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Attorneys for Defendant
Sirius XM Radio Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 13-05693 PSG (GJS)

Hon. Philip S. Gutierrez

DEFENDANT SIRIUS XM RADIO INC.'S LIMITED RESPONSE TO CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND COSTS

[DECLARATION OF CASSANDRA L. SETO FILED CONCURRENTLY HEREWITH]

Hearing Date: March 13, 2017
Hearing Time: 1:30 p.m.
Courtroom: 6A

Sirius XM submits this limited response to class counsel's fee motion to correct misstatements concerning the New York Court of Appeals' ruling in the related New York action and its impact on the Stipulation of Class Action Settlement pending before this Court. On December 20, 2016, the New York Court of Appeals held that "New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings." 2016 N.Y. LEXIS 3811, at *38 (N.Y. Dec. 20, 2016).

This ruling definitively resolves the performance-right issue under New York law, along with Flo & Eddie's claims challenging Sirius XM's performances of its pre-1972 recordings under New York copyright and unfair competition law, in Sirius XM's favor. *See* Seto Decl. Ex. A (Sirius XM's Jan. 17, 2017 letter brief to Second Circuit). Under the plain terms of the Stipulation, Sirius XM has prevailed on the performance-right issue in New York—which means the royalty rate Sirius XM may have to pay for future performances of class members' pre-1972 recordings must be reduced by 2% and Sirius XM is not required to pay additional compensation to class members at this time. *See* Doc. 666-4 § IV(B)(1)-(2).

In the fee motion, however, class counsel takes the remarkable position that Flo & Eddie prevailed on the performance-right issue in New York—meaning the royalty rate will not be reduced, Sirius XM is required to pay class members an additional $5 million, and class counsel is entitled to increased fees. Doc. 670 at 2 & n.2, 12 (asserting that Flo & Eddie's "unfair competition claims … remain viable"). This position is indefensible and reflects an attempt to rewrite and repudiate the Stipulation, in violation of its plain terms and the parties' extensively documented negotiations. *See* Seto Decl. Ex. B (meet-and-confer exchange).

Sirius XM will submit complete briefing addressing these issues if and when appropriate, but the parties' dispute may be moot, since class counsel has agreed to abandon its position if the Second Circuit determines that Flo & Eddie's performance claims are no longer viable. *See id.* ¶¶ 6-12. Depending on what the

Second Circuit rules, the matter may be submitted to this Court, with Sirius XM reserving all rights to rescind and challenge the Stipulation, oppose approval of the Stipulation, and oppose class counsel's fee motion. In the meantime, Sirius XM submits this limited response to correct the record and make clear that any fee award must take into account that, as a result of the New York Court of Appeals' ruling, the maximum possible recovery to class members is $35 million and a 3.5% prospective royalty rate.

Dated: January 26, 2017

O'MELVENY & MYERS LLP

By: /s/ Daniel M. Petrocelli
Daniel M. Petrocelli
Attorneys for Sirius XM Radio Inc.

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Attorneys for Defendant
Sirius XM Radio Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 13-05693 PSG (GJS)

Hon. Philip S. Gutierrez

DECLARATION OF CASSANDRA L. SETO IN SUPPORT OF DEFENDANT SIRIUS XM RADIO INC.'S LIMITED RESPONSE TO CLASS COUNSEL'S MOTION FOR ATTORNEYS' FEES AND COSTS

Hearing Date: March 13, 2017
Hearing Time: 1:30 p.m.
Courtroom: 6A

DECLARATION OF CASSANDRA L. SETO

I, Cassandra L. Seto, declare and state:

1. I am a partner at the law firm of O'Melveny & Myers LLP, counsel of record for defendant Sirius XM Radio Inc. ("Sirius XM") in the above-entitled action. I make this declaration in support of Sirius XM's Limited Response to Class Counsel's Motion for Attorneys' Fees and Costs. I have personal knowledge of the matters set forth in this declaration, and if called to testify thereto, I could and would do so competently.

2. Attached hereto as **Exhibit A** is a true and correct copy of Sirius XM's January 17, 2017 letter brief to the Second Circuit in *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. 15-1164 (2d Cir.) (without attachments).

3. Attached hereto as **Exhibit B** is a true and correct copy of an e-mail exchange between counsel for Sirius XM and counsel for Flo & Eddie, Inc. ("Flo & Eddie") and the class dated December 30, 2016 through January 26, 2017.

4. Attached hereto as **Exhibit C** is a true and correct copy of a proposed stipulation and amended class notice that I sent to counsel for Flo & Eddie and the class via e-mail on January 18, 2017.

5. Attached hereto as **Exhibit D** is a true and correct copy of revisions to the proposed stipulation (Exhibit C) that I received from counsel for Flo & Eddie and the class via e-mail on January 24, 2017.

6. On January 9, 2017, I participated in a telephonic meet-and-confer with Steven Sklaver, counsel for Flo & Eddie and the class. My colleague, Patrick McNally, also participated on behalf of Sirius XM. Mr. Sklaver stated that, in his view, the New York Court of Appeals' December 20, 2016 ruling left open the possibility that Flo & Eddie has a performance right under New York unfair competition law, and that Flo & Eddie therefore "prevailed" in the New York

appeal for purposes of the parties' Stipulation of Class Action Settlement ("Stipulation").

