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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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. CV13-05693 PSG (GJSx)

FLO & EDDIE, INC. OPPOSITION TO NOTICE OF MOTION AND MOTION OF NON-CLASS MEMBER AMERICAN ASSOCIATION OF INDEPENDENT MUSIC ET AL FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Date: May 1, 2017
Time: 1:30 p.m.
Place: Courtroom 6A
Judge: Hon. Philip S. Gutierrez

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I. INTRODUCTION

Plaintiff Flo & Eddie, Inc. ("Flo & Eddie") and the Settlement Class in the above-titled action, respectfully submit this memorandum in opposition to the motion of the Non-Class Member American Association of Independent Music ("A2IM"), American Federation of Musicians of the United States and Canada ("AFM"), AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund ("AFM & SAG-AFTRA Fund"), Recording Industry Association of America ("RIAA"), Screen Actors Guild – American Federation of Television and Radio Artists ("SAG-AFTRA"), and SoundExchange, Inc. ("SoundExchange") (collectively, "Petitioners") for leave to file a brief in opposition to the parties' proposed settlement agreement. Dkt. 681.

Petitioners' effort to torpedo the historic settlement with Sirius XM achieved by Class Members for their pre-1972 sound recordings is entirely improper and should be rejected. *First*, Petitioners *are not members of the Class* and therefore have no standing to object to the settlement. Petitioners' conduct is unseemly given the fact that the Major Record Labels[1]—who belong to petitioner group RIAA—opted out of this very Class and negotiated a $210 million settlement with Sirius XM for their own pre-1972 sound recordings. Having secured their own lucrative settlement as a direct result of Class Counsel's work in obtaining summary judgment and certification in this case, the Major Record Labels—dressed up as purported amici in this case—now want to impede other owners of pre-1972 sound recordings from benefiting financially. Those efforts are in bad faith and at odds with, not in protection of, the Class in this case.

[1] The Major Record Labels are: Capitol Records, LLC ("Capitol"), Sony Music Entertainment ("Sony Music"), UMG Recordings, Inc. ("UMG"), Warner Music Group Corp. ("WMG"), and ABKCO Music & Records, Inc. ("ABKCO") (the "Record Companies").

Second, to the extent Petitioners purport to raise other interests for this Court's consideration, they do not bear on whether the settlement is fair, reasonable and adequate. Rather, Petitioners seek to subordinate the interests of the Class regarding *pre*-1972 recordings to their *own* interests regarding setting rates for *post*-1972 recordings subject to the Copyright Act. This distinction between pre- and post-1972 recordings makes all the difference, and Petitioners self-interested focus on the latter has nothing to do with the interests of the Class. Petitioners' tenuous predictions about how and whether this settlement may impact them in other, completely unrelated proceedings provide no basis for denying approval of this settlement.

Petitioners do not deny that the Class obtained a ground-breaking settlement against Sirius XM on behalf of owners of pre-1972 recordings that Sirius XM had publicly performed without authorization since August of 2009. That settlement was achieved against a backdrop of uncertain (and often unexplored) state law across multiple jurisdictions, recognized by this Court as issues of first impression. The Court's task now is to determine if that settlement is fair, reasonable and adequate for the Class. Without any support for their argument, Petitioners argue that the Court should consider the interests of those *outside* the Class in making that determination. Petitioners cite no law for this remarkable proposition—because no such law exists.

Petitioners take issue with the settlement, arguing that the relief afforded to the Class in the form of ongoing royalties for *pre*-1972 recordings protected under *state* law is not sufficiently comparable to the royalties currently paid for *post*-1972 recordings protected under *federal* law. But Petitioners' apples-to-oranges comparison glosses over the disparate legal regimes governing each body of recordings and completely omits that prior to the Class settlement, such royalties were not protected by federal law *at all* for *pre*-1972 sound recordings. Moreover,

in the states where a performance right is upheld on appeal, the settlement provides a royalty rate that actually *exceeds* Petitioners' much-touted federal rate on a pro rata basis.[2]

Further, because they are not class members, nothing in this litigation or the Class settlement affects any rights of Petitioners. Petitioners claim that a *completely different* adversarial proceeding with Sirius XM before the Copyright Royalty Board ("CRB") will affect royalty rates payable to *post*-1972 recordings, and that Sirius XM will use the royalty rate administered through the Class settlement to support the apples-to-oranges argument discussed above. That prediction is far too attenuated to grant Petitioners standing in this case, which has nothing to do with the rights afforded to post-1972 recordings or the criteria by which such royalty rates are evaluated. Essentially, Petitioners believe that any royalty rate in this case must be vetted as though being approved by the CRB, which has no basis in the text of Rule 23 or any case law interpreting it.

