to give more adequate warning.”).

17 **E. Exclusion from the Class**

18 Class Members had the opportunity to request exclusion from the Class by  
19 submitting a written request for exclusion so that it was received no later than  
20 March 8, 2017. Only one member of the Class served a request for exclusion.  
21 Kierkegaard Decl. ¶ 8 & Ex. E.

22 **F. Class Member Objections**

23 The Court required Class member objections to be filed and served on or  
24 before March 24, 2017. Out of 330 potential Class Members, not one objected to  
25 the Settlement. This speaks volumes of the fairness, reasonableness, and adequacy  
26 of the Settlement.

27 **G. Continued Jurisdiction**

28 The Preliminary Approval Order states that this Court “retains exclusive

1 continuing jurisdiction over the Action, the parties, the Settlement Class, the  
2 Settlement Fund, and the Royalty Program to consider all further matters arising  
3 out of or connected with the Settlement.” Dkt. 676 at ¶ 26.

4 **III. FINAL CERTIFICATION OF THE SETTLEMENT CLASS IS**  
5 **WARRANTED**

6 In its January 27, 2017, Preliminary Approval Order, this Court determined  
7 that the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil  
8 Procedure are satisfied as to the Settlement Class as defined in the Stipulation.  
9 Plaintiffs request the Court to reaffirm its Preliminary Approval Order and order  
10 final certification of the proposed Settlement Class. Dkt. 676. The Class continues  
11 to meet the requirements for certification for the purposes of settlement under Rule  
12 23, for the same reasons set forth in the Court’s Order Granting Plaintiff’s Motion  
13 for Class Certification, Dkt. 225; Plaintiff’s Motion for Class Certification, Dkt.  
14 180; Plaintiffs’ Opposition to Sirius XM’s Motion for Decertification, Dkt. 396,  
15 and the Court’s Preliminary Approval Order, Dkt. 676. The Settlement Class,  
16 comprised of the same members of the Certified Class (other than opt outs),  
17 satisfies the requirements of Fed. R. Civ. P. 23(a), as well as the requirement of  
18 Fed. R. Civ. P. 23(b)(3) that the question of law or fact common to class members  
19 predominate, and that a class action is superior to other available methods for fairly  
20 and efficiently adjudicating the controversy. *See Jenkins v. Pech*, No. 8:14CV41,  
21 2015 WL 6738624, at \*1 (D. Neb. Nov. 4, 2015) (certifying class for reasons stated  
22 in court’s prior order on certification, where earlier certified class differed from the  
23 settlement class only with respect to the persons excluded).

24 **IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE**  
25 **AND WARRANTS FINAL APPROVAL**

26 Plaintiffs request that this Court grant final approval of the Settlement  
27 Agreement not only because public policy favors the settlement of complex class  
28 actions such as this one, but also, as demonstrated herein, because the Settlement

1 Agreement has achieved excellent results for the Settlement Class. Plaintiffs  
2 respectfully submit that the proposed settlement is fair, reasonable, and adequate  
3 and warrants final approval by this Court.

4 **A. The Legal Standard for Final Approval of Settlement**

5 Federal Rule of Civil Procedure 23(e) requires judicial approval for any  
6 compromise or settlement of class action claims. Approval of a proposed class-  
7 action settlement is a matter within the sound discretion of the district court. *See*  
8 *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This  
9 discretion should be exercised in the context of a public policy which strongly  
10 favors the pretrial settlement of class action lawsuits. *Id.* at 1276; *see Van*  
11 *Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (stating that “there is  
12 an overriding public interest in settling and quieting litigation,” and this “is  
13 particularly true in class action suits”).

14 In deciding whether to approve a proposed settlement, the Court must  
15 determine whether the settlement, “taken as a whole, is fair, adequate, and  
16 reasonable.” *City of Seattle*, 955 F.2d at 1291. “The court need not ‘reach any  
17 ultimate conclusions on the contested issues of fact and law which underlie the  
18 merits of the dispute, for it is the very uncertainty of outcome in litigation and  
19 avoidance of wasteful and expensive litigation that induce consensual  
20 settlements.’” *Id.* (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,  
21 625 (9th Cir. 1982)).

22 The Ninth Circuit has set forth the following list of factors that may be  
23 relevant in evaluating the fairness of a class action settlement:

24 the strength of plaintiffs’ case; the risk, expense, complexity, and  
25 likely duration of further litigation; the risk of maintaining class action  
26 status throughout the trial; the amount offered in settlement; the extent  
27 of discovery completed, and the stage of the proceedings; the  
28 experience and views of counsel; the presence of a governmental

1 participant; and the reaction of the class members to the proposed  
2 settlement.

