IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1161

FLO & EDDIE, INC., etc.,

Appellant,

v.

SIRIUS XM RADIO, INC., et al.,

Appellees.

REPLY BRIEF BY FLO & EDDIE, INC.

ON CERTIFIED QUESTIONS FROM THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 15-13100

Angel A. Cortiñas, Esquire
Jonathan H Kaskel, Esquire
GUNSTER
Appellate Counsel for Flo & Eddie, Inc.
600 Brickell Avenue
Suite 3500
Miami, Florida 33131

Henry Gradstein, Esquire
Maryann R. Marzano, Esquire
GRADSTEIN & MARZANO, P.C.
Counsel for Flo & Eddie, Inc.
6310 San Vicente Boulevard,
Suite 510
Los Angeles, California 90048

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I. INTRODUCTION[1]

Under Florida law, artistic performances embodied in pre-1972 recordings (*i.e.*, the sounds) are "property." *See* Fla. Stat. §540.11(1)(a); *CBS, Inc. v. Garrod*, 622 F. Supp. 532, 533 (M.D. Fla. 1985); and Fla. Stat. § 812.012(4)(b). As such, ownership of recorded artistic performances is constitutionally protected,[2] includes "all of the sticks or incidents of ownership,"[3] "is nearly absolute,"[4] and carries with it the right and ability to exclude others from all unauthorized uses.[5] The sale of a record for private enjoyment does not transfer ownership of the underlying artistic performances or authorize their commercial performance to 28 million subscribers, any more than the sale of a DVD transfers the right to commercially perform a movie embodied on the DVD or the sale of a CD-ROM transfers rights to the software embodied on it for commercial exploitation.

Any ambiguity in this regard was eliminated in 1977 when Florida repealed Fla. Stat. §§ 543.02-03, thereby reviving the copyright protections the Florida Legislature had earlier recognized and abrogated based on the sale of records. *See Florida Fertilizer & Mfg. Co. v. Boswell*, 34 So. 241 (Fla. 1903). If there is no

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[1] References to Flo & Eddie's Initial Brief are "IB," and references to SiriusXM's Responding Brief are "RB." Unless otherwise indicated all emphasis is added.
[2] *Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 964 (Fla. 1991).
[3] *Costa Del Sol Ass'n v. Dep't of Bus. & Prof'l Regulation, Div. of Fla. Land Sales, Condos., & Mobile Homes*, 987 So. 2d 734, 736 (Fla. 3d DCA 2008).
[4] *Dep't of Ins. v. Dade Cnty. Consumer etc.,* 492 So. 2d 1032, 1039 n. 3 (Fla. 1986).
[5] *Tatum Bros. Real Estate & Inv. Co. v. Watson*, 92 Fla. 278, 289 (1926).

doubt that the law protects against unauthorized public performance of a pre-1972 recording which has not been sold to the public, after the repeal of §§ 543.02-03, the sale of the record does not end that protection. A buyer may not take the artistic performance it does not own, and then sell, distribute, or lease it to 28 million subscribers.

The fact that public performance rights have not previously been enforced is of no moment. The changing demands of today's music marketplace, where records are no longer sold but rather digitally broadcast, now require owners of recordings to rely on their artistic performance rights (streaming, digital distribution, etc.) rather than their reproduction rights. IB 9-11. As Justice Ginsburg recently wrote, "there is nothing untoward about [a copyright owner] waiting to see whether an infringer's exploitation undercuts the value of the copyrighted work, has no effect on that work, or even complements it." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1976 (2014). Faced with these foundational tenets of Florida property law, SiriusXM chooses to rely on the history of *federal* copyright law and the historical fight to obtain a *federal* right of public performance for *post*-1972 recordings, arguing that this Court should (a) unbundle the rights inherent in ownership of pre-1972 recordings under Florida law and (b) validate only the right of reproduction and not public performance. The irony of this approach is that it is not only inapplicable to the inquiry at hand,

it does not give SiriusXM a free ride either; federal law requires SiriusXM to pay fully 11% of its defined gross revenues to a collection agency for further distribution to artists and owners. *See* 17 U.S.C. § 114.

