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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,

Defendant.

Case No. CV13-05693 PSG (GJSx)

**[PROPOSED] AMENDED ORDER
FOR AN AWARD OF
ATTORNEYS' FEES AND COSTS**

Date: May 8, 2017

Time: 1:30 p.m.

Place: Courtroom 6A

1 Plaintiffs in this class action have moved for an award of attorneys’ fees,
2 costs and expenses to Class Counsel and incentive awards to the named Class
3 representatives. No objections were made to the request for fees and expenses by
4 any party – including class members. Upon due considerations of the application
5 by plaintiffs and all of the papers, pleadings and files in this action, and good cause
6 appearing therefor, the Court hereby GRANTS the motion.

7 **I. ATTORNEYS’ FEES**

8 In a case where Class Counsel have through their efforts created a common
9 fund, courts usually base the fee award on a percentage of the fund recovered for
10 the class, but then cross-check the reasonableness of the percentage to be awarded
11 by reviewing the attorneys’ fees lodestar multiplier. *Vizcaino v. Microsoft Corp.*,
12 290 F.3d 1043, 1047 (9th Cir. 2002). The Ninth Circuit uses a 25% benchmark in
13 common fund cases, and “in most common fund cases, the award exceeds that
14 benchmark,” with a 30% award being the norm “absent extraordinary
15 circumstances that suggest reasons to lower or increase the percentage.” *In re*
16 *Omnivision Techs. Inc.*, 559 F. Supp. 2d 1036, 1047-48 (N.D. Cal. 2007) (quotation
17 omitted).

18 The requested award is \$7.65 million of the guaranteed \$25.5 million cash
19 payment – or 30% of the recovery to the Class. Class Counsel will receive 30% of
20 any additional recovery the Class receives, for example based on the appellate
21 contingencies in Florida and California. Class Counsel also will receive 30% of
22 any royalties if, when and as earned by the Class on a going forward basis.

23 After considering the evidence and all of the pertinent factors set forth in
24 *Vizcaino*, 290 F.3d at 1047-50, and subsequent cases, the Court finds Counsel’s fee
25 request to be fair and reasonable under both the percentage method and the lodestar
26 cross-check. Among other factors, plaintiffs’ counsel achieved an exceptional
27 result for the Class, the request is commensurate with market rates for contingency

1 fee cases, the case was unusually risky for plaintiffs’ counsel and undertaken
2 entirely on a contingency basis.

3 The reasonableness of this fee is confirmed by the lodestar cross-check, which
4 results in a multiplier of .88 of the guaranteed cash recovery to date versus the time
5 to date. *See Vizcaino*, 290 F.3d at 1052-54 (approving a fee award of \$27,127,800,
6 which equaled 28% of the cash settlement fund and which resulted in a 3.65
7 multiplier); *Milliron v. T-Mobile USA*, 423 F. App’x 131, 135 (3d Cir. 2011) (“we
8 have approved a multiplier of 2.99 in a relatively simple case”); *In re Cadence*
9 *Design Sys., Inc. Sec. & Derivative Litig.*, No. C-08-4966 SC, 2012 WL 1414092,
10 at *5 (N.D. Cal. April 23, 2012) (awarding counsel “more than 2.88 times its
11 lodestar amount”); *Been v. O.K. Industries, Inc.*, No. CIV-02-285-RAW, 2011 WL
12 4478766, at *11 (E.D. Okla. 2011) (citing a study “reporting average multiplier of
13 3.89 in survey of 1,120 class action cases” and finding that a multiplier of 2.43
14 would be “per se reasonable”). Accordingly, Cass Counsel’s request for a fee
15 award of 30% of the money paid to the Class, as, if and when received by the Class
16 is hereby GRANTED, which includes an award of \$7,650,000 from the minimum
17 amount initially guaranteed by the Settlement (= 30% x \$25,500,000).

18 **II. EXPENSES**

19 Class Counsel is entitled to recover their “out-of-pocket expenses that would
20 normally be charged to a fee paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19
21 (9th Cir. 1994). Class Counsel has submitted adequate support for the
22 \$1,679,587.55 in expenses they have incurred for which reimbursement is sought.
23 Accordingly, the motion for reimbursement is hereby GRANTED.

24 **III. INCENTIVE AWARDS**

25 Besides his or her *pro rata* share of the common fund, a named plaintiff can
26 recover his reasonable costs and expenses directly relating to his or her
27 representation of the class. *See In re Online DVD-Rental Antitrust Litig.*, No. 12-

1 15705, 2015 WL 846008 (9th Cir. Feb. 27, 2015) (affirming \$5,000 incentive
2 awards for each of the nine class representatives where each unnamed class
3 member received \$12). In this case the requested awards represent a very small
4 fraction of the settlement fund. Class Counsel has submitted a declaration
5 summarizing the principals of the named plaintiffs' time and expenses related to
6 their representation of the Class in this matter. Dkt. 672. Good cause being shown
7 therefor, the request for payment of \$25,000 each to Howard Kaylan and Mark
8 Volman, the principals of the named plaintiffs, is hereby GRANTED.

9 **IV. CONCLUSION**

10 Based on the foregoing findings and conclusions, the Court hereby ORDERS
11 as follows:

12 A. The Settlement Fund Escrow Agent is AUTHORIZED and DIRECTED to
13 pay 30% of all money paid into the Settlement Fund for attorneys' fees to
14 Class Counsel, including the \$7,650,000 from the minimum amount
15 initially guaranteed by the Settlement;

16 B. The Royalty Fund Escrow Agent is AUTHORIZED and DIRECTED to pay
17 30% of all money paid into the Royalty Fund for attorneys' fees to Class
18 Counsel;

19 C. The Settlement Fund Escrow Agent is further AUTHORIZED and
20 DIRECTED to pay from the Settlement Fund:

21 (i) \$1,679,587.55 for reimbursement to costs and expenses to Class
22 Counsel;

23 (ii) \$25,000 each to Howard Kaylan and Mark Volman, the
24 principals of the named plaintiffs

25 The foregoing amounts shall include interest thereon at the same rate as
26 earned by the Settlement Fund and Royalty Fund.

1 For the initial payment of attorneys' fees to Class Counsel, the Settlement
2 Fund Escrow Agent is AUTHORIZED and DIRECTED to compute the amount
3 paid into the Settlement Fund as also including an additional \$500,000 that Sirius
4 XM has agreed to make available to the Class for the payment of notice of
5 administration costs, but which does not necessarily have to be paid into the
6 Settlement Fund.

7 These amounts shall be paid by the Escrow Agent to a bank account
8 designated by Class Counsel. Class Counsel shall be responsible for the
9 distribution of all funds to the appropriate parties.

10 The Court shall retain continuing jurisdiction over the Settlement Fund and
11 Royalty Fund and the foregoing parties and counsel for purposes of supervising
12 such distributions.

13
14 IT IS SO ORDERED.

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17 Dated: _____

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19 By: _____

20 PHILIP S. GUTIERREZ
21 United States District Judge
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