Finally, Petitioners are well aware of the landscape against which the Class settlement was achieved. Some of their own members were putative class members until they settled with Sirius XM as part of a deal with the Major Record Labels for $210 million just after the Class successfully obtained summary judgment on liability and class certification. Petitioners' attempt to prevent the remainder of the Class from receiving a favorable class settlement, after having reaped the benefit of the hard work done by the Class for their own financial reward, offends notions of fair play and justice. Petitioners' motion for leave to file a brief in opposition to the proposed Class settlement should be denied.

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[2] For example, approximately 8.5% of Sirius XM's subscribers live in California. A pro rata royalty rate for these subscribers as compared to the current federal rate of 11% would be 0.935%. Comparatively, the Settlement provides a royalty rate of 2% in the event that Plaintiff prevails on the performance right issue in the California Appeal.

II. LEGAL STANDARD

Rule 23(e)(5) of the Federal Rules of Civil Procedure permits a *class member* to object to a proposed class settlement. *Sec. Litig. (In re First Capital)*, 33 F.3d 29, 30 (9th Cir. 1994) (holding that only "an aggrieved class member" has standing to object to a proposed class settlement); *Hazlin v. Botanical Laboratories, Inc.*, Case No. 13-CV-0618-KSC, 2015 WL 11237634, at *4 (S.D. Cal. May 20, 2015) (citations omitted) (exercising the Court's discretion to disregard the amicus brief objecting to the proposed class action settlement); *In re Hydroxycut Marketing and Sales Practice Litig.*, Case Nos. 09-MD-2087 BTM (KSCx), 09-cv-1088 BTM (KSC) 2013 WL 5275618, at *2 (S.D. Cal. Sept. 17, 2013) (striking objections of non-class members).[3] A court need not consider the objections of non-class members because they lack standing. *See In re Korean Airlines*, No. No. CV 07–05107 SJO (AGRx), 2013 WL 7985367 (C.D. Cal. Nov. 21, 2013) (striking objections of non-class members in holding that while class member members have "an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements," non-class members have no such interest in the settlement, citing *Devlin v. Scardelletti*, 536 U.S. 1, 6-7 (2002)); *Californians for Disability Rights v. Cal. Dept. of Transp.*, No. C 06–5125 SBA, 2010 WL 2228531, at *8 (N.D. Cal. 2010) (Armstrong, J.). "The plain language of Rule 23(e) clearly contemplates only allowing class members to object to settlement proposals." *Hazlin*, 2015 WL 11237634, at *4 (citations omitted). Because non-class members have no standing to object, allowing them to inject their concerns at the settlement stage frustrates the goal of encouraging settlements. *See San Francisco NAACP v.*

[3] *Reynolds v. Beneficial Nat. Bank*, cited by Petitioners, addresses objections of parties to a class action settlement in contrast with Petitioners, who lack standing to object. 288 F.3d 277, 283 (7th Cir. 2002) (noting various objectors to the settlement were "primarily intervening or would-be intervening plaintiffs who have claims that the settlement will release").

San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) (granting motion to strike objections filed by people who lacked standing because they failed to comply with the requirements of the class action notice).

Although a non-party may lack standing to object, the trial court may still "consider or even solicit the views of non-parties to proposed class settlements." *Hazlin*, 2015 WL 11237634, at *4 (citations omitted). However, such views cannot be thinly veiled efforts to object to the settlement, as standing to object is reserved for class members. *See In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1021 (S.D. Ohio 2001) ("being granted amicus standing does not infer the same standing to [an amicus curiae] as a rightful intervener, formal objector, or counsel to a class member").