In essence, SiriusXM has asked this Court to legislate from the bench by dismantling Florida's well-established property laws and replacing them with a system of piecemeal protections specific to pre-1972 recordings. There is neither a basis nor need for the Court to embark upon such a path. Ownership of the artistic performances embodied on the records includes the entire bundle of rights attendant to that ownership and there are no grounds to assign different levels of protection among the various rights, since they are all protected. And because the concomitant ability to exclude extends to all unauthorized uses of the artistic performances, the technological method of infringement chosen by SiriusXM does not matter. All parties agree that SiriusXM cannot copy and distribute unowned pre-1972 artistic performances. But just as it is a basic tenet of law that one cannot do indirectly that which it cannot do directly, SiriusXM cannot use sophisticated technology which it claims circumvents copying (it does not) to lease artistic performances it does not own to 28 million subscribers for billions of dollars and claim that there is a conceptual, moral, or legal difference in its manner of infringement.

Finally, upholding Flo & Eddie's property rights would not trigger the

parade of horribles advanced by SiriusXM (regarding determination of licensing rates, ownership, and exceptions to protection). RB 36-37. Licensing rates will be determined by freely contracting parties, just as it is done in every other sphere of the entertainment industry, which licenses pre-1972 recordings (such as film, television, video games, etc.), and just as SiriusXM has already done through licensing agreements settling claims with owners of pre-1972 recordings it has historically exploited. Exceptions to the rights recognized by the Court can be developed through subsequent case law as appropriate.

II. ARGUMENT

A. Federal Copyright Law and the Effect of a "Publication" Thereunder Have No Relevance Whatsoever to Florida Common Law Protections of Pre-1972 Recordings.

Florida law alone governs this case. Congress ceded to the states' *exclusive* authority for protecting pre-1972 recordings, which "shall not be annulled or limited" by federal copyright law until 2067. 17 U.S.C. § 301(c); *Goldstein v. California*, 412 U.S. 546 (1973). SiriusXM belabors the history of federal copyright law and the consequences of "publishing" a work protected by federal copyright. This entire discussion is a red herring. Pre-1972 recordings were never a category of work that could be "published" and handed off for federal protection. *Goldstein*, 412 U.S. at 570-72; *see generally Capitol Records, Inc. v. Naxos of Am., Inc.*, 830 N.E.2d 250, 258 (2005). "'[P]ublication' serves only as a term of [the]

art which defines the legal relationships which Congress has adopted under the federal copyright statutes. As to categories of writings which Congress has not brought within the scope of the federal statute [such as pre-1972 recordings], the term has no application." *Goldstein*, 412 U.S. at 570 n.28 (rejecting the argument that pre-1972 recordings were divested of state law protection because they were commercially distributed).

Each case cited by SiriusXM in support of divestive publication involves a category of work falling *squarely* under the federal Copyright Act, and thus irrelevant and distinguishable on its face. *Wheaton v. Peters*, 33 U.S. 591 (1834), concerned the publication of books, a category of work which has been protected under federal copyright law since the law was first enacted in 1790. *Id.* at 660-62.[6] Similarly, *Kisling v. Rothschild*, 388 So. 2d 1310 (Fla. 5th DCA 1980), concerned the publication of architectural plans, a category of work which has been protected under federal copyright law since 1909. 17 U.S.C. § 5(i) (1909); 17 U.S.C. § 102(8); *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 189 (2d Cir. 2012). Finally, *Glazer v. Hoffman*, 16 So. 2d 53 (1943), concerned the publication of a dramatic work (a magic performance), a category of work which has been protected under federal copyright law since 1856. *Mazer v. Stein*, 347

[6] SiriusXM's argument that *Wheaton* holds that publication divests common law copyright protection even in the absence of federal copyright protection was flatly rejected in *Goldstein*. *Id.; see also Naxos*, 830 N.E.2d at 261.

U.S. 201, 209 & n.11 (1954); 17 U.S.C. § 5(d) (1909); 17 U.S.C. § 102 (3); *see* discussion *infra*.

None of these cases support the argument of a divestive publication in the context of pre-1972 recordings because pre-1972 recordings were never covered by federal copyright law. Florida does not consider the commercial distribution of pre-1972 recordings to divest state law protection for any purpose. Otherwise, unauthorized copying and distribution would be sanctioned, which is plainly not the law in Florida.