3 *Id.* (quoting *Officers for Justice*, 688 F.2d at 625). “This list is not exclusive and  
4 different factors may predominate in different factual contexts.” *Torrisi v. Tuscon*  
5 *Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

6 The district court must exercise sound discretion in approving a settlement.  
7 The district court’s discretion, however, is to be exercised in light of the  
8 recognition that “the court’s intrusion upon what is otherwise a private consensual  
9 agreement negotiated between the parties to a lawsuit must be limited to the extent  
10 necessary to reach a reasoned judgment that the agreement is not the product of  
11 fraud or overreaching by, or collusion between, the negotiating parties, and that the  
12 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”  
13 *Officers for Justice*, 688 F.2d at 625. Thus, the Ninth Circuit limits the inquiry as  
14 follows:

15 [T]he settlement or fairness hearing is not to be turned into a trial or  
16 rehearsal for trial on the merits. Neither the trial court nor this court is  
17 to reach any ultimate conclusions on the contested issues of fact and  
18 law which underlie the merits of the dispute, for it is the very  
19 uncertainty of outcome in litigation and avoidance of wasteful and  
20 expensive litigation that induce consensual settlements. The proposed  
21 settlement is not to be weighed against a hypothetical or speculative  
22 measure of what might have been achieved by the negotiators.

23 *Id.*

24 As the Ninth Circuit observed, “the very essence of a settlement is  
25 compromise, a yielding of absolutes and an abandoning of highest hopes.” *Id.* at  
26 624 (internal quotation marks omitted). Indeed, “it is well-settled law that a  
27 proposed settlement may be acceptable even though it amounts to only a fraction of  
28 the potential recovery that might be available to the class members at trial.” *Nat’l*



1 *Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004)  
2 (citing *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998)); see  
3 *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2nd Cir. 1974) (“[T]here  
4 is no reason, at least in theory, why a satisfactory settlement could not amount to a  
5 hundredth or even a thousandth part of a single percent of the potential recovery.”).  
6 “Ultimately, the district court’s determination is nothing more than ‘an amalgam of  
7 delicate balancing, gross approximations and rough justice.’” *Nat’l Rural Telecom.*  
8 *Coop.*, 221 F.R.D. at 526 (quoting *City of Detroit*, 495 F.2d at 468.

9 Here, the factors identified by the Ninth Circuit support final approval of the  
10 Settlement Agreement.

11 **B. The Benefits to the Class of Settling Outweigh the Possibility of**  
12 **Achieving a Larger Recovery if Litigation Were to Continue**

13 Although Plaintiffs believe the claims have merit, they recognize that they  
14 faced significant legal, factual, and procedural obstacles that posed substantial risks  
15 to their likelihood of success on the merits. As evidence of this, subsequent to  
16 Preliminary Approval by this Court, the Second Circuit directed the district court to  
17 dismiss the New York action with prejudice, after the New York Court of Appeal  
18 found no performance right. In light of the strengths and weaknesses of the case—  
19 which Class Counsel was intimately familiar with, given that the case settled on the  
20 eve of trial, after all discovery was complete and pretrial filings were submitted—  
21 Class Counsel believe that the Settlement is more than reasonable because it  
22 achieves a significant benefit for the Class in a case in which the scope of damages  
23 was hotly contested, Sirius XM intended to move to decertify the case yet again,  
24 and failure on appeal was possible.

25 **1. The strength of Plaintiffs’ case and the amount offered in**  
26 **settlement.**

27 The proposed Settlement provides substantial economic benefits to the Class.  
28 Given the inherent risks associated with class certification, the liability issues found

1 by the Court as a matter of law which could be overturned on appeal, and an  
2 intensely disputed trial on the scope of damages which could produce highly  
3 variable results from a jury, the monetary payments provided for in the Settlement  
4 potentially exceeds the relief the Class could receive in a successful trial.

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

7 The risk, expense, complexity, and likely duration of further litigation are  
8 very significant. This second factor also weighs heavily in favor of final approval  
9 of the Settlement. At trial, Sirius XM planned to offer testimony that Plaintiffs'  
10 damages must be measured by the alleged detriment, if any, caused by Sirius XM.  
11 *See, e.g.*, Dkt. 521 at 1. Sirius XM planned to offer expert testimony that the  
12 appropriate measure of damages was a reasonable royalty rate, less any deduction  
13 for Plaintiff's failure to mitigate damages. Dkt. 644 at 2. Sirius XM's expert  
14 calculated the royalty to be vastly lower (*i.e.*, tens of millions of dollars lower) than  
15 Plaintiffs' damages model. The proposed Settlement guarantees a substantial  
16 recovery for the Class now while obviating the need for an uncertain trial and  
17 appeal. *See Officers for Justice*, 688 F.2d at 624 ("Naturally, the agreement reached  
18 normally embodies a compromise; in exchange for the saving of cost and  
19 elimination of risk, the parties each give up something they might have won had  
20 they proceeded with litigation.") (internal quotation marks omitted).