7. I reiterated that, as set forth in Sirius XM's January 4, 2017 e-mail (Exhibit B), that position was meritless and contrary to the parties' Stipulation. I also reiterated that Sirius XM reserves all rights to challenge and seek to rescind the Stipulation, oppose approval of the Stipulation, and oppose class counsel's fee motion based on class counsel's position—and in any event, that Sirius XM would need to submit a response to class counsel's fee motion in order to correct misstatements concerning the New York Court of Appeals' ruling and its impact.

8. Mr. Sklaver stated that class counsel would not pursue their position if the Second Circuit disagrees with their interpretation of the New York Court of Appeals' ruling or determines that Flo & Eddie's performance claims are no longer viable. He therefore proposed that the parties postpone raising their dispute to the Court until the Second Circuit has issued a decision.

9. I responded that there is no need to wait for the Second Circuit's decision, since the performance-right issue and claims have already been resolved in Sirius XM's favor, but would be willing to consider a stipulation to postpone resolution of the parties' dispute in the interest of efficiency. I also stated that the parties needed to apprise the Court of their dispute before the preliminary approval hearing, distribution of class notice (which, in its current form, makes no mention of the New York Court of Appeals' ruling or the parties' dispute), and final approval hearing, and asked whether Mr. Sklaver would stipulate to postpone those deadlines until the Second Circuit has issued a decision.

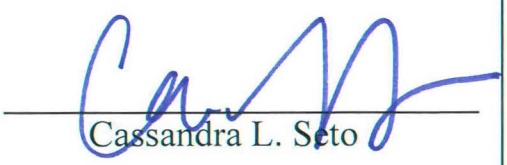
10. Mr. Sklaver agreed to consider that proposal and get back to me. He also agreed to consider a stipulation to amend the class notice to set forth the parties' dispute and get back to me on that issue as well. Mr. Sklaver stated that he would agree to a stipulation confirming that Sirius XM reserves all rights to

challenge class counsel's position and the parties' Stipulation—noting "you guys can reserve whatever rights you want"—and that Sirius XM's agreement to delay adjudication of the parties' dispute pending the Second Circuit's decision did not waive any such rights.

11. I had a follow-up phone call with Mr. Sklaver on January 11, 2017. Mr. Sklaver stated that he was not willing to stipulate to postpone any deadlines pending the Second Circuit's decision (although he indicated that the parties could revisit that issue in a few weeks). Mr. Sklaver stated that he would agree to a stipulation confirming that Sirius XM reserves all rights to challenge class counsel's position and the parties' Stipulation, and that Sirius XM's agreement to delay adjudication of the parties' dispute pending the Second Circuit's decision did not waive any such rights, and amending the proposed class notice attached to the Stipulation to apprise prospective class members of the parties' dispute.

12. On January 18, 2017, I sent Mr. Sklaver a proposed stipulation and amended class notice that was consistent with our discussions on January 9 and 11, 2017. On January 24, 2017, Mr. Sklaver responded, indicating that he would agree to the amended class notice, but would not agree to stipulate that Sirius XM reserves its rights to challenge the parties' Stipulation. I responded that, because Mr. Sklaver had reneged on his agreement to a stipulation confirming Sirius XM's reservation of rights, Sirius XM would separately advise the Court of its position. The parties' complete written exchange is reflected in Exhibits B, C, and D.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed on this 26th day of January 2017 at Los Angeles, California.



Cassandra L. Seto

EXHIBIT A

O'MELVENY & MYERS LLP

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January 17, 2017

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

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,

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

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).

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

§ 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.

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[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).

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

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:

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[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.'").

- 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

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[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.

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 pubic 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

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

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

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[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).

EXHIBIT B

From: Seto, Cassandra
Sent: Thursday, January 26, 2017 1:47 PM
To: 'Steven G. Sklaver'
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision; Rachel S. Black; Michael Gervais; Daniel Lifschitz (dlifschitz@gradstein.com); Joel Tan
Subject: RE: Sirius XM Settlement - meet and confer request

You're misstating our discussions and the parties' agreement, and we will so advise the Court.

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Wednesday, January 25, 2017 6:18 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision; Rachel S. Black; Michael Gervais; Daniel Lifschitz (dlifschitz@gradstein.com); Joel Tan
Subject: RE: Sirius XM Settlement - meet and confer request

Cassie,

The parties apparently have a dispute about how the settlement agreement applies to the current circumstances. The parties agreed that the Court will interpret the settlement agreement (*see, e.g.*, Section X.E of the settlement) and we'll abide by the result either way—although we are comfortable that our position is supported by the plain meaning of the contract. We stand by the agreement and do not, to use your language, "repudiate" it.

There isn't any basis for anyone to rescind the agreement, or any reason to litigate the issue via a debate buried within a proposed, new stipulation related to class notice, which is what your draft proposed. We certainly never agreed that you had or reserved any right to rescind the settlement agreement, although we can't stop you from seeking that remedy if you believe there is some basis for doing so, which we'd obviously oppose if you did.