B. *Glazer v. Hoffman* Supports the Existence of a Public Performance Right for Pre-1972 Recordings Regardless of Public Distribution

SiriusXM essentially concedes that *Glazer v. Hoffman* recognized the existence of a common law copyright in artistic performances, but argues that *Glazer* held "public distribution of a creative work surrenders its common law copyright *even where no federal protection is available*." RB 23 (emphasis in original). *Glazer* did not so hold. Again, SiriusXM blurs the distinction between (1) the unavailability of federal copyright protection because the *category* of work is not protected and divestive publication has no application (as in the case of pre-1972 sound recordings) and (2) the unavailability of federal copyright protection where the category of work *is* protected and divestive publication *is* applicable, but the *specific* work fails to meet the threshold creative requirements and formalities necessary for federal protection. *Glazer* concerned only the latter.

At issue in *Glazer* was plaintiff's magic act, a sleight-of-hand performance "preceded by an 'address' written or produced by the plaintiff." *Glazer*, 16 So. 2d at 53-54. The Court analyzed plaintiff's performance as a dramatic work covered by the 1909 Copyright Act. *Id* at 53-56. The plaintiff registered the "address" with the U.S. Copyright Office, but not the performance. *Id.* at 54. The Court found "in the record copyright protection only to the address or professional 'patter' of plaintiff…but it fail[ed] to embrace or include his sleight of hand performance." *Id.* at 55. Relying on federal authorities concerning creative requirements for dramatic works,[7] the Court concluded that plaintiff "failed to bring his act or performance within the terms of the Federal copyright statutes." *Id.*

The failure of the plaintiff to register his performance and imbue it with sufficient creative expression for protection under the 1909 Copyright Act, did not make it any less subject to the Act. Federal law occupied the field of copyright protection for the category of dramatic works and preempted state law once the work was published. *Goldstein, supra; see also Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 228-29 (1964) (doctrine of publication delineates where federal copyright law preempts state common law). It was in this context of the handoff to federal law that *Glazer* held that publication divested the plaintiff of state common

[7] *Fuller v. Bemis*, 50 F. 926, 929 (C.C.D.N.Y. 1892) (stage dance held to be insufficient); *Serrana v. Jefferson*, 33 F. 347, 348 (C.C.D.N.Y. 1888) (tank of water used to mimic river in stage play constituted "mere mechanical instrumentalities by which [stage] effects or situations [were] produced.").

law protection. *Glazer* did not hold that all common law protection ends "even where no federal protection is available." To the contrary, it expressly noted that "[p]rotection of these common law rights, after publication, is given under well-defined conditions and circumstances." *Glazer*, 16 So. 2d at 53-55. Therefore, divestive publication, which was relevant in *Glazer* because federal copyright laws occupied the field of copyright protection for the category of dramatic works at issue there, is entirely inapplicable to the pre-1972 recordings in this case, which are categorically excluded from federal copyright laws.

C. Repeal of Fla. Stat. §§ 543.02-03 Confirmed Florida's Protections of Common Law Copyrights in Performances of Sound Recordings.

As explained in Flo & Eddie's Initial Brief and the brief of Amicus Curiae Entertainment, Arts, and Sports Law Section of the Florida Bar ("AB"), in 1941, the State of Florida enacted §§ 543.02-03, Florida Statutes to strip from artists the common law copyright protections, among others, in their performances that existed at common law. IB 21-25; AB 6-14. In 1977, Florida repealed §§ 543.02-03, thereby reviving the protections the legislature had earlier recognized and abrogated. *See Florida Fertilizer & Mfg. Co.*, 34 So. at 241; *Naxos*, 830 N.E.2d at 261-62.

SiriusXM attempts to rewrite history by reading the specific facts of *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939) into §§ 543.02-03, arguing that its abolition was limited to the right found in that case. RB 31-32. SiriusXM thus

asks the Court to determine that the Florida Legislature did a futile act by abrogating law that did not exist, then took *another* futile act repealing its abrogation, which courts may not do. *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009).

With the repeal of §§ 543.02-03, the common law's full protection of the exclusive ownership of the artistic performances embodied on the records was fully revived. As in *Garrod*, the sale of a record was not a divestive publication, and SiriusXM's purchase of a single record for unlicensed public performance to 28 million paid subscribers though use of sophisticated technology which it claims circumvents copying (it does not) constituted common law copyright infringement.

D. There Is No Basis To Unbundle The Rights Inherent In Ownership of Pre-1972 Recordings In The Absence of a Legislative Act.