Amicus briefs which are unhelpful or fail to present unique information or which raise issues not addressed by the parties may be disregarded. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 n.10 (9th Cir. 2003) ("In the absence of exceptional issues ... we do not address issues raised only in an *amicus* brief."). To the extent such briefs are allowed, it is normally "only when a party is not represented competently or is not represented at all, and when the amicus has an interest in another case that may be affected by the holding in the present case, or when the amicus can present unique information that can help the court in a way that is beyond the abilities the lawyers for the parties are able to provide." *Gabriel Techs. Corp. v. Qualcomm Inc.*, 2012 U.S. Dist. LEXIS 33417, at *15-16 (S.D. Cal. Mar. 13, 2012) (citation omitted). "If these limitations … are not met, then the [amicus brief] should be denied." *Id.*

III. THE COURT SHOULD DENY PETITIONERS' LEAVE TO FILE THEIR PROPOSED BRIEF AS AMICUS CURIAE

A. Petitioners Are Not Class Members and Have No Standing to Object to the Class Settlement

Petitioners' proposed amicus brief cloaks itself as raising issues of interest to the Court. In fact, the brief is a thinly-veiled attempt to object to the settlement—something that Petitioners do not have standing to do as non-class members. *See Sec. Litig. (In re First Capital)*, 33 F.3d at 30. Indeed, the Major Record Labels—members of the Petitioner group the RIAA—took great pains to advise this Court that they were ***not*** part of the Class in seeking to assert they had no obligation to contribute to the common fund notwithstanding that their own settlement resulted from the efforts of the Class to obtain a liability ruling and certify a class:

> [The Major Record Labels] formally opted out, on August 24, 2015 (*see* ECF No. 255), and again on August 24, 2016. Ostroff Decl. ¶ 7. Given the Record Companies' unambiguous efforts to leave the class, and to prosecute their own action instead, it would violate the Due Process Clause to force them through the common fund doctrine nevertheless to pay fees. Such a result would render the opt-out provisions of Rule 23(b)(3) meaningless at best (insofar as opt-outs who prevailed in their separate action could still have to pay the class counsel they rejected, at a rate that vastly exceeds what they paid their own counsel), and self-destructive at worst (insofar as a party that opts out and loses would be estopped from obtaining relief).

Dkt. 385-2. Major Record Labels' Opposition to Plaintiffs' Motion for a Fee Award. The Major Record Labels want all of the benefit without any of the burden: first, they leveraged the work of Class and Class Counsel to broker their own $210 million settlement with Sirius XM—after Flo & Eddie obtained a liability ruling on summary judgment and weeks after a class in this case was

certified on May 27, 2015; next, the Major Record Labels successfully opposed the Class' effort to treat the $210 million settlement as part of a common fund, which operated to shift the entire cost of obtaining a summary judgment ruling on an issue of first impression on the remaining Class members; and now, the Major Record Labels want to prevent the rest of the Class from finally reaping the benefit of this hard-fought litigation through the Class settlement with Sirius XM.

The Major Record Labels' purported friend-of-the-court brief should be given little weight as it represents an effort by former class members seeking to interfere with a class settlement. *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 28-29 (2000) (holding that "class members who have opted out of 23(b)(3) class action have no standing to object to a subsequent class settlement" and rejecting objection by opt-outs who opposed a most favored nations clause in class settlement).

B. Petitioners' Arguments Are Unhelpful And Inaccurate

Lacking standing to object to the Class settlement, Petitioners nonetheless contend their amicus brief provides helpful guidance to the Court. It does not. Petitioners' brief attempts to introduce and argue an array of new purported facts regarding the existing market for sound recordings (both pre- and post-1972) and the potential effect of the settlement on the royalty rate proceedings they are engaged in before the CRB. Petitioners' self-promoting involvement in external factual matters is disqualifying. *See, e.g.*, *McCarthy v. Fuller*, No. 1:08-cv-994-WTL-DML, 2012 WL 1067863, at *2 (S.D. Ind. Mar. 29, 2012) (denying amicus status to lawyer who proposes to "aid the court by providing facts, insights and explanations," which "suggest[ed] the type of contribution a fact or expert witness would offer"); *Portland Pipe Line Corp. v. City of S. Portland*, 2017 WL 79948, at *6 (D. Me. Jan. 19, 2017) (party was "right to be concerned about whether the

amici will infuse external facts into the Court's consideration").[4]

