

E-FILED 5/16/17

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

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

20 Plaintiff,

21 v.

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

24 Defendants.

Case No. 2:13-cv-05693-PSG-GJS

~~[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 January 27, 2017 the Court entered its Order granting
6 preliminary approval of the proposed settlement (“Preliminary Approval Order”)
7 (Dkt. #676). 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 February 6, 2017, and the Court held a Final
11 Approval Hearing on May 8, 2017 at 1:30 p.m., at which time all interested persons
12 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 1 to the Declaration of Steven G. Sklaver in Support of
21 Preliminary Approval of Settlement (Dkt. #666-4).

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

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

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

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1 6. The one entity that timely and validly requested exclusion from the
2 Settlement Class identified in the Declaration of Eric Kierkegaard, filed on April 10,
3 2017, is excluded. The entity (Gusto Records, Inc.) is neither included in nor bound
4 by this Order and Final Judgment and is not entitled to any recovery from the
5 settlement proceeds (including not being entitled to any recovery from the
6 Settlement Fund or Royalty Program) obtained through this Settlement.

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

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

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

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

3 11. Pursuant to Federal Rule of Civil Procedure 53, the Court hereby
4 appoints Magistrate Judge _____ to serve as Special Master for the
5 specific role provided for in Section VI.C of the Stipulation. Any specific challenge
6 to ownership or control must be brought within one hundred and twenty (120) days
7 after a claimant has made a claim to a specific Identified Pre-1972 Sound
8 Recording(s) or one hundred and twenty (120) days after another party has made a
9 conflicting claim to specific Identified Pre-1972 Sound Recording, whichever comes
10 later. All decisions by the Special Master may be appealed to the Court.

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

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

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

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

3 16. The Action is dismissed with prejudice as to Sirius XM and, except as
4 provided in Section VII of the Stipulation, without costs to either party.

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

18 a. In the event that Plaintiff Prevails on the Performance Right
19 Issue in the California Appeal and/or Florida Appeal, Sirius XM shall pay into the
20 Settlement Fund Escrow Account an additional five million dollars (\$5 million) per
21 appeal, for a total up to ten million (\$10 million) dollars.

22 b. In the event that Sirius XM Prevails on the Performance Right
23 Issue in the California Appeal and/or Florida Appeal, the royalty rate that Sirius XM
24 must pay pursuant to the Royalty Program shall be reduced by 2% points per appeal
25 (e.g., from 3.5% to 1.5%), except that the reduction shall be 1.5% for the Florida
26 Appeal (e.g., from 3.5% to 2.0%).

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

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

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

21 19. A separate order shall be entered regarding Class Counsel’s application
22 for attorneys’ fees and payment of expenses and incentive awards as allowed by the
23 Court. A separate order shall be entered regarding the proposed plan of allocation.
24 Such orders shall in no way disturb or affect this Judgment and shall be considered
25 separate and apart from this Judgment.

26 20. Without further order of the Court, the settling Parties may agree to
27 reasonable extensions of time to carry out any of the provisions of the Settlement.
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1 21. Without affecting the finality of this Judgment in any way, this Court
 2 hereby retains continuing jurisdiction over: (i) implementation of the Settlement; (ii)
 3 the allowance, disallowance or adjustment of any Class Member’s claim an any
 4 award or distribution of the Settlement Fund and/or the Royalty Program; (iii)
 5 disposition of the Settlement Fund and Royalty Fund; (iv) hearing and determining
 6 applications for attorneys’ fees, costs, interest and payment of expenses in the
 7 Action; (v) all settling Parties for the purpose of construing, enforcing and
 8 administering the Settlement and this Judgment; and (vi) other matters related or
 9 ancillary to the foregoing.

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

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

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 15 **IT IS SO ORDERED.**

16 DATED: 5/16/17

17 By: **PHILIP S. GUTIERREZ**
 18 PHILIP S. GUTIERREZ
 19 United States District Judge