

1 GRADSTEIN & MARZANO. P.C.  
 HENRY GRADSTEIN (89747)  
 2 hgradstein@gradstein.com  
 MARYANN R. MARZANO (96867)  
 3 mmarzano@gradstein.com  
 6310 San Vicente Blvd., Suite 510  
 4 Los Angeles, California 90048  
 5 T: 323-776-3100

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6 SUSMAN GODFREY L.L.P.  
 STEPHEN E. MORRISSEY (187865)  
 7 smorrissey@susmangodfrey.com  
 STEVEN G. SKLAVER (237612)  
 8 ssklaver@susmangodfrey.com  
 KALPANA SRINIVASAN (237460)  
 9 ksrinivasan@susmangodfrey.com  
 1901 Avenue of the Stars, Suite 950  
 10 Los Angeles, CA 90067-6029  
 11 T: 310-789-3100 F: 310-789-3150

12 [Additional Counsel for Plaintiff on Signature Page]  
 13 *Co-Lead Class Counsel*

14 **UNITED STATES DISTRICT COURT**  
 15 **CENTRAL DISTRICT OF CALIFORNIA**  
 16 **WESTERN DIVISION**

17  
 18 FLO & EDDIE, INC., a California  
 corporation, individually and on behalf  
 19 of all others similarly situated,  
 20  
 Plaintiff,  
 21  
 v.  
 22 SIRIUS XM RADIO, INC., a Delaware  
 corporation; and DOES 1 through 10,  
 23  
 Defendants.  
 24

Case No. 2:13-cv-05693-PSG-GJS

~~[PROPOSED]~~ ORDER AND FINAL JUDGMENT

1           **WHEREAS** Plaintiff Flo & Eddie, Inc. (“Plaintiff,” for itself and on behalf of  
2 the proposed Settlement Class, entered into a Stipulated Class Action Settlement  
3 (the “Stipulation,” together with the Exhibits annexed thereto, the “Settlement”)  
4 with Defendant Sirius XM Radio Inc. (“Sirius XM” or “Defendant”).

5           **WHEREAS**, on January 27, 2017 the Court entered its Order granting  
6 preliminary approval of the proposed settlement (“Preliminary Approval Order”)  
7 (Dkt. #676). The Preliminary Approval Order, among other things, authorized  
8 Plaintiff to disseminate Notice of the Settlement, the Final Approval Hearing, and  
9 related matters to the Class. Notice was provided to the Class pursuant to the  
10 Preliminary Approval Order on February 6, 2017, and the Court held a Final  
11 Approval Hearing on May 8, 2017 at 1:30 p.m., at which time all interested persons  
12 were afforded the opportunity to be heard.

13           **WHEREAS**, this Court has duly considered Plaintiff’s motion, all papers and  
14 evidence submitted in connection therewith, the Stipulation, and all of the  
15 submissions and arguments presented at the Final Approval Hearing with respect to  
16 the proposed Settlement.

17           **NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND**  
18 **DECREEED** as follows:

19           1.     The capitalized terms used herein shall have the meanings set forth in  
20 the Settlement, Exhibit 1 to the Declaration of Steven G. Sklaver in Support of  
21 Preliminary Approval of Settlement (Dkt. #666-4).

22           2.     This Court has jurisdiction over the subject matter of the above-  
23 captioned action (“Action”) and over all settling Parties and all members of the  
24 Settlement Class.

25           3.     The Notice provided for and given to the Settlement Class: (i) was  
26 provided and made in full compliance with the Preliminary Approval Order; (ii)  
27 constituted the best notice practicable under the circumstances; (iii) constituted  
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1 notice that was reasonably calculated to apprise the Settlement Class of the terms of  
2 Settlement, of the proposed distribution plan, of Class Counsel's application for an  
3 award of attorney's fees, costs and expenses incurred in connection with the Action,  
4 of Settlement Class Members' right either to request exclusion from the Settlement  
5 Class or to object to the Settlement, the plan of allocation, or Class Counsel's  
6 application for an award of attorney's fees, costs and expenses, and application for  
7 an incentive award Plaintiff, and of the right of Settlement Class Members to appear  
8 at the Final Approval Hearing; (iv) constituted due, adequate, and sufficient notice  
9 to all persons entitled to receive notice of the proposed Settlement; (v) was the best  
10 notice practicable under the circumstances; and (vi) fully satisfied the notice  
11 requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States  
12 Constitution (including the Due Process Clause of the Fifth Amendment to the  
13 Constitution), and all other applicable law and rules.

