



O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
HONG KONG
LONDON
LOS ANGELES
NEWPORT BEACH
NEW YORK

1999 Avenue of the Stars
Los Angeles, California 90067-6035

TELEPHONE (310) 553-6700
FACSIMILE (310) 246-6779
www.omm.com

SAN FRANCISCO
SEOUL
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT DIAL
(310) 246-6850

January 17, 2017

WRITER'S E-MAIL ADDRESS
dpetrocelli@omm.com

VIA ECF

Ms. Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, NY 10007

Re: Flo & Eddie, Inc. v. Sirius XM Radio Inc., No. 15-1164

Dear Ms. Wolfe:

Pursuant to the Court's December 29, 2016 order, appellant Sirius XM respectfully submits this letter brief addressing the effect of the New York Court of Appeals' recent decision (Doc. 207), on the appeal pending before the Court. For the reasons explained below, the Court of Appeals' ruling, together with a recent settlement agreement between the parties, is dispositive of the entire action.

Every claim in Flo & Eddie's suit against Sirius XM is predicated on the proposition that New York common law provides owners of pre-1972 recordings a right to control and demand compensation for performances of those recordings.

Based on that purported right, Flo & Eddie asserted common law copyright

O'MELVENY & MYERS LLP

January 17, 2017 - Page 2

infringement and unfair competition claims challenging Sirius XM's (i) broadcast of its pre-1972 recordings ("performance claims") and (ii) creation of incidental, internal reproductions made to facilitate those broadcasts ("reproduction claims"). Sirius XM defended these claims principally on the ground that New York law does not provide any performance right in pre-1972 recordings, and alternatively contended that applying such a right to Sirius XM, an interstate broadcaster required by federal law to broadcast uniformly nationwide, would violate the Commerce Clause. Recognizing the centrality of the performance-right question to every claim in this case, the Court certified that question to the Court of Appeals.

Before the Court of Appeals' decision, the parties entered into a nationwide settlement agreement. The agreement's financial terms are conditioned in part on the outcome of the performance-right and Commerce Clause questions in this and related appeals. The agreement, however, requires dismissal with prejudice of Flo & Eddie's claims regardless of the outcome of those appeals.

On December 20, 2016, the Court of Appeals answered the certified question in the negative, holding that there is no performance right in pre-1972 recordings under New York common law. That holding, along with the settlement agreement, resolves every issue in this case. It requires dismissal of Flo & Eddie's performance claims on the merits. It renders moot the Commerce Clause question,

O'MELVENY & MYERS LLP

January 17, 2017 - Page 3

which would only matter if (contrary to the Court of Appeals' decision) there were a performance right under New York law. And it disposes of Flo & Eddie's derivative reproduction claims, which in any event were rendered moot by the parties' settlement agreement.

Despite the Court of Appeals' definitive decision that there is no performance right under New York law, Flo & Eddie now takes the position that the ruling was confined to the common law of copyright, and that in the penultimate paragraph of its lengthy opinion, the Court held a performance right exists under the law of unfair competition. To be sure, Flo & Eddie is advancing this position solely to extract unwarranted benefits under the parties' settlement agreement. That aside, the argument is completely devoid of merit, for the reasons explained below. The Court should adopt the Court of Appeals' ruling and remand for dismissal of the action pursuant to the parties' settlement agreement.

BACKGROUND

1. In 2013, Flo & Eddie brought suit against Sirius XM asserting two sets of claims, each under New York common law of copyright and unfair competition.

First, Flo & Eddie's performance claims alleged that Sirius XM unlawfully performed (i.e., broadcast) its pre-1972 recordings without permission. *Second*, its

O'MELVENY & MYERS LLP

January 17, 2017 - Page 4

reproduction claims alleged that it was also unlawful for Sirius XM to create internal copies (e.g., buffer and cache copies) to facilitate those broadcasts.

Sirius XM moved for summary judgment, contending that (i) all of Flo & Eddie's claims rest on the existence of a New York common law right of public performance in pre-1972 recordings, which does not exist, and (ii) applying such a state right to Sirius XM would violate the Commerce Clause, because federal law requires Sirius XM to maintain nationally uniform radio broadcasts.

The district court concluded that New York common law *does* recognize a performance right in pre-1972 recordings—thus upholding Flo & Eddie's common law copyright and unfair competition claims—and rejected Sirius XM's Commerce Clause argument. The district court certified its order for interlocutory appeal, and this Court accepted the appeal on May 27, 2015.