Petitioners' argument that "the settlement's prospective component does not remotely reflect the marketplace" (Br. at 5) intentionally conflates the market for pre-1972 recordings (governed by state law) with the market for post-1972 recordings (governed by federal law). Prior to Flo & Eddie's litigation, the contemporary market for licensing the public performance of pre-1972 recordings *did not exist at all*. Sirius XM's agreements with its direct licensors, including the Major Record Labels represented by the RIAA, all post-date Flo & Eddie obtaining summary judgment on liability in September of 2014. Moreover, none of these agreements support Petitioners' purported expert testimony that "when pre-1972 recordings are licensed in the free market, they generally are licensed on the same financial terms as post-1972 recordings." *Id.* As this Court is aware from the parties' motion practice and the evidence submitted therein, Sirius XM's agreements with its direct licensors all provide for royalty rates far lower than the 11% figure under 37 C.F.R. § 382.12(a). Dkt 225. Petitioners' self-interested and false generalization applies when pre-1972 recordings are licensed for uses *other than public performance*, such as synchronization in film and television, implicating rights (such as reproduction and distribution rights) that are far more established under state law. However, there is nothing in or outside the record to support a market rate of 11% for the public performance of pre-1972 recordings, and Petitioners provide none.[5]

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[4] *Safari Club Intern. v. Harris*, cited by Petitioners, is of limited utility here because the court did not explain what information was contained in the amicus brief. No. 2:14-cv-01856, 2015 WL 1255491, at *1 (E.D. Cal. Jan. 14, 2015). The one page opinion only noted that the proposed brief "contain[ed] information that [was] not part of Defendant's motion [to dismiss]."

[5] Petitioners' citation to *Rodriguez* is without merit, as that case addressed the court's role as a fiduciary in analyzing the conflict arising out of incentive agreements contained in a retainer agreement which "obligated" class counsel to

Petitioners' accusation that the settlement's language concerning a willing buyer and willing seller in a competitive market for the public performance of pre-1972 recordings is "gratuitous" simply underscores Petitioners' antagonistic interests to the Class and inadequate familiarity with this market, which discovery in this case revealed to encompass royalty rates between 0% (in other words, a *gratis* license) to 5% (the highest royalty rate obtained by one of Sirius XM's direct licensors). Indeed, out of all such agreements produced, nineteen (19) were 0% licenses, ten (10) were 1% licenses, one (1) was a 3% license, six (6) were 3.5% licenses, and one (1) was a 5% license. The settlement's potential 5.5% royalty maligned by Petitioners exceeds all of these figures, and even the reduced 3.5% figure triggered by the result of the New York proceedings constitutes the second-highest figure obtained by Sirius XM's direct licensors. *See also* Declaration of Michael J. Wallace in Support of Motion for Final Approval at DKT. 686-2.

Furthermore, because the Class settlement's prospective royalty rates comport with rates previously negotiated by Sirius XM, it cannot be said that Class Members will somehow be harmed by the Settlement – indeed *no class member objected to the Settlement*. Br. at 8. Anyone who believes they can negotiate higher rates with Sirius XM had the right to opt-out but chose not to. The settlement is estimated to cover only 15% of the total pre-1972 recordings historically exploited by Sirius XM. Dkt. 666-4 at 17. The Class Members so covered likely do not command large enough market shares to economically justify directly negotiating ongoing licenses with Sirius XM. Thus, these Class Members are afforded a choice, which they selected by remaining in the Class, to have a mechanism through the settlement by which to enjoy ongoing royalties from Sirius XM without being

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seek additional payments for the class representatives, which obviously is not the same as the Court purportedly endorsing a "market" rate. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 957, 968 (9th Cir. 2009).

required to undertake frequent renegotiation and all the attendant costs, burdens, and expense that entails. While Petitioners may be upset that the Class Members have chosen to be independent artists not under the control of the Major Record Labels, that is not grounds for Petitioners to try to deprive Class Members of their settlement that they universally and unanimously approve.