Despite the language in *Glazer* supporting common law protection of pre-1972 recordings as against unauthorized public performance and its reliance on a case explicitly granting the same (*Waring*), SiriusXM argues that "Florida law could recognize a right to control post-sale copying without recognizing a right to control post-sale performance," and that existing case law only demonstrates the existence of such an "anti-piracy" right and not a performance right. RB 20, 36-46. It reaches this conclusion based on anti-piracy cases that do not address a common law prohibition against performance of a pilfered sound recording as well. It is well-established, however, that an issue not raised or addressed in a case has no

precedential value, rendering the absence of such holdings meaningless. *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930) ("[N]o decision is authority on any question not raised and considered, although it may be involved in the facts of the case.").

The importance of the anti-piracy cases relied upon by SiriusXM is that they demonstrate that the artistic performances in pre-1972 recordings are, in fact, property, the unauthorized taking of which creates liability. *See Garrod*, 622 F. Supp. at 535; *Mercury Record Productions, Inc. v. Economic Consultants, Inc*., 218 N.W.2d 705 (Wis. 1974), *appeal dismissed*, 420 U.S. 914 (1975) (record producers have intangible property interests in "professional investment of time, skill, and money in the recordings."); *Waring v. WDAS Broad. Station*, 327 Pa. 433, 441 (Pa. 1937) (one who transforms a musical composition into a sound product creates "something of novel intellectual or artistic value [and] has undoubtedly participated in the creation of a product in which he is entitled to a right of property"); *Metro.Opera v. Wagner-Nichols*, 199 Misc. 786, 802 (N.Y. Sup. Ct. 1950) ("To refuse to the groups who expend time, effort, money and great skill in producing [] artistic performances the protection of giving them a 'property right' in the resulting artistic creation would be contrary to existing law…").

E. The Public Policy of Florida Supports Enforcement of Common Law Copyrights in Performances of Sound Recordings.

SiriusXM's slippery slope argument that recognition of a public performance right will bar the private enjoyment of music forever and bring chaos

to the broadcast industry is specious. First, Congress has placed an expiration date of 2067 on all common law copyright protections. 17 U.S.C. § 301. Second, well-established law recognizes a distinction between private performance and public performance and this case addresses only public performance. *See Waring*, 327 Pa. at 447; *Buck v. Jewell-La Salle Realty Co*., 283 U.S. 191, 196 (1931). Third, SiriusXM's claims of chaos are overstated and defeated by the order that presently exists in the broadcasting industry, whereby SiriusXM has negotiated royalty rates with many pre-1972 recording artists.[8] Fourth, courts are fully capable and empowered to evaluate other potential exceptions to the performance right as the need arises in subsequent cases. *See e.g. Naxos*, 830 N.E.2d at 266-67. Fifth, the Florida Legislature has recognized the existence of a common law copyright protection for sound recordings. Fla. Stat. §§ 543.02-03 (1941) and (1977).

F. SiriusXM's Systematic Reproduction of Full Copies of Plaintiff's Pre-1972 Recordings Should Not Qualify as a "Fair Use" Thereof.

SiriusXM's reproduction defense fails for the same reason its public performance defense fails – it has misapprehended the respective rights and burdens of the parties. SiriusXM argues that "Plaintiff cites no case holding that buffer, cache, or similar temporary copies infringe statutory or common law

[8] The ability to contract has, to date, not proven to be an impediment to SiriusXM. In June 2015, it licensed approximately 80% of the pre-1972 recordings it has historically played in a single agreement, and has since entered into dozens of additional licenses with owners of pre-1972 recordings to cure its infringements and obtain future authorizations.

copyright." RB 42. No such case is needed because the right to exclude under Florida property law extends to *all* unauthorized uses of the property in question.[9]

Because a fair use determination is highly fact-dependent and evaluated on a case-by-case basis, it would be prudent not to rule on the Eleventh Circuit's third certified question as worded (*i.e*., whether SiriusXM's reproductions constitute fair use), but rather whether a fair use defense is available in the first instance, and if so, remand accordingly. *See, e.g., Daniels v. State*, 595 So. 2d 952, 953 (Fla. 1992) (rewording certified question); *Atwell v. Sacred Heart Hosp*., 520 So. 2d 30, 32 (Fla. 1988) (same). This is because the resolution of the ultimate issue as to whether SiriusXM's reproduction are fair use in this case rests on numerous facts and factors that a federal trial court is best suited to evaluate. *See MDS (Can.) Inc. v. Rad Source Techs., Inc*., 143 So. 3d 881, 892-93 (Fla. 2014).

