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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**
18 **WESTERN DIVISION**

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

22 Plaintiff,

23 v.

24 SIRIUS XM RADIO INC., a Delaware
corporation; and DOES 1 through 10,

25 Defendants.
26

Case No. CV13-05693 PSG (GJSx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Date: January 30, 2017
Time: 1:30 p.m.
Place: Courtroom 880

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1 **I. INTRODUCTION**

2 After three years of hard-fought litigation, Plaintiff Flo & Eddie, Inc.
3 (“Plaintiff” or “Flo & Eddie”), on behalf of itself and the class of owners of Pre-
4 1972 Sound Recordings proposed to be certified for purposes of settlement
5 (collectively, “Plaintiffs”), and Defendant Sirius XM Radio Inc. (“Sirius XM”)
6 have reached a settlement of this action, subject to Court approval, as set forth in
7 the parties’ Stipulated Class Action Settlement (the “Stipulation” or “Settlement”).¹
8 The Stipulation, attached to the supporting Declaration of Steven G. Sklaver as
9 Exhibit 1 (“Stip.”), provides a potential *\$99 million cash benefit* to the prospective
10 Settlement Class.² For past relief, Sirius XM has agreed to pay up to \$40 million.
11 Of that amount, the Class is guaranteed \$25 million upon final approval and will
12 receive an additional \$5 million—up to an additional \$15 million payment—for
13 each appeal in which Flo & Eddie prevails on the performance rights issue in
14 California, New York, and Florida. On a per-play basis, the minimum \$25 million
15 settlement represents approximately an award of *\$15.68 per play*; the \$40 million
16 settlement represents approximately *\$25 per play*. Wallace Decl. at ¶21. None of
17 these funds revert back to Sirius XM. By any measure, that compensation by itself
18 is an excellent result.

19 The Settlement also provides for a ten-year license through January 1, 2028
20 in exchange for cash royalty payments by Sirius XM at up to a 5.5% royalty rate
21 for each Settlement Class Member’s pro rata share of Sirius XM’s defined Gross
22 Revenue. The royalty rate of 5.5% is the *highest* royalty rate negotiated by any of
23 the independent record labels who chose to settle directly with Sirius XM after
24 class certification rather than await the resolution of this case. Wallace Decl. at ¶20.

25

26

27 ¹ All capitalized terms used herein are as defined in the Stipulation.

28 ² See Stip.; Declaration of Plaintiffs’ Damages Expert Michael Wallace (“Wallace Decl.”) ¶¶ 15-21.

1 Moreover, only one of those direct licenses expressly provided compensation for
2 past use of Pre-1972 Sound Recordings (for the year 2015). *Id.*

3 At the final approval hearing, the Court will have before it more extensive
4 submissions in support of Settlement and will be asked to make a determination as
5 to whether the Settlement is fair, reasonable, and adequate in light of all the
6 relevant factors, including the fact that Plaintiffs' expert estimates that the 5.5%
7 future license could generate between approximately \$45.47 million (assuming that
8 Sirius XM has no annual revenue growth) to over \$59.21 million (assuming
9 continued annual revenue growth) in additional cash payments to the Class over the
10 next 10 years. (Wallace Decl. at ¶¶15-16.) This portion of the Settlement represents
11 a substantial benefit for the Class, and generates monetary relief that could not be
12 obtained even if Plaintiffs were victorious at trial.

13 On preliminary approval, the question is whether the Settlement's
14 substantive terms fall within the range of "possible" approval, such that notice
15 should be sent to the Class and a full fairness hearing should be held. The
16 substantial recovery obtained for the Class in light of the risks of continued
17 litigation—namely the range of potential damages, competing damage models, and
18 adverse rulings on appeal on both the merits and on decertification in this and other
19 jurisdictions—easily meets that test. Of course, the Court is very familiar with the
20 issues raised in this litigation and the claims and defenses of the Parties. The
21 Settlement culminated less than 48 hours before the jury trial was set to commence
22 and after all pretrial filings were complete and after more than three years of hotly
23 contested litigation, and it resulted from an extensive, arm's-length negotiation
24 between the parties. Accordingly, Flo & Eddie respectfully requests that the Court
25 preliminarily approve the terms of the Settlement so that Class members can
26 receive notice of the Settlement and the final approval hearing.

