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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 Defendant.

Case No. CV13-05693 PSG (GJSx)

**REPLY IN SUPPORT OF MOTION  
BY PLAINTIFF FOR AN AWARD  
OF ATTORNEYS' FEES AND  
COSTS**

Date: May 8, 2017

Time: 1:30 p.m.

Place: Courtroom 6A

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1 **I. INTRODUCTION**

2 Class Counsel submits this reply in support of its motion for fees and costs—  
3 a motion that received no objection or opposition from any Class member and  
4 which remains reasonable and appropriate given the favorable result achieved and  
5 the unique ongoing uncertainties and work associated with this matter.

6 This is an extraordinary case in which Plaintiffs, through Class Counsel,  
7 secured a settlement that allows for the first time in history a class of owners to  
8 recover for performance of pre-1972 sound recordings. As detailed in Class  
9 Counsel’s opening brief, Dkt. 666 (Class Counsel’s “Fee Motion” or “opening  
10 motion”), Class Counsel obtained this settlement and litigated this case to the eve  
11 of trial in a skillful and efficient manner, despite considerable risk. Notably, not  
12 one of the Class Members has objected to Class Counsel’s Fee Motion.<sup>1</sup> This is a  
13 testament to the reasonableness of Class Counsel’s request and the result achieved  
14 by Class Counsel.<sup>2</sup>

15 As discussed in the Fee Motion, the requested fee of 30% is manifestly fair  
16 and reasonable. A 30% fee is consistent with the percentages awarded in  
17 comparable cases. As applied to the current guaranteed \$25.5 million cash benefit,  
18 a 30% award would amount to \$7.65 million. This amount is lower than Class  
19

20 \_\_\_\_\_  
21 <sup>1</sup> Class Counsel’s request of 30% is less than the amount disclosed to Class  
22 Members in the Court-approved notice to the class. Class Counsel’s Motion for  
23 Preliminary Approval, Dkt. 666-1, and the Court-approved class notice, Dkt. 686-4,  
24 provided notice of Class Counsel’s intention to seek “an award of attorney’s fees of  
up to one-third from the Settlement.” *See, e.g.*, Dkt. 684-4 at Page 5 of 303.

25 <sup>2</sup> The purported amici brief pursuant to which various entities—including  
26 former putative Class members who opted out of this case—seek leave to file  
27 regarding the settlement also does not take issue with Class Counsel’s request for  
28 fees and costs. Dkt. 681. As outlined in Plaintiffs’ Opposition, the amici  
petitioners have no standing, in any event, to object to or interfere with the  
proposed class settlement. Dkt. 687.

1 Counsel's current lodestar.<sup>3</sup>

2 At the same time, recent developments underscore the substantial benefit to  
3 the Class of the settlement obtained by Class Counsel; the large investment made  
4 and the significant risks undertaken by Class Counsel; and the future work still  
5 required to administer the terms of the settlement. Specifically:

- 6 • The settlement, which was reached after years of hard-fought litigation,  
7 extensive negotiations, and on the eve of trial, provides the Class with an  
8 exceptional recovery – for the first time allowing a class of owners to  
9 recover for performance of pre-1972 sound recordings. The settlement  
10 provides a guaranteed \$25,500,000 million in cash benefits, which could  
11 increase to over \$73 million through additional cash payments and a  
12 royalty program. *See* Dkt. 686-2 ¶ 22-23.
- 13 • To date, Class Counsel has invested \$8,727,094.80 in time and  
14 \$1,679,587.55 in expenses in the cases against Sirius XM on a purely  
15 contingent basis. Indeed, the lodestar in this case exceeds Class  
16 Counsel's fee request.
- 17 • Class Counsel seeks a total of \$1,679,587.55 in costs incurred to date,  
18 which includes an additional \$146,037.56 in costs incurred since the  
19 filing of its opening motion seeking fees and costs.
- 20 • As described below, since the filing of its opening motion, Class Counsel  
21 has continued to expend time and resources in implementing class notice,  
22 updating the class action website, overseeing administration of the  
23 settlement process, and seeking final approval of the settlement. Class  
24 Counsel also has continued to litigate underlying issues related to the  
25

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26 <sup>3</sup> Class Counsel also requests 30% of any additional sums paid under the  
27 Settlement by Sirius XM depending on outcomes in California and New York, and  
28 any going forward royalties, if and when earned by Class members.