If by "advise the court of [y]our position" you mean you intend to bring a motion, we should meet and confer per the local rules, as we think the issue can only be presented by a motion requesting that the Court construe and enforce the settlement agreement should either of us want to have the Court rule on it before the Second Circuit rules. We can meet to discuss that motion after the hearing on Monday, if you do intend to file a motion. Let me know if that works. But if you plan to do something else, please attach and quote this email within whatever it is that you are filing.

The fact that SXM is now apparently choosing to fight so hard, with so much vitriol, to try to get out of the settlement speaks volumes as to how good the settlement is for the Class.

Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Email: ssklaver@susmangodfrey.com

Direct: 310-789-3123
Web Bio

From: Seto, Cassandra [mailto:cseto@omm.com]
Sent: Wednesday, January 25, 2017 5:51 PM
To: Steven G. Sklaver
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision; Rachel S. Black; Michael Gervais; Daniel Lifschitz (dlifschitz@gradstein.com); Joel Tan
Subject: RE: Sirius XM Settlement - meet and confer request

These comments and proposed revisions are contrary to our meet and confer discussions on January 9 and 11.

We made clear, in our emails and discussions, that this is not a mere issue of contractual interpretation. Rather, your position constitutes an improper attempt to re-trade, rewrite, and repudiate the parties' settlement agreement, in violation of its plain terms and the parties' extensive negotiations. We also made clear that if you continue to pursue that position, we would exercise our rights to rescind and challenge the agreement, oppose approval of the settlement, and oppose your motion for attorneys' fees -- and that we need to raise these issues now, before preliminary approval, distribution of class notice, and final approval.

During our discussions on January 9 and 11, you said it was premature to raise these issues with the Court, since you would drop the arguments in your December 30 email if the Second Circuit disagrees with your reading of the New York Court of Appeals' ruling and/or concludes that Flo & Eddie's performance claims are no longer viable. You also agreed to a stipulation confirming that Sirius XM reserves all rights to rescind and challenge the settlement, and does not waive any such rights by waiting to assert these arguments until the Second Circuit has issued a decision.

It appears that you have now reneged on that agreement, in which case we will separately advise the Court of our position. As for the revised class notice, we will circulate a new stipulation.

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Tuesday, January 24, 2017 10:34 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision; Rachel S. Black; Michael Gervais; Daniel Lifschitz (dlifschitz@gradstein.com); Joel Tan
Subject: RE: Sirius XM Settlement - meet and confer request

Edits to and comments re: the proposed stip here; probably worth a phone call to discuss; we're ok with your proposed edits to the class notice.

Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Email: ssklaver@susmangodfrey.com
Direct: 310-789-3123
Web Bio

From: Seto, Cassandra [mailto:cseto@omm.com]
Sent: Tuesday, January 24, 2017 4:57 PM
To: Steven G. Sklaver
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

We don't believe further briefing is necessary and thus object to your request, though of course we will submit a reply brief if the Court so requests.

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Monday, January 23, 2017 5:53 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

You count weekends! Ok, yes, we will respond by tomorrow.

On the 2d Circuit letter briefs submitted, we propose by stipulation seeking leave for both sides to file 5 page replies on a mutually agreed deadline (2 weeks from whenever, but open to alternatives, quicker or longer). Let us know your thoughts on that.

Thanks,
Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Email: ssklaver@susmangodfrey.com
Direct: 310-789-3123
Web Bio

From: Seto, Cassandra [mailto:cseto@omm.com]
Sent: Monday, January 23, 2017 5:48 PM
To: Steven G. Sklaver
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

It's been five days since we circulated the proposed stipulation and amended class notice. Please let us know your position by tomorrow.

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Thursday, January 19, 2017 4:17 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

Thanks we will review and report back.

Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Email: ssklaver@susmangodfrey.com
Direct: 310-789-3123
Web Bio

From: Seto, Cassandra [mailto:cseto@omm.com]
Sent: Wednesday, January 18, 2017 2:52 PM
To: Steven G. Sklaver
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

Steve,

Further to our discussions last week, attached is a proposed stipulation and amended class notice.

We reserve all rights.

-----Original Message-----
From: Seto, Cassandra
Sent: Monday, January 09, 2017 9:37 AM
To: 'Steven G. Sklaver'
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

I will call your office at 4.45 p.m. We can discuss the topics contemplated by Local Rule 7-3.

-----Original Message-----
From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Saturday, January 07, 2017 5:46 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: Re: Sirius XM Settlement - meet and confer request

4 pm is no longer available but 4:45 pm or after is. Let me know what works. We will discuss your new Sheridan filings and proposals in those cases too.

On Jan 7, 2017, at 5:34 PM, Seto, Cassandra <cseto@omm.com<mailto:cseto@omm.com>> wrote:

I will call your office on Monday at 4.00 p.m. We can discuss the issues in your email then.

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Wednesday, January 04, 2017 2:32 PM
To: Seto, Cassandra
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: RE: Sirius XM Settlement - meet and confer request

We will see you on January 9 at 1, 2, or 4 p.m. Please let me know a preferred time. Let me know who will be here and I will have added to the security list.

We can discuss the substance and rhetoric in the below then. This is a straightforward issue, and one that can be answered as a matter of contract interpretation, as the parties agreed in the settlement. None of this should impact either the fee motion or final approval -- both of which contemplated ongoing appeals in NY, CA and FL.