27 **II. BACKGROUND**

28 Flo & Eddie filed its Complaint in this action on August 1, 2013 in state

1 court. Sirius XM removed the case to this Court on August 6, 2013. Dkt 1. Sirius
2 XM then filed a Motion to Transfer Venue, Dkt. 30, and a Motion to Stay
3 Proceedings, Dkt. 32. The Court denied both motions. Dkts. 42-43. Sirius XM also
4 filed a Motion to Strike Class Allegations, which the Court denied. Dkt. 47, 56. The
5 Court bifurcated discovery into liability and damages phases. Dkt. 58. After
6 conducting liability discovery, Plaintiffs moved for summary judgment on liability
7 as to all of their claims, and substantial briefing followed. Dkt. 65, 86, 97, 106, 111.
8 The Court heard oral argument on September 15, 2014. On September 22, 2014,
9 the Court granted summary judgment against Sirius XM on liability based on the
10 performance right issue, but not the reproduction issue. Dkt. 117.

11 On October 15, 2014, Sirius XM moved to certify the Court's summary
12 judgment order for interlocutory appeal and requested a stay, which Plaintiff
13 opposed. Dkt. 123, 143, 149. The Court denied Sirius XM's request for
14 interlocutory appeal on November 20, 2014. Dkt. 159. Sirius XM also filed a
15 motion for reconsideration of the Court's summary judgment order on November
16 17, 2014. Dkt. 154, 162 (opposition), 165 (reply). The Court denied Sirius XM's
17 motion on February 19, 2015. Dkt. 175.

18 On March 16, 2015, after conducting additional extensive discovery, Plaintiff
19 filed its motion for class certification. Dkt. 180. Plaintiff moved the Court under
20 Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure for an order certifying
21 the Action as a class action on behalf of:

22 The owners of sound recordings fixed prior to February 15, 1972 ...
23 which have been reproduced, performed, distributed, or otherwise
24 exploited by Defendant Sirius XM in California without a license or
25 authorization to do so during the period from August []1, 2009 to the
26 present.

27 Dkt. 180 at 2. *See also* Dkt. 193 (opposition), 200 (reply), and the Court held a
28 hearing on May 22, 2015, Dkt. 224. The Court entered an order certifying the class

1 on May 27, 2015. Dkt. 225.

2 Shortly thereafter, on June 2, 2015, Sirius XM filed an *Ex Parte* Application
3 for Stay Pending Rule 23(f) Petition or, Alternatively, to Modify Scheduling Order,
4 Dkt. 228, requesting the Court stay the case pending resolution of Sirius XM's
5 petition to the Ninth Circuit for permission to appeal the Court's order granting
6 Plaintiff's motion for class certification. Dkt. 228, 230 (opposition), 232 (reply).
7 The Court heard oral argument on June 8, 2015, Dkt. 236, and that same day
8 entered an order granting the motion. Dkt. 237. Sirius XM filed its Rule 23(f)
9 petition to the Ninth Circuit on June 10, 2015, which Plaintiffs opposed. On August
10 10, 2015, the Ninth Circuit denied the petition. On August 24, 2015, Sirius XM
11 filed a petition for rehearing or reconsideration *en banc*, which the Ninth Circuit
12 denied on November 10, 2015. On November 25, 2015, Sirius XM filed a Motion
13 to Continue Stay Pending Resolution of Related Appeal. Dkt. 264, Dkt. 269
14 (opposition), Dkt. 270 (reply). The Court denied Sirius XM's motion. Dkt. 271.