Petitioners' comparison of the Class settlement to that in *Authors Guild v. Google Inc*., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) is inapposite. In *Authors Guild*, the court rejected the parties' settlement because "[t]he case was about the use of an indexing and searching tool" by which Google made "snippets" of orphan works available for online searching, "not the sale of complete copyrighted works" as the settlement agreement contemplated. *Authors Guild*, 770 F. Supp. 2d at 678. By contrast, this case concerned Sirius XM's exploitation of full copies of pre-1972 recordings, and it remains so concerned in the settlement. As such, the settlement would not "release claims well beyond those contemplated by the pleadings." Br. at 10 (quoting *Authors Guild*, 770 F. Supp. 2d at 678). Furthermore, it does not extend beyond the rights of the parties because the settlement only includes pre-1972 recordings that Sirius XM exploited within the damages period, and does not permit, for example, Sirius XM to compulsorily use pre-1972 recordings that it has *not* been previously exploited during the damages period, which are outside the Class. *See* Dkt. 666-4 at 2.

As to Petitioners' argument concerning purported ongoing work in Congress to provide a statutory royalty to owners of pre-1972 recordings (Br. at 13-14), in the event that such proposed legislation is ever actually passed, Congress may always choose to allow Class Members to opt into a higher royalty unencumbered by the Settlement. *See In re Magsafe Apple Power Adapter Litig*., 2015 U.S. Dist. LEXIS 11353, at *27 (N.D. Cal. Jan. 30, 2015) (describing class settlement as a "judicially-enforced contract"); *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137,

1151 (9th Cir. 2004) (the Contract Clause "subject[s] only state statutes that impair a specific (explicit or implicit) contractual provision to constitutional scrutiny."). Until such time as Congress does so, however, the Class settlement represents the only reliable mechanism for owners of pre-1972 recordings not sufficiently powerful enough to negotiate their own licenses to be compensated by Sirius XM, and Petitioners' denigration of that mechanism merely betrays their own superior bargaining position and, apparently, depends upon their own self-proclaimed, heretofore unheard of superhuman ability to predict what legislation Congress will one day pass.

C. Petitioners' Rights Are Not Affected By The Settlement

Because Petitioners' arguments are unhelpful and inaccurate, the only other basis for which to consider their amicus brief is if their rights are affected by the . 14cv0751-GPC-DHB, 2015 U.S. Dist. LEXIS 70576, at *2 (S.D. Cal. June 1, 2015).[6] The crux of Petitioners' purported interest is a prediction that in the future "Sirius XM intends to use [the Settlement] as evidence of a 'market' rate in future rate-setting litigation" before the CRB. Br. at 7. In other words, the settlement does not actually affect Petitioners' rights, but rather may be used in future arguments before the CRB, which may or may not lower the rates payable to Petitioners based on evidence that may or may not include the figures in the settlement, despite said figures covering completely different sound recordings governed by a completely different body of law, and which Petitioners' admit only covers approximately 15% of the recordings played by Sirius XM, obviating any argument that it is a

[6] In *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1028 (9th Cir. 1998), cited by Petitioners, the court considered an amicus brief submitted by several state attorneys general because the provision of the settlement agreement specifically related to government enforcement. Nonetheless, the court rejected the argument of the attorneys general. Here, by contrast, Petitioners have not demonstrated how the settlement agreement impacts their interests.

prevailing rate for pre-1972 recordings. Br. at 4, n.4. Just to state this meandering position is to refute it.

Petitioners' interests are far too hypothetical and attenuated to constitute a cognizable interest in the outcome of these proceedings. Petitioners have myriad arguments before the CRB as to the impact of the 5.5% royalty figure in the settlement. That Petitioners may need to address an inapposite comparison before the CRB does not in any sense render the Class Settlement in this case unfair, and Petitioners' proper remedy is to point out the flawed nature of the comparison in their later adversarial proceedings, not to attempt to torpedo the Class Settlement in an effort to do less work elsewhere. Petitioners' pronounced disinterest in the danger of continued litigation betrays their true interest: to protect the prospective rights of post-1972 recordings not at issue in this litigation to the detriment of the Class.