14 4. The Court has considered any objections to the Settlement submitted  
15 pursuant to Rule 23(e)(5) of the Federal Rules of Civil Procedure. The Court finds  
16 and concludes that each of the objections is without merit, and they are hereby  
17 overruled.

18 5. In light of the substantial benefits provided to the Settlement Class by  
19 the Settlement, the complexity, expense and possible duration of further litigation of  
20 the Action, including any possible appeals, the risks of establishing liability and  
21 damages, and the costs of continued litigation, the Court hereby fully and finally  
22 approves the Settlement as set forth in the Stipulation in all respects, and finds that  
23 the Settlement is in all respects fair, reasonable and adequate, and in the best  
24 interests of Plaintiff, the Settlement Class, and the Settlement Class Members. This  
25 Court further finds that the Settlement set forth in the Stipulation is the result of  
26 arm's-length negotiations by highly experienced counsel representing the interests  
27 of their respective settling Parties.

28

1           6.     The one entity that timely and validly requested exclusion from the  
2 Settlement Class identified in the Declaration of Eric Kierkegaard, filed on April 10,  
3 2017, is excluded. The entity (Gusto Records, Inc.) is neither included in nor bound  
4 by this Order and Final Judgment and is not entitled to any recovery from the  
5 settlement proceeds (including not being entitled to any recovery from the  
6 Settlement Fund or Royalty Program) obtained through this Settlement.

7           7.     With the exception of the California Appeal and Florida Appeal and for  
8 any actions necessary to enforce the Settlement, during the Term, the institution and  
9 prosecution, by any Settlement Class Member, either directly, individually,  
10 representatively, derivatively or in any other capacity, by whatever means, of any  
11 other action against the Covenantees in any court, or in any agency or other  
12 authority or arbitral or other forum wherever located, asserting any of the claims in  
13 Paragraph III.D (Covenant Not to Sue) of the Stipulation is barred, enjoined and  
14 restrained.

15           8.     The Administrator is authorized to distribute from the Settlement Fund  
16 to Settlement Class Members the amounts that Class Counsel and the Administrator  
17 have determined are owed to each Settlement Class Member under the terms of the  
18 approved plan of allocation.

19           9.     The Royalty Administrator is authorized to distribute from the Royalty  
20 Fund to Settlement Class Members from time to time the amounts that Class  
21 Counsel and the Royalty Administrator have determined are owed to each  
22 Settlement Class Member under the terms of the approved Royalty Program.

23           10.    Settlement Class Members are permanently barred, enjoined and  
24 restrained from making any claims against the Settlement Fund and Royalty Fund,  
25 and all persons, including the Administrator, Royalty Administrator, Plaintiff and  
26 Class Counsel and Defendant and Defendants' counsel, involved in the processing  
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1 of distributions from the Settlement Fund and Royalty Program are released and  
2 discharged from any claims arising out of such involvement.

3 11. Pursuant to Federal Rule of Civil Procedure 53, the Court hereby  
4 appoints Magistrate Judge \_\_\_\_\_ to serve as Special Master for the  
5 specific role provided for in Section VI.C of the Stipulation. Any specific challenge  
6 to ownership or control must be brought within one hundred and twenty (120) days  
7 after a claimant has made a claim to a specific Identified Pre-1972 Sound  
8 Recording(s) or one hundred and twenty (120) days after another party has made a  
9 conflicting claim to specific Identified Pre-1972 Sound Recording, whichever comes  
10 later. All decisions by the Special Master may be appealed to the Court.

11 12. Neither the Settlement, nor any act performed or document executed  
12 pursuant to the Settlement, may be deemed or used as an admission of wrongdoing  
13 in any civil, criminal, administrative, or other proceeding in any jurisdiction.

14 13. The Settlement Fund Escrow Account and Royalty Fund Escrow  
15 Account established by Plaintiff and Sirius XM, are each approved as a Qualified  
16 Settlement Fund pursuant to Internal Revenue Code Section 468B and the Treasury  
17 Regulations promulgated thereunder.

18 14. Plaintiffs are authorized to pay from the escrow account established in  
19 Section VII of the Stipulation all reasonable Notice and administrative costs to the  
20 Administrator and Royalty Administrator, including all costs and expenses incurred  
21 and expected to be incurred by the Administrator and Royalty Administrator, and all  
22 costs and expenses incurred to date.