On April 13, 2016, this Court issued an opinion determining that the entire appeal hinged on one critical issue—whether New York common law recognizes a performance right in pre-1972 recordings.¹ Concluding that the existence and potential scope of such a right is a “determinative question[] of New York law,” N.Y.C.R.R. 500.27(a), the Court deferred ruling on any claims and certified the

¹ See Doc. 189 at 1, 3 (resolution of this “significant and unresolved issue of New York law is determinative” of the case and “controls the present appeal”); *id.* at 8, n.4 (performance-right issue is “determinative” of the performance and reproduction claims under New York copyright and unfair competition law).

O'MELVENY & MYERS LLP

January 17, 2017 - Page 5

following question to the New York Court of Appeals: “Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?” Doc. 189 at 1, 12.

On December 20, 2016, the New York Court of Appeals answered the certified question in the negative. In a lengthy, 35-page opinion, that court held that “New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings.” Doc. 207 at 37. The court also held that New York common law “has never recognized a right of public performance for pre-1972 sound recordings,” and “[b]ecause the consequences of doing so could be extensive and far-reaching, and there are many competing interests at stake,” “the recognition of such a right should be left to the legislature.” *Id.* at 30.

2. On November 13, 2016—before the Court of Appeals’ ruling—the parties entered into a nationwide settlement agreement that expressly preserves their rights to proceed with this appeal and related appeals in Florida and California. Certain payment terms are contingent upon appellate resolution of the performance-right and Commerce Clause issues. Specifically, the agreement provides that Sirius XM may have to pay royalties for future performances of class members’ pre-1972 recordings, but the royalty rate will be reduced if Sirius XM prevails on the performance-right issue in the various appeals. Attachment A

O'MELVENY & MYERS LLP

January 17, 2017 - Page 6

§ IV(B)(1)-(7) (Case No. 2:13-cv-05693-PSG (C.D. Cal.), Doc. 666-4). Moreover, if Sirius XM prevails on the Commerce Clause issue in any of the appeals, no future royalty payments are required. *Id.* § IV(B)(8). This Court thus retains jurisdiction over the performance-right and Commerce Clause issues.²

The settlement agreement did not, however, leave open appellate resolution of Flo & Eddie's reproduction claims, which must be dismissed with prejudice no matter how the performance-right and Commerce Clause issues are resolved. *Id.* § III(B). This Court thus lacks jurisdiction over those claims. *See infra* at 11-12.

ARGUMENT

Under the Court of Appeals' decision and the parties' settlement agreement, there is no reasonable dispute about the proper disposition of each issue on appeal: (i) the performance claims must be dismissed for lack of a performance right, *infra* Section A, (ii) the Commerce Clause question is rendered moot by the lack of a performance right, *infra* Section B, and (iii) the reproduction claims are likewise moot and the settlement agreement requires their dismissal, *infra* Section C. Flo & Eddie, however, contends that its unfair-competition performance claim survives the Court of Appeals' ruling. That argument is meritless, as explained below.

² *See Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982) (appeal is not moot where contingent settlement agreement leaves parties with "considerable financial stake in the resolution of the question presented" on appeal); Attachment B (Nov. 22, 2016, joint letter to New York Court of Appeals addressing settlement agreement).

O'MELVENY & MYERS LLP
January 17, 2017 - Page 7

A. The Court of Appeals' Decision Defeats The Performance Claims

The Court of Appeals has confirmed “that New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings.” Doc. 207 at 37. The effect of that holding is straightforward—because there is no performance right, Flo & Eddie’s performance claims fail.

Flo & Eddie now contends the Court of Appeals’ opinion merely rejected a performance right under common law copyright, but allows for recognition of an identical performance right under the common law of unfair competition. This contention is obviously wrong: as the parties, the district court, and this Court all have recognized, the unfair competition claim hinges entirely on the existence of a performance right, which is why the Court of Appeals answered the certified question of whether there is *any* performance right “under New York law”—not just New York copyright law—in the negative. *See, e.g.*, Doc. 207 at 3, 11, 37; *cf.* Doc. 189 at 1, 12 (certifying “issue of New York law”).

It has been long-established that a plaintiff must possess a cognizable property right or interest to establish an unfair competition claim. *See ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 478 (2007) (“Under New York law, an unfair competition claim involving misappropriation usually concerns the *taking and use of the plaintiff’s property* to compete against the plaintiff’s own use of the same

O'MELVENY & MYERS LLP

January 17, 2017 - Page 8

property”) (emphasis added and quotations omitted). Thus, a cause of action for unfair competition—including in the specific context of sound recordings—cannot exist without “some property right[]” that is “recognized and protected by the courts.” *Metro. Opera Ass’n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483, 493 (Sup. Ct. 1950). Indeed, *Capitol Records, Inc. v. Naxos of America, Inc.*, 4 N.Y.3d 540 (2005), the principal case on which Flo & Eddie has relied throughout this litigation, held that common law “[c]opyright infringement is distinguishable from unfair competition” only because the latter requires a plaintiff to establish the elements of copyright infringement—“(1) *the existence of a valid copyright*; and (2) unauthorized reproduction of the work protected by the copyright”—and “*in addition*” to show “competition in the marketplace or similar actions designed for commercial benefit.” *Id.* at 563 (emphasis added).³ Because there is no common law performance right and thus no copyright infringement for the performance of pre-1972 recordings, there is a fortiori no unfair competition.