1 existence of a public performance right for pre-1972 sound recordings in  
2 appellate proceedings in New York and Florida. As a result, Class  
3 Counsel's lodestar has increased by \$370,217.00 for work from  
4 November 30, 2016 and April 20, 2017 (excluding work performed on its  
5 motion for attorneys' fees).

- 6 • The substantial risk borne by Class Counsel in pursuing these actions for  
7 pre-72 sound recordings against Sirius XM is highlighted by the recent  
8 ruling of the New York Court of Appeals, which found no right of public  
9 performance under New York common law. Despite the possibility of  
10 recovering nothing, Class Counsel undertook these actions and continues  
11 to advocate vigorously on behalf of the Class in multiple jurisdictions.

12 For the reasons described in its opening motion and supplemented by this  
13 reply, Class Counsel seeks 30% -- or \$7.65 million — in fees of the \$25.5 million  
14 in guaranteed benefits awarded to the Class as part of the settlement, along with  
15 30% of any additional sums paid under the Settlement by Sirius XM depending on  
16 outcomes in California and New York and any going forward royalties, if and when  
17 earned by Class members. Class Counsel also seeks reimbursement of  
18 \$1,679,587.55 for costs and expenses incurred through April 20, 2017.<sup>4</sup>

19 **II. CLASS COUNSEL'S FEE REQUEST OF 30% OF THE**  
20 **SETTLEMENT IS REASONABLE IN LIGHT OF THE LEGAL**  
21 **SERVICES PROVIDED TO DATE AND ONGOING WORK.**

22 As described in its opening brief, Dkt 670, Class Counsel's work on behalf  
23 of a class of owners of pre-72 sound recordings represented a herculean task – from  
24

25 \_\_\_\_\_  
26 <sup>4</sup> Class Counsel's opening brief requested reimbursement of \$1,533,549.99  
27 of expenses. As discussed below, Class Counsel has continued to incur out-of-  
28 pocket expenses since filing its opening brief, and requests herein that such  
additional expenses be reimbursed.

1 developing and pursuing the legal strategy for establishing a performance right for  
2 pre-72 sound recordings as an issue of first impression, to securing class  
3 certification, to preparing for trial before eventually reaching the proposed  
4 classwide settlement. Subsequent to the filing of Class Counsel’s Fee Motion,  
5 Class Counsel has continued to dedicate substantial time and incur additional  
6 expenses to further benefit the Class: In the California action, Class Counsel  
7 prepared and filed motions with this Court for preliminary and final approval of the  
8 class settlement, responded to Sirius XM’s statement regarding preliminary  
9 approval, and submitted an Opposition to the motion by non-Class members to file  
10 an amicus brief. *See* Supplemental Declaration of Henry Gradstein in Support of  
11 Fee Motion (“Gradstein Decl.”) at ¶ 2.

12 Class Counsel also has worked extensively with the Royalty Administrator  
13 Music Reports Inc. (“MRI”) to develop the database and website for Class  
14 members to claim their pro-rata share of the Settlement Fund. Gradstein Decl. at ¶  
15 3. Class Counsel has also worked extensively with Garden City Group (“GCG”),  
16 the Administrator, to develop the class action website, provide notice to Class  
17 members, and update the Class with additional information as the case has  
18 progressed. *Id.* Class Counsel has also had numerous communications with Class  
19 members regarding the status of the settlement. *Id.*

20 In the New York proceedings, Class Counsel prepared and filed the letter  
21 brief as requested by the Second Circuit regarding the ruling by the New York  
22 Court of Appeals, and submitted as well as a supplemental letter brief. In the  
23 Florida proceedings, Class Counsel prepared and filed the reply brief with the  
24 Florida Supreme Court and prepared for and argued the appeal before the Florida  
25 Supreme Court on April 6, 2017. Gradstein Decl. at ¶ 2.

26 The additional work by Class Counsel has further increased the lodestar in  
27 these matters to \$8,727,094.80 – which includes \$370,217 in additional time  
28

1 incurred since the filing of Class Counsel’s original motion for fees. *See*  
2 Supplemental Declaration of Steven Sklaver in Support of Fee Motion (“Sklaver  
3 Decl.”) at ¶ 4. The lodestar thus is greater than the \$7.65 million Class Counsel  
4 seeks as a percentage of the current cash payment amount of \$25.5 million. Class  
5 Counsel’s fees would increase should Plaintiff’s prevail on the existence of a  
6 performance right in California and Florida on appeal. Class Counsel also seeks  
7 a 30% fee on any future royalties collected by the class but only when, if and after  
8 such royalties are collected.