We should also discuss the timing of having Judge Gutierrez address this issue, including waiting until after the Second Circuit rules, based on the supplemental briefs the Court requested and we are submitting in that court in 2 weeks.

Thanks,
Steven G. Sklaver
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Email: ssklaver@susmangodfrey.com <mailto:ssklaver@susmangodfrey.com %20>
Direct: 310-789-3123

Web Bio<http://www.susmangodfrey.com/Attorneys/Steven-G-Sklaver/#Pane1>

From: Seto, Cassandra [mailto:cseto@omm.com]
Sent: Wednesday, January 04, 2017 12:35 PM
To: Steven G. Sklaver
Cc: Henry Gradstein; Maryann Marzano; Steve Morrissey; Kalpana Srinivasan; Petrocelli, Daniel; Winter, Vision
Subject: FW: Sirius XM Settlement - meet and confer request

Steven,

Please see the response below, sent on Dan's behalf.

* * *

Steven,

Your position is frivolous and asserted in a bad-faith attempt to re-trade, rewrite, and repudiate the parties' settlement agreement. The New York Court of Appeals ruled definitively that there is no performance right under New York law. Under our settlement agreement, that means the prospective royalty rate is reduced by 2% and no additional payment beyond the $25 million is due. If you persist in attempting to repudiate the agreement, your actions will be met with stiff consequences, including Sirius XM's right to rescind and terminate the agreement, oppose approval of the settlement, and oppose your motion for attorneys' fees -- which, among other things, mischaracterizes the New York Court of Appeals' ruling and the parties' settlement agreement and overstates the potential recovery by the Flo & Eddie class. In all events, your motion for attorneys' fees must be amended to correct the inaccurate representations regarding the New York Court of Appeals' ruling and its effect on our settlement.

Your attempt to extract an additional $5 million and avoid the royalty rate reduction despite losing the New York appeal destroys the entire basis of our settlement, as evidenced by the agreement's explicit provisions and our extensively documented negotiations. See, e.g., Nov. 13, 2016 Settlement Agreement ¶¶ I(A)(45) ("'Sirius XM Prevails' means, in the context of the California Appeal, New York Appeal, and the Florida Appeal, that as a result of the appeal, Sirius XM is entitled to publicly perform Pre-1972 Sound Recordings owned by Plaintiff without having to obtain permission from and pay compensation to Plaintiff."); I(A)(29) ("'Performance Right Issue' means the question of whether Sirius XM is entitled to publicly perform Pre-1972 Sound Recordings owned by Plaintiff without having to obtain permission from and pay compensation to Plaintiff."); IV(B)(1) ("In the event that Plaintiff Prevails on the Performance Right Issue in the New York Court of Appeals, Sirius XM shall pay into the Settlement Fund Escrow Account an additional five million dollars ($5 million)."); IV(B)(2) ("In the event that Sirius XM Prevails on the Performance Right Issue in the New York Court of Appeals, the prospective royalty rate provided for in Section IV.C.2 shall be reduced by 2% points (i.e., from 5.5% to 3.5%, if not already reduced as provided herein).").

The New York Court of Appeals held that New York law does not recognize a performance right in pre-1972 recordings. Slip Op. at 35 ("We hold that New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings."); id. at 1-2 ("Because New York common-law copyright does not recognize a right of public performance for creators of sound recordings, we answer the certified question in the negative."); id. at 28 ("Simply stated, New York's common-law copyright has never recognized a right of public performance for pre-1972 sound recordings. Because the consequences of doing so could be extensive and far-reaching, and there are many competing interests at stake, which we are not equipped to address, we decline to create such a right for the first time now."). As a result of that ruling, Sirius XM is entitled to publicly perform pre-1972 recordings owned by Flo & Eddie without having to obtain permission and pay compensation.

The dictum on the last page of the Court's opinion about "other potential avenues for recovery," Slip Op. at 35, does nothing to change or diminish, let alone eviscerate, the Court's ruling meticulously explained in the prior 34 pages. Nothing in the dictum states or remotely suggests that despite having no performance right under New York law

plaintiffs can nonetheless resort to unfair competition or other claims to bar Sirius XM from broadcasting their pre-1972 recordings or seek damages for doing so unless it first obtains plaintiffs' consent and meets their payment demands, precisely as though they did have a performance right. To the contrary, the Second Circuit expressly recognized that Flo & Eddie's unfair competition claim would fail if the New York Court of Appeals answered the certified question in the negative and held that New York law does not provide pre-1972 recording owners a public performance right -- which is exactly what it did. Appeal No. 15-1164, Doc. 189 at 8 & n.4 (Flo & Eddie's "unfair-competition claim depends upon the resolution of the certified question" and "rise[s] and fall[s]" with resolution of that question). Indeed, Judge McMahon herself made clear that her ruling on Flo & Eddie's unfair competition claim was premised on the assumption that New York law provides a public performance right, and if that assumption were "incorrect," then Flo & Eddie's "copyright infringement and unfair competition claims … will have to be dismissed." Case No. 1:13-cv-05784-CM, Doc. 118 at 3 (emphasis added). Notably, your statements to the press acknowledged that Flo & Eddie decisively lost the New York appeal -- in contrast to the remarkable statement in your email that Flo & Eddie, in fact, "prevailed" in that appeal. Anandashankar Mazumdar, No Performance Right for Oldies Under New York State Law (Dec. 23, 2016), available at https://www.bna.com/no-performance-right-n73014449047/<https://na01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fwww.bna.com%2Fno-performance-right-n73014449047%2F&data=01%7C01%7CPatrick.Donnelly%40siriusxm.com%7C183f60beba144c85c97608d434d723ef%7Cc69f0fed51c54fedbe55ba0d512d25ab%7C0&sdata=v9PdpPu%2FNnq8aaqfJ1gz01Cd0aPNexv0XfdzcX%2FaCbE%3D&reserved=0> ("'The fight rages on,' Flo & Eddie's counsel, Henry Gradstein of Gradstein & Marzano PC, told Bloomberg BNA. 'I have 49 other states to fight in.'").