That is why this Court, the district court, and Flo & Eddie itself have recognized that its unfair competition claim fails if its copyright claim fails:

³ See also *Estate of Hemingway v. Random House, Inc.*, 279 N.Y.S.2d 51, 61 (N.Y. Sup. Ct. 1967), *aff’d on other grounds*, 23 N.Y.2d 341 (1968) (“New York’s state and federal courts have refused to permit a litigant to escape the limitations of copyright protection simply by renaming his cause of action as ‘unfair competition.’”).

O'MELVENY & MYERS LLP

January 17, 2017 - Page 9

- This Court concluded that the performance-right issue is “determinative” of the case and “controls the present appeal.” Doc. 189 at 1, 3. Flo & Eddie’s “unfair-competition claim,” therefore, “rise[s] and fall[s]” with and “depends upon the resolution of the certified question.” *Id.* at 8 & n.4.
- The district court recognized that if its performance-right holding “is incorrect, then significant portions of this lawsuit—including the ... unfair competition claims—will have to be dismissed.” SPA55.
- Flo & Eddie expressly identified the elements of copyright infringement as prerequisites for “a claim for unfair competition in New York” in its complaint, A18 ¶ 1, and reiterated that position in subsequent briefing.⁴

Nothing in the Court of Appeals’ penultimate paragraph remotely suggested, let alone held, that a performance right exists or may exist under unfair competition law. The Court of Appeals’ statement that “sound recording copyright holders may have other causes of action,” including “unfair competition,” Doc. 207 at 37,⁵ merely confirmed existing law that pre-1972 recording owners in *some circumstances* may be able to bring unfair competition claims, such as where a defendant creates pirated copies of recordings and sells them in competition with the recording owner. Indeed, that appears to be the precise scenario the Court of

⁴ *See, e.g.*, Doc. 117 at 27-28, n.16 (“Unfair competition is ... misappropriating for the commercial advantage of one person a benefit or property right [of] another.”); Case No. 1:13:-cv-05784-CM, Doc. 56 at 13-14 (“The protection afforded to owners of pre-1972 recordings is rooted in the concept that liability should attach to the conduct of people who attempt to profit off the property of others.”).

⁵ Of course, the Court’s reference to plaintiff prevailing in the district court was based on that court’s ruling that there was a performance right under New York law, and that Sirius XM’s broadcasts and incidental copies were hence unauthorized. *See id.*; SPA55.

O'MELVENY & MYERS LLP

January 17, 2017 - Page 10

Appeals had in mind, because it expressly linked Flo & Eddie's outstanding unfair competition claim to its *reproduction* allegations, not its performance claims. Doc. 207 at 37 ("The Second Circuit concluded that defendant had copied plaintiff's recordings, but postponed the questions of fair use and competition..."); *accord id.* at 5 n.1; *see also id.* at 34 n.6.

But the Court's recognition that pre-1972 recording owners can bring unfair competition claims in *some* circumstances clearly does not mean they can bring such a claim *based only on the defendant's public performance* despite the lack of any property interest in public performance. Accepting that argument would require a nonsensical reading of the Court of Appeals' opinion: It would mean the Court of Appeals overruled sub silentio decades of precedent requiring a protectable property interest as a predicate to unfair competition claims. It would also mean the Court wrote a detailed 35-page opinion explaining that pre-1972 recording owners have no common law performance right, and detailing the widespread policy problems such a right would generate, for no reason—and that the dissent did not realize the right for which it was advocating had actually been silently adopted by the majority. And it would require reading the Court's direct holding—*i.e.*, that "New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings," Doc. 207 at 37—to say

O'MELVENY & MYERS LLP

January 17, 2017 - Page 11

that New York common law *does* recognize such a right so long as the plaintiff names it “unfair competition.”

Flo & Eddie’s reading, in short, is patently wrong and should be rejected out of hand. The Court of Appeals’ decision requires rejecting Flo & Eddie’s performance claims in their entirety.

B. The Commerce Clause Issue Is Now Moot

The Court declined to address Sirius XM’s Commerce Clause argument until the Court of Appeals confirmed “what rights—if any—are provided under New York common law” to pre-1972 recording owners. Doc. 189 at 11. Because New York law does not provide pre-1972 recording owners any performance right, there is no need for the Court to address the Commerce Clause issue. If, however, the Court were to disagree and conclude that Flo & Eddie’s performance claims somehow survive, it should hold those claims are barred by the Commerce Clause for the reasons explained in prior briefing. Doc. 39 at 48-60; Doc. 121 at 25-31.