G. Flo & Eddie's Non-Copyright Claims are Valid under Florida Law.

SiriusXM concedes that "common law copyright may 'co-exist' with other 'state laws protecting property' ([IB] 40) and that 'unfair competition, conversion, and civil theft are applicable to intangible property' ([IB] 41)" but argues that no such common law copyright exists here due to loss of common law copyright by publication. RB 45 (citation omitted). SiriusXM advances no Florida law

[9] It is not Flo & Eddie that requires authorization for a specific exclusion, but rather SiriusXM that requires authorization for a specific exemption to overcome property rights.

supporting its theory that publication or common law copyright has any effect on Florida's conversion, unfair competition, or civil theft laws, and other jurisdictions flatly reject SiriusXM's argument. *See e.g. Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2016 NY Slip Op 08480, ¶ 16 (N.Y. Ct. App. Dec. 20, 2016) ("[S]ound recording copyright holders may have other causes of action, such as unfair competition, which are not directly tied to copyright law. […] Thus, even in the absence of a common-law right of public performance, plaintiff has other potential avenues of recovery.")[10]; *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718 (9th Cir. 1984) (finding conversion and unfair competition with respect to pre-1972 recordings in the absence of common law copyright).

Florida's broad definition of property certainly captures the performance embodied in a sound recording, and SiriusXM's purchases allow it to *listen* to the recordings (the authorized use of a recording sold at retail), and nothing more. Under Florida law, "[i]t is not necessary for a person to deprive another of exclusive possession of their property in order to be liable for conversion." *Warshall v. Price*, 629 So. 2d 903, 904 (Fla. 4th DCA 1993). Having been "denied the benefit" of one's recordings when SiriusXM took and used copies is enough.

[10] The New York Court of Appeals' additional holding that New York common-law copyright does not recognize a right of public performance was predicated on the view that New York law does not follow *Waring*. 2016 NY Slip Op 08480, ¶ 8. In contrast, this Court expressly looked to *Waring* in determining what protections Florida provides under *its* common law. *Glazer*, 153 Fla. at 813-14.

Id. at 905 (conversion was appropriate for copying a patient list, "even though [the plaintiff] at all times had access to his own [copy]."); *see also Joe Hand Promotions, Inc. v. Hart*, 11-80971-CIV, 2012 WL 1289731, at *2 (S.D. Fla. Apr. 16, 2012) (conversion based on unauthorized taking of television broadcast); *Garrod*, 622 F. Supp. at 536 (conversion based on unauthorized taking of the "time, effort and expense" of producing records); *Total Mktg. Techs. v. Angel Medflight Worldwide Air Ambulance Servs., LLC*, 2012 WL 33150, at *3-4 (M.D. Fla. Jan. 6, 2012) (conversion based on taking of confidential business information by diverting phone calls); *Intelsat Corp. v. Multivision TV LLC*, 2010 WL 5437261, at *5 (S.D. Fla. Dec. 27, 2010) ("unauthorized transmissions to the satellite and the concomitant disruption of service are acts of dominion over [plaintiff's] satellite services inconsistent with [plaintiff's] ownership.").[11]

SiriusXM's narrow definition of unfair competition under Florida law, which it argues its actions do not qualify as (RB 45), purposefully confuses two different forms of unfair competition – the form articulated in *Garrod* and applicable in this case, which protects against competitive misappropriation of property developed by the investment of time, labor, and money, and the separate

[11] SiriusXM's claim that "Courts have dismissed conversion claims grounded in the unauthorized use of a copyrighted work" (RB 48) ignores that those cases involve *federally* copyrighted works, meaning state law conversion claims that were subject to preemption under 17 U.S.C. § 301(a), which has no application here. *Garrido v. Burger King Corp*., 558 So. 2d 79, 81-82 (Fla. 3d DCA 1990).

and distinct form where "the unfair competition claim is based upon 'reverse passing off.'" *Ediciones Musicales y Representaciones Internacionales, S.A. v. San Martin*, 582 F. Supp. 2d 1358, 1361 (S.D. Fla. 2008).[12] The former is plainly applicable.

Concerning civil theft, SiriusXM argues that "plaintiff [cannot] establish that SiriusXM's performances were wrongful or made with wrongful intent." RB 48. Intent, however, is inherently a fact or jury question not susceptible to judgment as a matter of law, *Sebastiano v. Fla*., 14 So. 3d 1160, 1164 (Fla. 4th DCA 2009), particularly since it can be "inferred from the acts of the parties and from the surrounding circumstances," *State v. West*, 262 So. 2d 457 (Fla. 4th DCA 1972). Where, as here, Flo & Eddie has stated a cause of action for civil theft that is independent from its common law copyright protections, the issue of whether SiriusXM's intent was wrongful is a question of fact to be resolved by a jury.