Your threatened motion would be utterly baseless and distract from our shared goal of obtaining final approval of the settlement agreement. If you decide to proceed, we will pursue all available relief -- including rescinding and/or terminating the agreement and opposing approval of the settlement and your pending motion for attorneys' fees.

We are available to further meet and confer the morning of Monday, January 9.

Dan

From: Steven G. Sklaver [mailto:ssklaver@SusmanGodfrey.com]
Sent: Friday, December 30, 2016 11:40 AM
To: Petrocelli, Daniel; Seto, Cassandra; Winter, Vision
Cc: Henry Gradstein (hgradstein@gradstein.com<mailto:hgradstein@gradstein.com>); Steve Morrissey; Kalpana Srinivasan; Maryann Marzano
Subject: Sirius XM Settlement - meet and confer request

Dan, Cassie, and Vision,

We write pursuant to the local rules to schedule a meet and confer to discuss a motion to enforce the settlement agreement in light of the New York Court of Appeals' recent decision. Let me know if Wednesday, Jan. 4, 2017 works in the afternoon or other proposed dates/times. We have read some comments in the press in which Dan has explicitly stated that Sirius XM believes the decision drops the royalty to 3.5% and Sirius XM will not be making an additional $5 million payment into the settlement fund. If that is Sirius XM's position, please confirm and let us know your support for that position based on the plain language of the agreement.

Under the Settlement Agreement, after final approval, Sirius XM is obligated to make the additional $5 million payment unless the New York Court of Appeals ("NYCOA") determined that "Sirius XM is entitled to publicly perform Pre-1972 Sound Recordings owned by Plaintiff without having to obtain permission from and pay compensation to Plaintiff." The federal District Court had held that Sirius XM's public performance of Flo & Eddie's recordings constituted unfair competition in violation of New York law ("Sirius Engaged in Unfair Competition….Sirius harms Flo and Eddie's sales and

potential licensing fees (even if the latter market is not yet extant) by publicly performing Turtles sound recordings.") Flo & Eddie, Inc. v. Sirius XM Inc, 62 F. Supp. 3d 325, 348-49 (S.D.N.Y. 2014). The NYCOA did not hold otherwise. While it held that public performance of Pre-1972 Sound Recordings does not provide a basis for a copyright claim under New York common law, it expressly further held that Plaintiff's unfair competition claim based on public performance of Pre-1972 Sound Recordings remained viable, and thus did not upset the federal district court's decision that Sirius XM's public performance of Plaintiff's recordings constituted unfair competition in violation of New York law. Flo & Eddie, Inc. v. Sirius XM Inc., 2016 NY Slip. Op. 08480 at 35 (N.Y. Ct. App. Dec. 20, 2016) ("[S]ound recording owners may have other causes of action, such as unfair competition, which are not directly tied to copyright law. . .; [t]hus, even in the absence of a common law right of public performance, plaintiff has other potential avenues of recovery"). Under the Settlement Agreement, this is a circumstance in which "Plaintiff Prevails" and an additional $5 million is owed by Sirius XM; in the event of any dispute on that issue, Plaintiff will need to bring a motion to enforce the Settlement Agreement.

Let us know a time to meet and discuss or, if Sirius XM agrees with our position and the press reports were inaccurate, let us know that too.

Putting all of these issues aside, we wish you and the entire OMM team a Happy and Healthy New Year.

Thanks,
Steven G. Sklaver
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Direct: 310-789-3123
Web Bio<http://www.susmangodfrey.com/Attorneys/Steven-G-Sklaver/#Pane1>

EXHIBIT C

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Flo & Eddie, Inc. and the Class

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Attorneys for Defendant
Sirius XM Radio Inc.