C. The Reproduction Claims Are Moot

As Sirius XM has argued, and as this Court has recognized, Flo & Eddie’s reproduction claims also depend on the existence of a performance right, because absent such right, Sirius XM’s creation of internal copies to facilitate its broadcasts

O'MELVENY & MYERS LLP

January 17, 2017 - Page 12

would be protected fair use.⁶ But that question is in any event no longer before this Court, because the parties' settlement agreement requires dismissal of Flo & Eddie's reproduction claims. *See supra* at 6. Thus, because a ruling by this Court on the reproduction claims will have no effect on their ultimate resolution, the Court need not and should not consider them.⁷

CONCLUSION

For the foregoing reasons, the Court should issue a decision adopting the New York Court of Appeals' ruling and remanding to the district court for dismissal with prejudice pursuant to the settlement agreement.

Very truly yours,

Daniel M. Petrocelli

cc: All Counsel

⁶ Docs. 39 at 45-48, 121 at 32-36 (addressing fair use factors); Doc. 189 at 8 n.4 (reproduction claims are "bound up with whether the ultimate use of the internal copies is permissible," and therefore "the certified question is determinative of [Flo & Eddie's] copying claims as well"); *see also* SPA55 (Judge McMahon: "[R]eversal of this Court's ruling [that New York recognizes a public performance right] might well require reconsideration of the Court's fair use analysis [.]"); *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 2015 WL 3852692, at *6 (S.D. Fla. June 22, 2015) (rejecting a performance right under Florida law and therefore finding that Sirius XM's internal copies of pre-1972 recordings constitute fair use).

⁷ *See Fox v. Bd. of Trustees of the State Univ. of N.Y.*, 42 F.3d 135, 140 (2d Cir. 1994) (issue becomes moot when "the parties lack a legally cognizable interest in the outcome") (internal citations omitted).

Attachment A

1 GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (S.B. #89747)
2 hgradstein@gradstein.com
MARYANN R. MARZANO
3 (S.B. #96867)
mmarzano@gradstein.com
4 DANIEL B. LIFSCHITZ (S.B. #285068)
dlifschitz@gradstein.com
5 6310 San Vicente Blvd., Suite 510
Los Angeles, CA 90048
6 Telephone: (323) 776-3100

7 *Attorneys for Plaintiff*
8 *Flo & Eddie, Inc. and the Class*

9 O'MELVENY & MYERS LLP
DANIEL M. PETROCELLI (S.B. #97802)
dpetrocelli@omm.com
10 CASSANDRA L. SETO (S.B. #246608)
cseto@omm.com
11 1999 Avenue of the Stars, 8th Floor
Los Angeles, CA 90067-6035
12 Telephone: (310) 553-6700
13 Facsimile: (310) 246-6779

14 *Attorneys for Defendant*
Sirius XM Radio Inc.

SUSMAN GODFREY LLP
STEPHEN E. MORRISSEY
(S.B. #187865)
smorrissey@susgmangodfrey.com
STEVEN G. SKLAVER
(S.B. #237612)
ssklaver@susmangodgrey.com
KALPANA SRINIVASAN
(S.B. #237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

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

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

19
20 Plaintiffs,

21 v.

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

24 Defendants.

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

Hon. Philip S. Gutierrez

**STIPULATED CLASS ACTION
SETTLEMENT**

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

5 **I. DEFINITIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

26 20. “Florida Appeal” means the appeal of the Florida Action, filed
27 on July 10, 2015 in the United States Court of Appeals for the Eleventh Circuit (the
28

1 “Eleventh Circuit”), Appeal No. 15-13100, and certified to the Florida Supreme
2 Court on June 29, 2016, Appeal No. SC16-1161.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

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

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

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

7 **II. RECITALS**

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

18 B. In the California Action, the Court concluded that California law
19 provided for an exclusive right of public performance of Pre-1972 Sound
20 Recordings. On September 22, 2014, the Court granted Plaintiff’s motion for
21 summary judgment with respect to the alleged unauthorized public performance of
22 Plaintiff’s Pre-1972 Sound Recordings. The Court did not grant summary
23 judgment with respect to the alleged unauthorized reproduction of such recordings.
24 On May 27, 2015, the Court granted Plaintiff’s motion for class certification. On
25 September 8, 2016, the Court granted Sirius XM’s motion for summary judgment
26 on Plaintiffs’ claim for common law unfair competition and request for punitive
27 damages. A jury trial was scheduled to commence on November 15, 2016 to
28

1 resolve the California Class’s claims for damages and injunctive relief, which was
2 to be followed by a post-trial claims administration process.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 C. Florida Action. The Parties preserve their respective rights to proceed
23 with the Florida Appeal and any further proceedings. If, after the conclusion of the
24 Florida Appeal and the Effective Date and satisfaction of any payment obligations
25 required under Section IV.B.3, the Florida Action is remanded to the Florida Court,
26 Plaintiff shall immediately dismiss with prejudice any and all claims against Sirius
27 XM by way of a stipulated dismissal that shall provide that each Party shall bear
28

1 their own costs and fees, except for all fees and costs provided for in Section VII
2 below.

