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15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

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

20 Plaintiff,

21 v.

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

24 Defendants.

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

Hon. Philip S. Gutierrez

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

[PROPOSED] ORDER GRANTING  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT

1           The parties to the above-captioned action have entered into a Stipulation of  
2 Class Action Settlement, dated November 13, 2016 (the “Stipulation”), together  
3 with the Exhibits annexed thereto (the “Settlement”), to settle the above-captioned  
4 class action in its entirety, and Plaintiff has applied for an order preliminarily  
5 approving the terms and conditions of the Settlement, which Sirius XM supports.  
6 All capitalized terms used in this Order have the meaning as defined in the  
7 Stipulation, which is incorporated herein by reference.

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

10           IT IS HEREBY ORDERED that:

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

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

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

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

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

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

22 6. The Court finds that the certification of the Settlement Class for  
23 purposes of the Settlement is warranted because: (i) the Settlement Class is so  
24 numerous that joinder is impracticable; (ii) plaintiff's claims present common  
25 issues that are typical of the Settlement Class; (iii) plaintiff and Class Counsel will  
26 fairly and adequately represent the Settlement Class; and (iv) common issues  
27 predominate over any individual issues affecting the Settlement Class Members.  
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1 The Court further finds that plaintiff's interests are aligned with the interests of all  
2 other Settlement Class Members. The Court also finds that resolution of this action  
3 on a class basis for purposes of the Settlement is superior to other means of  
4 resolution.

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

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

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

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

25 11. Sirius XM shall pay for all reasonable notice and administrative costs,  
26 up to \$500,000, but will not pay for any of the costs for the proceedings that are  
27 appealed from the Special Master to the Court to resolve any ownership disputes  
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1 related to Pre-1972 Sound Recordings, unless appealed by Sirius XM who shall  
2 bear its own attorneys' fees and costs. If Sirius XM wishes to challenge any notice  
3 and administrative costs as being unreasonable, it shall first notify Class Counsel,  
4 and if such challenge is not resolved within ten (10) business days of notice, Sirius  
5 XM may file an application with the Court. Any such challenged costs will not be  
6 due and payable unless and until the Court rules upon the application. Any unused  
7 funds in the Settlement Administration Account shall be refunded to Sirius XM.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 23. The Stipulation shall be used for settlement purposes only. The fact  
24 of, or any provision contained in, the Stipulation or any action taken pursuant to it  
25 shall not constitute an admission of the validity of any claim or any factual  
26 allegation that was or could have been made by plaintiff and Settlement Class  
27 Members in the California, New York or Florida Actions, or of any wrongdoing or  
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1 liability of any kind on the part of Sirius XM. The Stipulation shall not be offered  
2 or be admissible in evidence by or against Plaintiff or Sirius XM or cited or referred  
3 to in any other action or proceeding, except (a) in any action or proceeding brought  
4 by or against the parties to enforce or otherwise implement the terms of the  
5 Stipulation, (b) in any action involving plaintiff, Settlement Class Members, or any  
6 of them, that asserts claims barred by the covenant not to sue in the Stipulation  
7 against Sirius XM, to support a defense of *res judicata*, collateral estoppel, release,  
8 or other theory of claim preclusion, issue preclusion, or similar defense, or (c) in  
9 any action or proceeding involving Sirius XM to determine royalty rates for sound  
10 recordings.

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

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

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

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

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10 **IT IS SO ORDERED.**

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12 Dated: 1/27/17

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By: 

PHILIP S. GUTIERREZ

United States District Judge