D. The Settlement Is Fair, Reasonable, and Adequate

The role of the Court in approving a class settlement is to determine whether the proposed settlement is "fair, reasonable, and adequate" after giving class members notice and an opportunity either to opt out of the settlement or to object to it. Fed. R. Civ. P. 23(e). In deciding whether to grant final approval to a proposed settlement, the court must consider eight enumerated factors: "(1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." *Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *accord In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

The potential impact of a settlement on non-class members appears nowhere in the factors articulated by the Ninth Circuit *supra*, yet Petitioners' argument is that this concern should nonetheless be layered in as an additional consideration. No law supports this argument, and it should be summarily rejected.[7] The Class settlement in this case fully comports with the requirements of Rule 23 and the *Churchill Village* factors, as outlined in Class Counsel's motion for preliminary approval and motion for final approval filed concurrently herewith. Dkt. 666-4. Indeed, the settlement in this case is particularly satisfactory because it is non-reversionary. In a reversionary ("claims-made") settlement, the defendant offers to pay a certain amount to each class member who files a claim, usually up to a cap. William B. Rubenstein, Newberg on Class Actions § 13:7 (5th ed. 2016). If the claims process results in payouts of less than the amount of the cap, then the unclaimed funds are returned to the defendant. *Id*.; *see, e.g., Lemus v. H & R Block Enters. LLC*, No. C 09–3179 SI, 2012 WL 3638550, at *5 (N.D. Cal. Aug. 22, 2012). That is not the case in a non-reversionary ("common fund") settlement, where the defendant pays a fixed amount of money into a fund. Rubenstein, Newberg on Class Actions § 13:7. Any unclaimed money does not go back to the settling defendant. *Id*. Thus, in a non-reversionary settlement, the amount that the defendant pays is known even before the notice and claims process begins.

[7] Petitioners rely on language in a Second Circuit decision that "[w]here the rights of third parties are affected" by a class action settlement, "their interests too must be considered[.]" Br. at 8 (quoting *In re Masters Mates & Pilots Pension Plan & IRAP Litig*., 957 F.2d 1020, 1026 (2d Cir. 1992)). This language, however, refers to the rights of non-settling class members, whose rights are preserved through the objection process. *See In re Drexel Burnham Lambert Grp*., 995 F.2d 1138, 1146-47 (2d Cir. 1993); *King Cty. v. IKB Deutsche Industriebank AG*, No. 09 Civ. 8387 (SAS), 2012 U.S. Dist. LEXIS 107779, at *6-8 (S.D.N.Y. July 31, 2012). Petitioners are not Class Members in this case and have no claims that may be extinguished through the settlement.

These structural variations affect the analysis of the fourth *Churchill Village* factor, the value of the settlement. In a reversionary settlement, the court cannot know how much the defendant will pay without knowing how many class members will file claims, and so "it is difficult to assess the proportionality between the settlement's value and Plaintiffs' expected recovery at trial…" *Minor v. FedEx Office & Print Servs., Inc*., No. C09–1375 TEH, 2013 WL 503268, at *4 (N.D. Cal. Feb. 8, 2013). Accordingly, courts considering reversionary class settlements may require the settling parties to provide evidence supporting a reasonable estimate of the ultimate claim rate. *See Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242, 267 (E.D.N.Y. 2009) (holding, in a final approval order, that a reversionary settlement "should be valued on the basis of the number of claims that were made against it"); *Lemus v. H & R Block Enters*. LLC, No. C 09–3179 SI, 2012 WL 3638550, at *5 (N.D. Cal. Aug. 22, 2012) (finding a claims-made settlement reasonable despite being generally disfavored because "a significant portion of the class participated in the settlement, and the average class member recovery is at least $1,200"); *cf. Small v. Target Corp*., 53 F. Supp. 3d 1141, 1143 (D. Minn. 2014) (stating inclination to deny proposed reversionary settlement where the proposed notice and claims process seemed likely to result in a low claim rate).