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

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

23 **IV. SETTLEMENT RELIEF**

24 A. Settlement Fund.

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

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

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

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

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

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

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

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

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

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

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

27 B. Additional Payment Terms Contingent on Appellate Outcomes.

28

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

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

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

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

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

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

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

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

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

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

18 C. License.

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

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

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

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

28

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

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

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

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

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

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

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

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

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

22 **V. CONDITIONS; TERMINATION**

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

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

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

2 3. One of the following has occurred:

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

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

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

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

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

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

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

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

19 A. Preliminary Approval.

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

26 B. Class Notice.

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

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

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

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

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

14 C. Ownership Disputes.

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

27 D. Final Approval Hearing.

28

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

9 E. The Settlement Fund Claim Program.

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

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

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

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

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

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

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

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

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

12 **IX. COVENANTS AND WARRANTIES**

13 A. Authority to Enter Agreement.

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

24 B. Represented by Counsel.

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

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

3 C. No Other Actions.

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

13 **X. MISCELLANEOUS**

14 A. Governing Law.

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

17 B. Counterparts.

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

22 C. No Drafting Party.

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

26 D. Entire Agreement.

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

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

6 E. Retained Jurisdiction.

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

15 F. Cooperation.

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

19 G. Amendments in Writing.

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

22 H. Binding Effect; Successors and Assigns.

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

25 I. Construction.

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

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

3 J. Waiver in Writing.

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

5 K. Computation of Time.

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

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

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

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

9 M. Notice.

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

12 For Plaintiff and the Class:

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

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

29 For Sirius XM:

30 Daniel M. Petrocelli

1 Cassandra L. Seto
2 O'Melveny & Myers LLP
3 1999 Avenue of the Stars, Suite 800
4 Los Angeles, California 90067-6035
5 Telephone: (310) 553-6700
6 Facsimile: (310) 246-6779
7 dpetrocelli@omm.com
8 cseto@omm.com

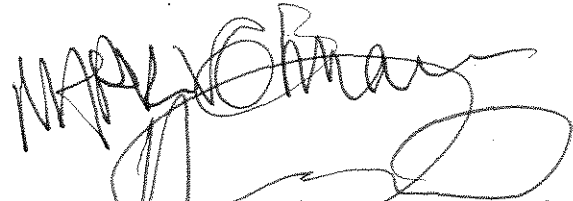
9 with a copy to:

10 Patrick L. Donnelly
11 Executive Vice President, General Counsel
12 and Secretary
13 Sirius XM Radio Inc.
14 1290 Avenue of the Americas
15 11th Floor
16 New York, New York 10104
17 Telephone: (212) 584-5180
18 Facsimile: (212) 584-5353
19 patrick.donnelly@siriusxm.com
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN WITNESS WHEREOF, the parties hereto and their counsel of record have executed this Stipulation as of the dates set forth below.

dated: November 13, 2016



for the Plaintiff Class

to and Eddy, Inc.

dated: November 13, 2016

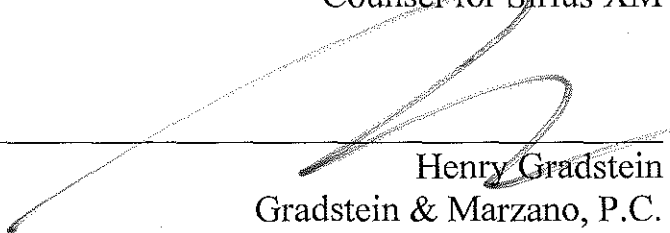


for Sirius XM Radio Inc.