23 15. In the event that the Settlement does not become effective in  
24 accordance with the terms of the Stipulation, then this Judgment shall be rendered  
25 null and void to the extent provided by and in accordance with the Stipulation and  
26 shall be vacated; and in such event, all orders entered and covenants delivered in  
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1 connection herewith shall be null and void to the extent provided by and in  
2 accordance with the Stipulation.

3 16. The Action is dismissed with prejudice as to Sirius XM and, except as  
4 provided in Section VII of the Stipulation, without costs to either party.

5 17. This Court has previously granted summary judgment in favor of  
6 Plaintiff and against Sirius XM on the Performance Right Issue and the Commerce  
7 Clause Issue. *See e.g.*, Dkt. 117 (Order granting Plaintiff s Motion for Summary  
8 Judgment); Dkt. 175 (Order denying Motion for Reconsideration). A bona fide  
9 justiciable dispute remains between the Parties as to the Performance Right Issue  
10 and the Commerce Clause Issue that neither Party has waived by entering into the  
11 Settlement. The Parties retain all procedural and substantive rights to proceed with  
12 the Florida Appeal and any further proceedings to the United States Supreme Court,  
13 and, except for Sirius XM’s agreement not to appeal this Court’s class certification  
14 rulings, to proceed with the California Appeal and any further proceedings to the  
15 United States Supreme Court, to resolve those two discrete issues. This limited  
16 agreement gives both Sirius XM and Plaintiff a considerable financial stake in the  
17 appellate resolution of these two questions.

18 a. In the event that Plaintiff Prevails on the Performance Right  
19 Issue in the California Appeal and/or Florida Appeal, Sirius XM shall pay into the  
20 Settlement Fund Escrow Account an additional five million dollars (\$5 million) per  
21 appeal, for a total up to ten million (\$10 million) dollars.

22 b. In the event that Sirius XM Prevails on the Performance Right  
23 Issue in the California Appeal and/or Florida Appeal, the royalty rate that Sirius XM  
24 must pay pursuant to the Royalty Program shall be reduced by 2% points per appeal  
25 (e.g., from 3.5% to 1.5%), except that the reduction shall be 1.5% for the Florida  
26 Appeal (e.g., from 3.5% to 2.0%).

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1           c.     In the event that Sirius XM Prevails on the Commerce Clause  
2 Issue in the Eleventh Circuit, Ninth Circuit, or United States Supreme Court, then  
3 Sirius XM's going-forward royalty obligations to eligible Settlement Class  
4 Members pursuant to the Royalty Program shall immediately terminate. In such an  
5 event, the termination of Sirius XM's royalty obligation shall be prospective only  
6 and no funds previously disbursed to Settlement Class Members under the Royalty  
7 Program shall revert back to Sirius XM.

8           d.     In the event that Sirius XM Prevails on the Commerce Clause  
9 Issue in the Eleventh Circuit or Ninth Circuit, but Plaintiff Prevails in the United  
10 States Supreme Court on the Commerce Clause Issue, then the termination of Sirius  
11 XM's royalty obligation shall be null and void and Sirius XM shall pay all royalty  
12 obligations owed to eligible Class Members under the Royalty Program from  
13 January 1, 2018 through January 1, 2028.

14         18.    The resolution of the Performance Right Issue and/or Commerce  
15 Clause Issue in the California Appeal, New York Appeal and/or Florida Appeal,  
16 shall not operate to terminate the Settlement and, regardless of the pendency and  
17 outcome of those two issues in these appeals, Sirius XM's obligation to fund the \$25  
18 million Settlement Payment shall be in full force and effect as set forth in the  
19 Stipulation and those funds may be disbursed from the Settlement Fund Escrow  
20 Account pursuant to its terms.

21         19.    A separate order shall be entered regarding Class Counsel's application  
22 for attorneys' fees and payment of expenses and incentive awards as allowed by the  
23 Court. A separate order shall be entered regarding the proposed plan of allocation.  
24 Such orders shall in no way disturb or affect this Judgment and shall be considered  
25 separate and apart from this Judgment.

26         20.    Without further order of the Court, the settling Parties may agree to  
27 reasonable extensions of time to carry out any of the provisions of the Settlement.  
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