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

23 Sirius XM previously indicated its intention to move to decertify the Class  
24 yet again. *See* Dkt. 594. Plaintiffs believe it would be successful in maintaining  
25 class action status through the trial and into an appeal, but there is a risk that Sirius  
26 XM would prove successful in attacking class certification. Pursuant to this  
27 Settlement, Sirius XM will not appeal the issue of certification.  
28

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

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

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

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

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

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

23                   The single request for exclusion from the Class and the absence of any Class  
24 Member objections raises a "strong presumption" that the terms of the Settlement  
25 are favorable to Class Members. *See Nat'l Rural Telecom. Coop.*, 221 F.R.D. at  
26 529 ("It is established that the absence of a large number of objections to a  
27 proposed class action settlement raises a strong presumption that the terms of a  
28 proposed class settlement action are favorable to the class members."). Notices  
were issued to the 330 members of the Class, only one Class Member requested

1 exclusion, and no Class Member objected. As detailed in Part II.D, *supra*, the  
2 Notice provided the Class with the necessary information to make an informed  
3 decision regarding the Settlement, including the essential terms of the Settlement,  
4 details regarding the procedure and deadline for opting out of the Class and for  
5 filing objections, and Class Counsel’s motion for an award for fees (including  
6 accrued interest) and expenses and for incentive awards to the Representative  
7 Plaintiffs. Given the large size of the Class and the detail of the Court-approved  
8 Notice, the single opt out and the absence of any Class Member objections speaks  
9 loudly in support of the Settlement and its achievements for the Class.

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

12 In addition to the factors just discussed, the Court must also be satisfied that  
13 “the settlement is not the product of collusion among the negotiating parties.” *In re*  
14 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011).  
15 Factors considered here include: “(1) when counsel receive a disproportionate  
16 distribution of the settlement, or when the class receives no monetary distribution  
17 but class counsel are amply rewarded”; “(2) when the parties negotiate a clear  
18 sailing arrangement providing for the payment of attorneys’ fees separate and apart  
19 from class funds, which carries the potential of enabling a defendant to pay class  
20 counsel excessive fees and costs in exchange for counsel accepting an unfair  
21 settlement on behalf of the class,” and “(3) when the parties arrange for fees not  
22 awarded to revert to defendants rather than be added to the class fund.” *Id.* (internal  
23 quotation marks omitted).

24 The parties have actively engaged in many rounds of arm’s-length  
25 negotiations, involving the exchange of numerous proposals and counter-proposals  
26 over a period of months. The end result—a cash portion of currently up to \$35  
27 million, plus a 10-year license currently at up to 3.5% for a total value of up to  
28 approximately \$37.68 million, with no reversion to Sirius XM and no “clear

1 sailing” arrangement—is fair, appropriate, and in the best interests of the Class.

2 **V. THE CONCERNS RAISED BY PROPOSED AMICI CURIAE ARE**  
3 **NOT RELEVANT AND SHOULD BE OVERRULED**

4 On March 3, 2017, certain entities—which include the Major Record Labels  
5 that had opted out of this action—filed a Motion for Leave to File Brief as Amici  
6 Curiae, expressing concerns that the ongoing royalty rate set forth in the Settlement  
7 may effect *post-1972* licensing rates. Dkt. 684. For the reasons set forth in Class  
8 Counsel’s Opposition to Motion of American Association of Independent Music *et*  
9 *al.* for Leave to File Brief as Amici Curiae, filed concurrently herewith, the Court  
10 should deny Petitioner’s request. Petitioners—who are not class members and  
11 whose interests are not aligned with the Settlement Class— have no standing to  
12 object to the Settlement. Moreover, no weight should be given to the efforts of the  
13 Major Record Labels—which brokered their own settlement with Sirius XM before  
14 opting out of this class—to impede other smaller sound recording owners from  
15 being able likewise to settle their claims. The concerns raised by Petitioners are not  
16 relevant to the Court’s determination of whether the Settlement is fair, adequate,  
17 and reasonable *to the Settlement Class*. Moreover, Petitioners misunderstand the  
18 perceived effect the Settlement’s proposed ongoing royalty rate—which governs  
19 royalties for *pre-1972* recordings protected under *state* law that varies from state to  
20 state—will have on *post-1972* licensing rates, which are protected under federal  
21 law that does not vary from state to state.

22 **VI. CONCLUSION**

23 For the foregoing reasons, Plaintiffs respectfully request that the Court order  
24 final certification of the Settlement Class, grant final approval to the Settlement,  
25 approve the Notice as being in compliance with Rule 23 of the Federal Rules of  
26 Civil Procedure, and approve the plan of distribution as fair, reasonable and  
27 adequate.

28

1 Dated: April 10, 2017

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By: /s/ Rachel S. Black

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