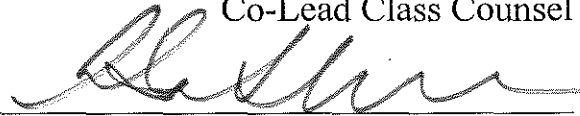
Approved as to form:



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



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



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

1 GRADSTEIN & MARZANO, P.C.
2 HENRY GRADSTEIN (S.B. #89747)
3 hgradstein@gradstein.com
4 MARYANN R. MARZANO
5 (S.B. #96867)
6 mmarzano@gradstein.com
7 DANIEL B. LIFSCHITZ (S.B. #285068)
8 dlifschitz@gradsetin.com
9 6310 San Vicente Blvd., Suite 510
10 Los Angeles, CA 90048
11 Telephone: (323) 776-3100

12 Attorneys for Plaintiff
13 Flo & Eddie, Inc. and the Class

14 DANIEL M. PETROCELLI (S.B. #97802)
15 dpetrocelli@omm.com
16 CASSANDRA L. SETO (S.B. #246608)
17 cseto@omm.com
18 O'MELVENY & MYERS LLP
19 1999 Avenue of the Stars, 8th Floor
20 Los Angeles, CA 90067-6035
21 Telephone: (310) 553-6700
22 Facsimile: (310) 246-6779

23 Attorneys for Defendant
24 Sirius XM Radio Inc.

SUSMAN GODFREY LLP
STEPHEN E. MORRISSEY
(S.B. #187865)
smorrissey@susgmangodfrey.com
STEVEN G. SKLAVER
(S.B. #237612)
ssklaver@susmangodgrey.com
KALPANA SRINIVASAN
(S.B. #237460)
ksrinivasan@susmangodfrey.com
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

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

20 Plaintiff,

21 v.

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

25 Defendants.

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

Hon. Philip S. Gutierrez

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

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

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

10 IT IS HEREBY ORDERED that:

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

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

1 attorneys' fees, expense reimbursements, and incentive awards; and (e) ruling upon
2 such other matters as the Court may deem appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27
28

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

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

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

27
28

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

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

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

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

27
28

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

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

28

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

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

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

23 23. The Stipulation shall be used for settlement purposes only. The fact
24 of, or any provision contained in, the Stipulation or any action taken pursuant to it
25 shall not constitute an admission of the validity of any claim or any factual
26 allegation that was or could have been made by plaintiff and Settlement Class
27 Members in the California, New York or Florida Actions, or of any wrongdoing or
28

1 liability of any kind on the part of Sirius XM. The Stipulation shall not be offered
2 or be admissible in evidence by or against Plaintiff or Sirius XM or cited or referred
3 to in any other action or proceeding, except (a) in any action or proceeding brought
4 by or against the parties to enforce or otherwise implement the terms of the
5 Stipulation, (b) in any action involving plaintiff, Settlement Class Members, or any
6 of them, that asserts claims barred by the covenant not to sue in the Stipulation
7 against Sirius XM, to support a defense of *res judicata*, collateral estoppel, release,
8 or other theory of claim preclusion, issue preclusion, or similar defense, or (c) in
9 any action or proceeding involving Sirius XM to determine royalty rates for sound
10 recordings.

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

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

27
28

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

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated:

By: _____
 PHILIP S. GUTIERREZ
 United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

Plaintiff,

v.

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

Defendants.

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

Hon. Philip S. Gutierrez

**[PROPOSED] ORDER AND FINAL
JUDGMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 16. The Action is dismissed with prejudice as to Sirius XM and, except as
27 provided in § _____ of the Stipulation, without costs to either party.
28

1 17. This Court has previously granted summary judgment in favor of
2 Plaintiff and against Sirius XM on the Performance Right Issue and the Commerce
3 Clause Issue. *See e.g.*, Dkt. 117 (Order granting Plaintiff’s Motion for Summary
4 Judgment); Dkt. 175 (Order denying Motion for Reconsideration). A bona fide
5 justiciable dispute remains between the Parties as to the Performance Right Issue
6 and the Commerce Clause Issue, that neither Party has waived by entering into the
7 Settlement. The Parties retain all procedural and substantive rights to proceed with
8 the New York Appeal and Florida Appeal and any further proceedings to the United
9 States Supreme Court, and, except for Sirius XM’s agreement not to appeal this
10 Court’s class certification rulings, to proceed with the California Appeal and any
11 further proceedings to the United States Supreme Court, to resolve those two
12 discrete issues. This limited agreement gives both Sirius XM and Plaintiff a
13 considerable financial stake in the appellate resolution of these two questions.

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

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

23 c. In the event that Sirius XM Prevails on the Commerce Clause
24 Issue in the Second Circuit, Eleventh Circuit, Ninth Circuit, or United States
25 Supreme Court, then Sirius XM’s going-forward royalty obligations to eligible
26 Settlement Class Members pursuant to the Royalty Program shall immediately
27 terminate. In such an event, the termination of Sirius XM’s royalty obligation shall
28

1 be prospective only and no funds previously disbursed to Settlement Class
2 Members under the Royalty Program shall revert back to Sirius XM.