9 Given the complexities of the settlement and its appellate contingencies,  
10 Class Counsel’s work will continue for quite some time following the Court’s  
11 determination of whether to grant final approval of the settlement. Administration  
12 of the Settlement Fund will require Class Counsel to continue to work with the  
13 Administrator GCG and the Royalty Administrator MRI and field questions from  
14 Class members. Class Counsel will be involved in implementing the future royalty  
15 program contemplated under the Settlement Agreement. Additionally, Class  
16 Counsel will remain available to address issues arising from the forthcoming ruling  
17 by the Florida Supreme Court and to litigate any further proceedings in the  
18 Eleventh Circuit. Finally, as envisioned by the Settlement Agreement, Class  
19 Counsel will need to prepare, brief and argue Sirius XM’s appeal from this Court’s  
20 summary judgment ruling, both in the Ninth Circuit and potentially in the  
21 California Supreme Court. Gradstein Decl. at ¶ 4.

22 **III. RECENT DEVELOPMENTS HIGHLIGHT THE SIGNIFICANT**  
23 **RISKS UNDERTAKEN BY CLASS COUNSEL AND THE VALUE OF**  
24 **THEIR EFFORTS ON BEHALF OF THE CLASS**

25 Class Counsel pursued this case on a pure contingency basis with the  
26 attendant risk of no recovery. That risk was particularly acute here on an issue this  
27 Court has recognized as one of first impression and given the differing legal paths  
28

1 available in different jurisdictions.

2        Shortly after the motion for preliminary approval was granted by this Court,  
3 the New York Court of Appeals held that a right of public performance does not  
4 exist under New York common law and the Second Circuit Court of Appeals  
5 directed summary judgment in favor of Sirius XM on Flo & Eddie's claims in that  
6 jurisdiction. Class Counsel's ability to obtain a settlement that guarantees the Class  
7 a recovery of at least \$25.5 million against this backdrop of legal uncertainty, and  
8 their willingness to face the risks associated with that uncertainty through the eve  
9 of trial to obtain the best result possible for the Class, further demonstrates the  
10 appropriateness of the fee request here. Even with the adverse New York ruling,  
11 the guaranteed \$25.5 million in cash payments by Sirius XM could increase to  
12 \$35,500,000. The Settlement also creates a royalty program for Sirius XM to pay  
13 the Class up to an additional \$37.68 million. Dkt. 686-1. Class Counsel will  
14 continue to risk their time to pursue those additional recoveries on behalf of the  
15 Class, and they will be further compensated only if their efforts are successful.

16 **IV. CLASS COUNSEL SEEKS RECOVERY OF REASONABLE COSTS**  
17 **AND EXPENSES, WHICH THEY CONTINUE TO INCUR.**

18        Class Counsel also requests reimbursement in the amount of \$1,679,587.55  
19 for out-of-pocket expenses reasonably and necessarily incurred in connection with  
20 this litigation. Class Counsel outlined various costs incurred during the pendency  
21 of this action and the parallel cases in New York and Florida. Dkt. 672. Since that  
22 time, Class Counsel has expended an additional \$146,037.56 on appellate  
23 specialists who assisted with preparation for oral argument before the Florida  
24 Supreme Court, damages experts to help quantify the value of the settlement to the  
25 Class, and research done in preparing the motion for final approval of the  
26 settlement. *See* Sklaver Decl. at ¶¶7-9; Gradstein Decl. at ¶ 7. As the work in this  
27 matter continues, including any future expenses for administration of the settlement  
28



1 and going-forward royalty, Class Counsel reserves the right to seek additional  
2 reimbursement of costs in the future.

3 **V. CONCLUSION**

4 For each of the foregoing reasons, Class Counsel respectfully submits the  
5 Court should approve the fee application and award Class Counsel attorneys' fees  
6 in the amount of \$7.65 million in fees (30%) of the \$25.5 million in guaranteed  
7 cash payments awarded, along with 30% of any additional sums paid under the  
8 Settlement by Sirius XM including future royalties paid to the Class. Class  
9 Counsel further submits that the Court should grant Class Counsel's request for  
10 reimbursement of \$1,679,587.55 in litigation costs and expenses, and grant  
11 incentive awards of \$25,000 to each of Flo & Eddie's principals, Howard Kaylan  
12 and Mark Volman, to compensate them for their efforts supporting this litigation  
13 since the inception of this case in 2013.

14  
15 DATED: April 24, 2017

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