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

JOINT STIPULATION REGARDING CLASS ACTION SETTLEMENT

[[PROPOSED] ORDER FILED HEREWITH]

Courtroom: 880

JOINT STIPULATION

This stipulation is made by and between plaintiff Flo & Eddie, Inc. ("Flo & Eddie") on behalf of itself and the Settlement Class[1] (collectively, "plaintiffs"), on the one hand, and defendant Sirius XM Radio Inc. ("Sirius XM"), on the other hand, through their respective undersigned counsel of record, as follows:

I. The Stipulation of Class Action Settlement

WHEREAS, on November 13, 2016, the parties signed a Stipulation of Class Action Settlement (Doc. 666-4);

WHEREAS, because the purpose of the Stipulation was to resolve plaintiffs' claims nationwide while allowing the parties to obtain guidance from the New York, Florida, and California appellate courts on the Performance Right Issue and the Commerce Clause Issue, certain financial terms that are central to the Stipulation are contingent on appellate resolution of those issues;

WHEREAS, of particular relevance here, the Stipulation provides that:

- "In the event that Sirius XM Prevails on the Performance Right Issue in the New York Court of Appeals, the prospective royalty rate provided for in Section IV.C.2 shall be reduced by 2% points (i.e., from 5.5% to 3.5%, if not already reduced as provided herein)" (*id.* § IV(B)(2));
- "In the event that Flo & Eddie Prevails on the Performance Right Issue in the New York Court of Appeals, Sirius XM shall pay into the Settlement Fund Escrow Account an additional five million dollars ($5 million)" (*id.* § IV(B)(1));

WHEREAS, on November 15, 2016, the Court issued a scheduling order setting a preliminary approval hearing for January 30, 2017 and a final approval hearing for March 13, 2017 (Doc. 665);

---

[1] Unless otherwise noted, all capitalized terms used herein shall have the meaning given those capitalized terms in the parties' Stipulation of Class Action Settlement. (Doc. 666-4.)

WHEREAS, pursuant to the Stipulation, notice will be distributed to prospective members of the Settlement Class "within ten (10) days following the entry of the Preliminary Approval Order" and the opt-out period will close "thirty (30) days after the notice date" (Doc. 666-4 § VI(B));

II. The New York Court of Appeals' Decision

WHEREAS, in the New York Appeal, the Second Circuit issued a certification order on April 13, 2016 providing: "A significant and unresolved issue of New York law is determinative of this appeal: 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? Accordingly, we CERTIFY this question to the New York Court of Appeals and reserve decision" (Doc. 288, Ex. A at 1);

WHEREAS, the New York Court of Appeals issued a decision on December 20, 2016 providing: "We hold that New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings. Accordingly, the certified question should be answered in the negative." (Attachment B at 35 (*Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. CTQ-2016-00001 (N.Y. Dec. 20, 2016));

WHEREAS, the parties disagree as to the impact of the New York Court of Appeals' ruling on the Stipulation:

- **Sirius XM's Position.** [To be exchanged simultaneously]
- **Flo & Eddie's Position.** [To be exchanged simultaneously]

WHEREAS, on January 17, 2017, the parties submitted supplemental briefing to the Second Circuit addressing the effect of the New York Court of Appeals' ruling on the New York Appeal (Attachments C & D, *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. 15-1164 (2d Cir.), Docs. 215 & 216);

WHEREAS, the parties expect the Second Circuit to issue a decision and final mandate in the New York Appeal shortly;

WHEREAS, if the Second Circuit does not adopt Flo & Eddie's position that its performance claims remain viable in New York, Flo & Eddie will concede that Sirius XM has "Prevail[ed] on the Performance Right Issue in the New York Court of Appeals " pursuant to the Stipulation and the parties' dispute will be moot;

WHEREAS, Sirius XM maintains that it has already "Prevail[ed] on the Performance Right Issue in the New York Court of Appeals" pursuant to the Stipulation, but in the interest of efficiency, agrees to postpone adjudication of the parties' dispute until after the Second Circuit's decision;

WHEREAS, the parties agree that the most efficient approach is to postpone adjudication of the parties' dispute until after the Second Circuit's decision, which could moot that dispute;

III. <u>This Stipulation</u>

WHEREAS, the parties have agreed to enter into this stipulation to: (1) confirm that Sirius XM reserves all rights to rescind and challenge the Stipulation, oppose approval of the settlement, and oppose class counsel's fee motion if Flo & Eddie maintains the position asserted *supra* at __, and Sirius XM's agreement to postpone adjudication of these issues pending the Second Circuit's decision is not intended to waive, and does not waive, any such rights; and (2) amend the proposed Class Notice attached to the Stipulation in order to apprise prospective members of the Settlement Class of the parties' dispute;

THEREFORE, the parties hereby stipulate and respectfully request that the Court enter an order providing that: (1) Sirius XM reserves all rights to rescind and challenge the Stipulation, oppose approval of the settlement, and oppose class counsel's fee motion if Flo & Eddie maintains the position asserted *supra* at __, and Sirius XM's agreement to postpone adjudication of these issues pending the Second Circuit's decision is not intended to waive, and does not waive, any such rights; and (2) the proposed Class Notice shall be amended as reflected in Attachment A to this stipulation.

Dated: January 18, 2017

O'MELVENY & MYERS LLP

By: /s/
DANIEL M. PETROCELLI
Attorneys for Sirius XM Radio Inc.

Dated: January 18, 2017

SUSMAN GODFREY LLP

By: /s/
STEVEN G. SKLAVER
Attorneys for Flo & Eddie, Inc. and the Class

Attestation

I hereby attest that the other signatories listed herein, on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: January 18, 2017

O'MELVENY & MYERS LLP

By: /s/
DANIEL M. PETROCELLI
Attorneys for Sirius XM Radio Inc.

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, additional payments ~~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 (the amount of which ~~as high as 5.5%~~ depends~~ing~~ 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.