CONCLUSION

For the foregoing reasons, the certified questions should be answered as requested in Flo & Eddie's Initial Brief, and the case returned to the U.S. Court of Appeals for the Eleventh Circuit for further proceedings.

[12] SiriusXM misleadingly claims that Flo & Eddie conceded the parties do not compete with one another. RB 46-47. What Flo & Eddie said is that it does not compete with SiriusXM in providing satellite or Internet music services. Where they do compete, however, is that they are both selling access to the same music.

Respectfully submitted,

GUNSTER
Appellate Counsel for Flo & Eddie, Inc.
600 Brickell Avenue, Suite 3500
Miami, Florida 33131
Telephone: 305-376-6000
Facsimile: 305-376-6010
acortinas@gunster.com
jkaskel@gunster.com

By: /s/ Angel A. Cortiñas
Angel A. Cortiñas, FBN 797529
Jonathan Kaskel, FBN 52718

GRADSTEIN & MARZANO, P.C.
Counsel for Flo & Eddie, Inc.
6310 San Vicente Boulevard
Suite 510
Los Angeles, California 90048
Telephone: 323- 776-3100
Facsimile: 323−931−4990
hgradstein@gradstein.com
mmarzano@gradstein.com

By: /s/ Henry Gradstein
Henry Gradstein
Cal. Bar No. 89747
Admitted pro hac vice by the Florida Supreme Court

By: /s/ Maryann R. Marzano
Maryann R. Marzano
Cal. Bar No. 96867
Admitted pro hac vice by the Florida Supreme Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 23, 2017, a true and correct copy of the foregoing was served on the following:

By: /s/ Angel A. Cortiñas
Angel A. Cortiñas

Service List

Glenn H. Waldman, Esquire
Jason Gordon, Esquire
HELLER WALDMAN, P.L.
Attorneys for Flo & Eddie, Inc.
3250 Mary Street, Suite 102
Coconut Grove, Florida 33133
Telephone: 305-448-4144
Telecopier: 305-448-4155
gwaldman@hellerwaldman.com
jgordon@hellerwaldman.com

Steven G. Sklaver, Esquire
Attorneys for Flo & Eddie, Inc.
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067
Telephone 310-789-3123
Telecopier: 310-789-3150
ssklaver@susmangodfrey.com

Steve Morrissey, Esquire
SUSMAN GODFREY LLP
Attorneys for Flo & Eddie, Inc.
1201 Third Avenue, Suite 3800
Seattle, WA 98101-3000
Telephone: 206-373-7380
Telephone: 310-789-3103
Telecopier: 206-516-3883
smorrissey@susmangodfrey.com

Henry D. Gradstein, Esquire
Maryann R. Marzano, Esquire
GRADSTEIN &MARZANO, P.C.
Attorneys for Flo & Eddie, Inc.
6310 San Vicente Blvd., Suite 510
Los Angeles, CA 90048
Telephone: 323-776-7100
Telecopier: 323-931-4990
hgradstein@gradstein.com
mmarzano@gradstein.com

David M. Gersten, Esquire
GORDON & REES, ET AL.
Attorneys for Appellee
200 S. Biscayne Blvd., Suite 4300
Miami, FL 33131
Telephone: 305-428-5300
Telecopier: 877-644-6207
dgersten@gordonrees.com

Daniel M. Petrocelli, Esquire
Cassandra L. Seto, Esquire
O'MELVENY & MYERS LLP
Attorneys for Appellee
1999 Avenue of the Stars, 8th Floor
Los Angeles, CA 90067
Telephone: 310-246-6703
Telecopier: 310-246-6779
dpetrocelli@omm.com
cseto@omm.com

Anton Metlitsky, Esquire
O'MELVENY & MYERS LLP
Attorneys for Appellee
7 Times Square
New York, New York, 10036
Telephone: 212- 326-2291
Telecopier: 212-326-2061
ametlitsky@omm.com

Jonathan D. Hacker, Esquire
O'MELVENY & MYERS LLP
Attorneys for Appellee
1625 Eye Street NW
Washington, District of Columbia, 20006
Telephone: 202-383-5285
Telecopier: 202-383-5414
dhacker@omm.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

By: /s/ Angel A. Cortiñas
Angel A. Cortiñas