In a non-reversionary settlement, by contrast, the defendant pays the same amount no matter how many class members elect to receive payment. As such, the eventual claim rate should not affect whether the proposed settlement is fair, reasonable, or adequate. *See Rosado v. eBay Inc*., No. 5:12-cv-04005, 2016 WL 3401987, at *3, *5 (N.D. Cal. June 21, 2016) ($1.2 million "non-reversionary settlement fund" satisfied the fourth *Churchill Village* factor because it compared favorably to the defendant's "maximum exposure for Plaintiffs' claims," without considering claim rates); *Pierce v. Rosetta Stone, Ltd*., No. 11–01283 SBA, 2013 WL 5402120, at *4 (N.D. Cal. Sept. 26, 2013) (concluding that the fourth *Churchill*

Village factor weighed in favor of settlement approval where the settlement was non-reversionary and the amount of the settlement fund "represent[ed] a substantial portion of Defendant's maximum exposure, discounted by the risks of obtaining and maintaining class certification status and prevailing on the merits, the expense of further litigation, and the interest of providing Class Members with a guaranteed recovery quickly"); *cf. Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 499 (N.D. Ill. Nov. 23, 2015) ("because the parties seek approval of a nonreversionary settlement fund—Walgreens's total payment to the settlement fund will be $11 million regardless of the number of claims filed—the contention the parties designed the claims process to discourage class members from making claims is a hard one to sell"); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1383 (S.D. Fla. 2007) (stating, of the non-reversionary portion of an otherwise reversionary settlement, that "[t]he minimum redemption requirement ensures that Defendants must disgorge $1.5 million to the Class regardless of the claims rate. Thus, there is no need to wait for the final claims data to evaluate the success of the National Class's monetary recovery before valuing this portion of the settlement.").

The proposed settlement now before the Court is non-reversionary, distinguishing it from Petitioners' "claims made"/reversionary authority. *See* Br. at 12, n.10 (citing *Acosta v. Trans Union, LLC*, 243 F.R.D. 377 (C.D. Cal. 2007)). If the court approves the settlement, Sirius XM will pay $25 million no matter how many class members ultimately file claims. Dkt. 666-4 at 15-16.[8] The eventual

[8] Petitioners argue that a Class Member's inability to receive compensation for failure to file a claim is impermissible because "colorable legal claims are not worthless[.]" Br. at 12 n.10 (citing *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 782 (7th Cir. 2004)). In *Mirfasihi*, an entire subclass "received absolutely nothing" under a settlement agreement "while surrendering all its members' claims[.]" 356 F.3d at 782. No subclass of pre-1972 recording owners has been excluded from the ability to claim from the common fund in this case. *Mirfasihi* is thus wholly inapposite. Similarly, *Acosta* is irrelevant because in that case, the settlement made

number of claimants thus has no bearing on whether the amount offered in settlement is reasonable, rendering the only extant *Churchill Village* factor to be the reaction of Class Members to the settlement – a consideration Petitioners by definition cannot assist the Court with, further rendering their amicus brief irrelevant.

In sum, the Class settlement before the Court satisfies all requirements under relevant federal law for approval. "This is neither a situation where a party is not represented competently or not represented at all, nor where an amicus can present unique information to help the Court in a way that is beyond the parties' attorneys' ability to provide." *Wildearth Guardians v. Lane*, No. CIV 12–118 LFG/KBM, 2012 WL 10028647, at *4 (D.N.M. June 20, 2012). Here, the Class is more than adequately represented and their rights are protected by Class Counsel, as well as by this Court in its fiduciary role. Petitioners' attempts to protect the interests of non-Class Members in their post-1972 recordings through the pretext of an amicus curiae brief should not be countenanced.

IV. CONCLUSION

Not a single member of the Class objected to the settlement. For good reason. The settlement achieved is outstanding. Petitioners are not Class members, and their attempt to deny money to members of the Class, under the guise as "amici" should be denied. For all the foregoing reasons, Petitioners' motion for leave to file a brief regarding the parties' proposed Class settlement as amici curiae

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economic relief available only to a select group of class members because the case was divided into economic relief subclasses and a non-economic relief subclass, which compromised the claims of those who fell outside of the economic relief subclasses. *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 389-91 (C.D. Cal. 2007). By contrast, the proposed Class settlement makes economic relief available to *all* Class Members; it is they who decide whether to obtain the economic relief or to opt-out of the settlement.

should be denied.

Dated: April 10, 2017

By: */s/ Kalpana Srinivasan*

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