- On December 20, 2016, the New York Court of Appeals issued a decision in the New York appeal providing: "We hold that New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings." *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 2016 N.Y. Slip. Op. 08480, at 16 (Dec. 20, 2016). The parties dispute whether, as a result of this ruling, Sirius XM has prevailed on the performance right issue in New York—meaning the royalty rate has been reduced by 2% points (to a maximum of 3.5%) and no additional $5 million payment is required (meaning the maximum amount of additional payments is $10 million)—or Plaintiff has prevailed on that issue in New York—meaning the royalty rate has not been reduced and an additional $5 million payment is required. In the event the parties are not able to resolve this dispute, it will be adjudicated in subsequent proceedings.

- 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	**Stay in the Lawsuit. Await the outcome. Receive the benefits of this Settlement if it is approved.** 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. 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@susgmangodfrey.com.
EXCLUDE YOURSELF	**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**. 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. You may exclude yourself with a written request sent that is received no later than __, 2016, *i.e.*, 30 days from the beginning of the Notice period, that is sent to: Flo & Eddie v. Sirius XM — 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. If your exclusion request is properly submitted and received before the

	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.

OBJECT	**If you are a member of the Settlement Class, you may object to the Settlement.** 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. • If you object to the proposed Settlement, you must do so in writing on or before __, 2017, *i.e.*, 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.e.*, 45 days before the Final Approval Hearing. Class Counsel's application will be filed no later than _____, 2017, *i.e.*, 70 days before the Final Approval Hearing and will also be posted on the settlement website. 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). 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. Class Members who do not make their objections in a timely manner will waive all objections, their right to comment at the Fairness

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. A ruling has already been issued in one appeal. Sirius XM contends that it won that appeal, meaning the maximum royalty rate is 3.5% and the maximum amount of additional payments is $!0 million. Plaintiff contends that Sirius XM did not win that appeal, meaning the maximum royalty rate is 5.5% and the maximum amount of additional payments is $15 million. If the parties are not able to resolve this dispute, it will be adjudicated in court. 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.

EXHIBIT D

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Attorneys for Defendant
Sirius XM Radio Inc.

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

JOINT STIPULATION REGARDING CLASS ACTION SETTLEMENT

[[PROPOSED] ORDER FILED HEREWITH]

Courtroom: 880

JOINT STIPULATION

This stipulation is made by and between plaintiff Flo & Eddie, Inc. ("Flo & Eddie") on behalf of itself and the Settlement Class[1] (collectively, "plaintiffs"), on the one hand, and defendant Sirius XM Radio Inc. ("Sirius XM"), on the other hand, through their respective undersigned counsel of record, as follows:

I. The Stipulation of Class Action Settlement

WHEREAS, on November 13, 2016, the parties signed a Stipulation of Class Action Settlement (Doc. 666-4);

WHEREAS, ~~because the purpose of~~ the Stipulation ~~was to~~ resolved plaintiffs' claims nationwide while allowing the parties to obtain guidance from the New York, Florida, and California appellate courts on the Performance Right Issue and the Commerce Clause Issue

WHEREAS, certain financial terms ~~that are central to the Stipulation~~ are contingent on appellate resolution of those issues as outlined in IV(B) of the Stipulation;

WHEREAS, ~~of particular relevance here,~~ the Stipulation provides that:

- "In the event that Sirius XM Prevails on the Performance Right Issue in the New York Court of Appeals, the prospective royalty rate provided for in Section IV.C.2 shall be reduced by 2% points (i.e., from 5.5% to 3.5%, if not already reduced as provided herein)" (*id.* § IV(B)(2));
- "In the event that Flo & Eddie Prevails on the Performance Right Issue in the New York Court of Appeals, Sirius XM shall pay into the Settlement Fund Escrow Account an additional five million dollars ($5 million)" (*id.* § IV(B)(1));

[1] Unless otherwise noted, all capitalized terms used herein shall have the meaning given those capitalized terms in the parties' Stipulation of Class Action Settlement. (Doc. 666-4.)

- **WHEREAS,** the Stipulation also provides that "'Sirius XM Prevails' means, in the context of the California Appeal, New York Appeal, and the Florida Appeal, that as a result of the appeal, Sirius XM is entitled to publicly perform Pre-1972 Sound Recordings owned by Plaintiff without having to obtain permission from and pay compensation to Plaintiff. Any other outcome or resolution, including any failure to pursue or perfect an appeal by Sirius XM, shall be considered one in which ~~'Plaintiff Prevails.'~~" (§I (45));

WHEREAS, on November 15, 2016, the Court issued a scheduling order setting a preliminary approval hearing for January 30, 2017 and a final approval hearing for March 13, 2017 (Doc. 665);

WHEREAS, pursuant to the Stipulation, notice will be distributed to prospective members of the Settlement Class "within ten (10) days following the entry of the Preliminary Approval Order" and the opt-out period will close "thirty (30) days after the notice date" (Doc. 666-4 § VI(B));

II. The New York Court of Appeals' Decision

WHEREAS, in the New York Appeal, the Second Circuit issued a certification order on April 13, 2016 providing: "A significant and unresolved issue of New York law is determinative of this appeal: 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? Accordingly, we CERTIFY this question to the New York Court of Appeals and reserve decision" (Doc. 288, Ex. A at 1);

WHEREAS, the New York Court of Appeals issued a decision on December 20, 2016 providing: "We hold that New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings. Accordingly, the certified question should be answered in the negative." (Attachment B at 35 (*Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. CTQ-2016-00001 (N.Y. Dec. 20, 2016));

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WHEREAS, the New York Court of Appeals also recognized Flo & Eddie had "prevailed in the District Court on its causes of action alleging unfair competition and unauthorized copying of sound recordings" and held that the lack of a right of public performance under common-law copyright did not defeat those claims, which provide alternative "potential avenues of recovery." *Id.* at 35.