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

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

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

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

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

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

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

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

8
9

10 **IT IS SO ORDERED.**

11 Dated:

12
13

By: _____
PHILIP S. GUTIERREZ
United States District Judge

14
15

16
17

18
19

20
21

22
23

24
25

26
27

28

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF PENDENCY OF CLASS ACTION SETTLEMENT

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

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

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

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

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

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

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

1. THE LITIGATION

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

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

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

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

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

2. SIRIUS XM'S POSITION

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

3. NOTICE

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

4. SETTLEMENT CLASS

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

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

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

For purposes of this Settlement Class definition:

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

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

5. SETTLEMENT BENEFITS

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

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

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

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

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

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

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

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

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

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

6. COURT APPROVAL OF ATTORNEYS' FEES AND EXPENSES

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

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

7. RESULT IF COURT APPROVES SETTLEMENT

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

8. RESULT OF FAILURE TO OPT OUT

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

9. TAX CONSEQUENCES OF SETTLEMENT

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

10. YOUR OPTIONS

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

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

	<p>deadline, you will not be bound by the terms of the Settlement, and you will be free, if you choose, to pursue your own lawsuit against Sirius XM based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control. If you do not submit a clear and timely request for exclusion to the Administrator, you will be bound by the Settlement, entitled to receive the benefits of the Settlement, and covenant not to sue Sirius XM during the applicable term for any claims based on its performance, distribution, reproduction, or other exploitation of Pre-1972 Sound Recordings that you own or control.</p>
--	---

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

11. FINAL APPROVAL HEARING

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

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

12. ADDITIONAL INFORMATION

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

PLEASE DO NOT CALL OR WRITE TO THE COURT FOR

INFORMATION OR ADVICE. DATED: _____, 2016 BY

ORDER OF THE UNITED STATES

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

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

What is this case about?

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

Am I in the Settlement Class?

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

What are the Settlement Benefits?

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

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

What are my Options?

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

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

Where Can I get More Information?

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

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

Attachment B

November 22, 2016

VIA FEDERAL EXPRESS

John P. Asiello, Clerk
Court of Appeals of the State of New York
20 Eagle Street
Albany, NY 12207

Re: *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, APL-2016-00001

Dear Mr. Asiello:

We are writing in response to this Court's letter of November 17, 2016, seeking comment on whether a proposed agreement between the parties in a related California action affects the certified questions argued before this Court on October 18, 2016.

As explained below, the proposed agreement does not affect the certified questions because the agreement's terms depend on the outcome of this proceeding and the federal appeal from which the questions arose. Under settled law, an agreement between parties to an appeal does not affect its justiciability where, as here, the parties retain a significant financial stake in the outcome of the appeal.

On November 13, 2016, the parties entered into a Stipulation of Class Action Settlement, subject to court approval, in *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. 13-CV-05693 (C.D. Cal. 2016). The proposed agreement addresses rights in pre-1972 recordings claimed by plaintiff Flo & Eddie, Inc., and other members of a nationwide class. Among other things, the agreement would provide Sirius XM with a license to play the recordings for a specified future term. But the agreement explicitly states that it does not resolve the action pending in this Court on the certified questions, or other appeals in Florida and California. To the contrary, the agreement explicitly makes its terms dependent on the outcome of this and the other actions. Specifically, the outcome of the appeals will determine (1) the royalty rate under the proposed license, and (2) the amount of compensation to be paid by Sirius XM for past performances of the pre-1972 recordings. The amount of past and future compensation will vary by millions of dollars depending on the resolution of the pending appeals.

As a general matter, a claim "becomes moot, and thus beyond the jurisdiction of a federal court, when subsequent events deprive the parties of any practical interest in the outcome of the litigation." *Republic Ins. Co. v. Masters, Mates & Pilots Pension Plan*, 77

GIBSON DUNN

John P. Asiello, Clerk
November 22, 2016
Page 2

F.3d 48, 51 (2d Cir. 1996). Under that principle, an appeal does *not* become moot when the parties enter into a contingent agreement that leaves them with “a considerable financial stake in the resolution of the question presented” on appeal. *Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982); see *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1131 (9th Cir. 2005) (en banc) (contingent settlement agreement “preserve[s] a live controversy” when plaintiffs would “obtain meaningful monetary relief” from successful appeal); *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir. 2002) (“[B]ecause the parties have a considerable financial stake, the case is not moot, and we will proceed to the merits of this appeal.” (quotation omitted)); *Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 224 (3d Cir. 2000) (settlement did not moot appeal where amount of damage payment depended on outcome of appeal, leaving “both parties” with “a significant stake in the outcome”); see also *In re Elec. Books Antitrust Litig.*, 639 F. App’x 724, 726 (2d Cir. 2016) (affirming approval of damages settlement contingent on outcome of liability appeal).

This Court’s precedents are to the same effect. Because the “ability of an appellate decision to directly and immediately impact the parties’ rights and interests is among the most important aspects of the mootness analysis,” *Veronica P. v. Radcliff A.*, 24 N.Y.3d 668, 671 (2015), this Court does not consider an appeal moot “if there remain undetermined rights or interests which the respective parties are entitled to assert,” *Matter of Grand Jury Subpoenas*, 72 N.Y.2d 307, 311 (1988). Under the proposed agreement here, the parties’ rights and interests in past compensation and future royalties remain undetermined and will be directly and immediately affected by the resolution of the certified questions.

Moreover, the proposed agreement includes several contingencies that may affect its viability. The California federal district court overseeing the action must both preliminarily and finally approve the agreement, after going through notice, opt outs and allowing for objectors. This process is anticipated to last roughly five months. Either party may terminate the agreement if a significant number of class members choose to opt out. And neither party has waived its right to seek review in the United States Supreme Court.

For these reasons, the proposed agreement has no effect on the certified questions argued before this Court on October 18, 2016.

GIBSON DUNN

John P. Asiello, Clerk
November 22, 2016
Page 3

Respectfully,



Caitlin J. Halligan
Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, N.Y. 10166-0193
(212) 351-3909
CHalligan@gibsondunn.com

Counsel for Flo & Eddie, Inc.



Jonathan D. Hacker
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5285
jhacker@omm.com

Counsel for Sirius XM Radio, Inc.

cc (via Federal Express):
Henry Gradstein, Esq.
Maryann R. Marzano, Esq.
Daniel B. Lifschitz, Esq.
Daniel M. Petrocelli, Esq.
Cassandra L. Seto, Esq.
Anton Metlitsky, Esq.

Nikki Kustok

From: cmecf@ca2.uscourts.gov
Sent: Tuesday, January 17, 2017 7:58 PM
To: Nikki Kustok
Subject: 15-1164 Flo & Eddie, Inc. v. Sirius XM Radio, Inc. "Letter RECEIVED"

*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

Court of Appeals, 2nd Circuit

Notice of Docket Activity

The following transaction was filed on 01/17/2017

Case Name: Flo & Eddie, Inc. v. Sirius XM Radio, Inc.
Case Number: [15-1164](#)
Document(s): [Document\(s\)](#)

Docket Text:

LETTER, on behalf of Appellant Sirius XM Radio, Inc., RECEIVED. Service date 01/17/2017 by CM/ECF.[1949177] [15-1164]

Notice will be electronically mailed to:

Mr. Stephen Blake Kinnaird, Attorney: stephenkinnaird@paulhastings.com, wendyphinny@paulhastings.com, daniellesusanj@paulhastings.com
Mr. Arun S. Subramanian, Attorney: asubramanian@susmangodfrey.com, cdacosta@susmangodfrey.com, nkustok@susmangodfrey.com
Jonathan Hacker, -: jhacker@omm.com
Mr. Robert Bruce Rich, -: bruce.rich@weil.com, mco.appellatecourts@weil.com, todd.larson@weil.com, jacob.ebin@weil.com, john.haigh@weil.com
Mr. Mitchell Stoltz, -: mitch@eff.org, madeleine@eff.org, mitch-stoltz-6272@ecf.pacerpro.com, madeleine-mulkern-1669@ecf.pacerpro.com
Brandon Butler, -: bbutler@wcl.american.edu
Eugene Volokh, Counsel: volokh@law.ucla.edu
Robert Rimberg, -: rlr@grlawpllc.com
Daniel Petrocelli, -: dpetrocelli@omm.com, jenniferlee@omm.com
Cassie Seto, -: cseto@omm.com, #nymanagingattorney@omm.com, pmcnally@omm.com, svolpe@omm.com
Henry Gradstein, -: hgradstein@gradstein.com, ssummers@gradstein.com
Maryann R. Marzano, -: mmarzano@gradstein.com, ssummers@gradstein.com
Mr. Adam Ross Bialek, -: adam.bialek@wilsonelser.com

Mr. Mohammed Raza Panjwani, -: raza@publicknowledge.org, dockets@publicknowledge.org

Michael Gervais, -: mgevais@susmangodfrey.com, mritter@susmangodfrey.com

Deborah Holmes, Deputy Clerk: Deborah_Holmes@ca2.uscourts.gov

Notice will be stored in the notice cart for:

Deborah Holmes, Deputy Clerk
Quality Control 1

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

Document Description: Letter

Original Filename: Sirius XM Radio Inc. - Jan. 17 2017 Letter Brief Regarding NY Court of Appeals Ruling.pdf

Electronic Document Stamp:

[STAMP acecfStamp_ID=1161632333 [Date=01/17/2017] [FileNumber=1949177-0]

[8c48fd904834289bf5b65e451793eca830d39975d79eb780f730bdc10079a352b102d73dff22523d643e359673cd9a00cf046c5ddf336cd8e0b24917ecab1908]]