WHEREAS, the parties disagree as to the impact of the New York Court of Appeals' ruling on the Stipulation and whether certain additional contingencies have been triggered:

- **Sirius XM's Position.** [To be exchanged simultaneously]
- **Flo & Eddie's Position.** [To be exchanged simultaneously]

WHEREAS, on January 17, 2017, the parties submitted supplemental briefing to the Second Circuit addressing the effect of the New York Court of Appeals' ruling on the New York Appeal (Attachments C & D, *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Appeal No. 15-1164 (2d Cir.), Docs. 215 & 216);

WHEREAS, the parties expect the Second Circuit to issue a decision ~~and final mandate~~ in the New York Appeal shortly;

~~**WHEREAS**, if the Second Circuit does not adopt Flo & Eddie's position that its performance claims remain viable in New York, Flo & Eddie will concede that Sirius XM has "Prevail[ed] on the Performance Right Issue in the New York Court of Appeals " pursuant to the Stipulation and the parties' dispute will be moot;~~

~~**WHEREAS**, Sirius XM maintains that it has already "Prevail[ed] on the Performance Right Issue in the New York Court of Appeals" pursuant to the Stipulation, but in the interest of efficiency, agrees to postpone adjudication of the parties' dispute until after the Second Circuit's decision;~~

WHEREAS, any disputes that remain between the parties following the Second Circuit ruling will be raised to this Court, which retains jurisdiction of "all matters relating to the administration, consummation, implementation, enforcement, and interpretation of the terms of this Stipulation." (Doc. 666-4 § VI(E));

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Comment [SS1]: We do not need to insert positions now; that's premature and defeats the entire point of the stipulation

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~~the parties agree that the most efficient approach is to postpone adjudication of the parties' dispute until after the Second Circuit's decision, which could moot that dispute~~;

III. This Stipulation

WHEREAS, the parties have agreed to enter into this stipulation to~~:~~ ~~(1) confirm that Sirius XM reserves all rights to rescind and challenge the Stipulation, oppose approval of the settlement, and oppose class counsel's fee motion if Flo & Eddie maintains the position asserted *supra* at __, and Sirius XM's agreement to postpone adjudication of these issues pending the Second Circuit's decision is not intended to waive, and does not waive, any such rights; and~~ ~~(2)~~ amend the proposed Class Notice attached to the Stipulation in order to apprise prospective members of the Settlement Class of the parties' dispute;

THEREFORE, the parties hereby stipulate and respectfully request that the Court enter an order providing that~~:~~ ~~(1) Sirius XM reserves all rights to rescind and challenge the Stipulation, oppose approval of the settlement, and oppose class counsel's fee motion if Flo & Eddie maintains the position asserted *supra* at __, and Sirius XM's agreement to postpone adjudication of these issues pending the Second Circuit's decision is not intended to waive, and does not waive, any such rights; and~~ ~~(2)~~ the proposed Class Notice shall be amended as reflected in Attachment A to this stipulation.

Dated: January 18, 2017

O'MELVENY & MYERS LLP

By: /s/
DANIEL M. PETROCELLI
Attorneys for Sirius XM Radio Inc.

Comment [SS2]: We don't understand this position. The settlement provides that this Court construes any disputes about the terms of the settlement. My understanding of this stipulation is that SXM wants to make clear that by waiting for the 2d Cir to rule on our competing letters, plaintiffs agree that you are not waiving any potential arguments that you may need to raise to this court about what the settlement means and why you believe you prevailed – so, for example, we would not argue that preliminary approval or the Court's approval of our fee request (and no objection by SXM to that, which is already agreed to in the settlement) somehow means that we prevailed in NY. But this says you may want to reserve the right to RESCIND the settlement? Let's discuss. I mean, if you want to try to rescind the settlement, maybe we should just meet and confer pursuant to the LR and after laying out the basis for rescission, you should file that motion and see what Judge Gutierrez says about it. But we have no problem saying that you have reserved all rights and arguments as to why you prevailed in NY.

Comment [SS3]: Same point as above

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Dated: January 18, 2017

SUSMAN GODFREY LLP

By: /s/
STEVEN G. SKLAVER

Attorneys for Flo & Eddie, Inc. and the Class

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Attestation

I hereby attest that the other signatories listed herein, on whose behalf the filing is submitted, concur in the filing's content and have authorized the filing.

Dated: January 18, 2017

O'MELVENY & MYERS LLP

By: /s/
DANIEL M. PETROCELLI
Attorneys for Sirius XM Radio Inc.

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