15 Thereafter, the Court entered an order permitting Plaintiffs to conduct limited
16 damages-related discovery on Sirius XM and Sirius XM to conduct absent class
17 member discovery. Dkt. 272. The parties conducted such discovery, which
18 involved numerous in-person meet and confer sessions as well as motion practice.
19 Sirius XM served subpoenas on absent class members across the country and took
20 19 depositions, with absent class members collectively producing thousands of
21 pages of documents.

22 On April 27, 2016, Plaintiffs filed a Motion for an Order Approving the
23 Form and Manner of Class Notice. Dkt. 294, 311 (opposition), 313 (reply), which
24 the Court granted on June 16, 2016, Dkt. 317. Sirius XM filed a petition for writ of
25 mandamus with the Ninth Circuit, which was denied.

26 On July 6, 2016, Sirius XM filed a motion for partial summary judgment,
27 seeking judgment against Plaintiffs' claims for punitive damages, disgorgement,
28 and common law unfair competition. Dkt. 335. On September 8, 2016, the Court

1 granted Sirius XM's motion in part, granting Sirius XM judgment as a matter of
2 law on Plaintiffs' punitive damages and common law unfair competition claim.
3 Dkt. 411. On July 29, 2016, Sirius XM filed a Motion for Decertification. Dkt.
4 345, 396 (opposition), 424 (reply). The Court denied Sirius XM's motion on
5 September 20, 2016. Dkt. 432.

6 The parties briefed a total of 18 motions *in limine*, designated deposition
7 testimony from 23 witnesses, prepared competing jury instructions, Dkts. 592-593,
8 and designated and conferred regarding the admissibility of the parties' hundreds of
9 exhibits comprised of thousands of pages. The Court held pretrial conferences on
10 November 7, 2016 and November 10, 2016. Dkts. 639, 661. A jury trial was
11 scheduled to begin on November 15, 2016.

12 Leading up to trial and prior to agreeing to the Settlement, Plaintiffs, through
13 Class Counsel, conducted a thorough investigation of the facts and law relating to
14 the matters alleged in the Complaint, including, among other things, (i) reviewing
15 and analyzing the evidence and applicable law, including the review and analysis of
16 thousands of pages of documents produced by Sirius XM and third parties; (ii)
17 consulting with experts retained by Class Counsel; (iii) taking and defending
18 numerous depositions of fact and expert witnesses; (iv) engaging in extensive
19 motion practice, including motions to compel, class certification, summary
20 judgment, motions *in limine*; and (vi) the preparing exhibit lists, jury instructions,
21 and related pretrial conference filings. Less than two days before the jury trial was
22 to begin, and after extensive arm's-length negotiations, the Parties entered into the
23 Settlement Agreement.

24 Sirius XM has denied and continues to deny each and all of the claims and
25 contentions alleged by Plaintiffs. Sirius XM has expressly denied and continues to
26 deny all charges of wrongdoing or liability arising out of any of the conduct,
27 statements, acts or omissions alleged, or that could have been alleged, in this action
28 and explicitly denies that it has committed the alleged infringement, violations of

1 law or breaches of duty to Plaintiffs, the Settlement Class, or anyone else.

2 Plaintiffs and Class Counsel believe that the claims as to liability asserted
3 and damages sought have merit and that the evidence developed to date supports
4 the claims asserted. However, based upon their extensive discovery, investigation,
5 and evaluation of facts and the law concerning the matters alleged, Plaintiffs and
6 Class Counsel agreed to settle the Action pursuant to the provisions of the
7 Settlement after considering, among other things: (1) the fairness, reasonableness,
8 and adequacy of the Settlement; (2) the substantial risks and uncertainty of
9 protracted litigation as to damages in this case and appeals as to all issues,
10 especially in complex actions such as this, as well as the difficulties and delays
11 inherent in such litigation; and (3) the desirability of promptly providing relief to
12 Plaintiff and the Settlement Class Members.

13 **III. TERMS OF THE SETTLEMENT**

14 The Stipulation and the exhibits thereto provide all of the material details of
15 the Settlement terms. Class representatives Flo & Eddie approved the terms of the
16 Settlement, and Class Counsel deems such settlement to be fair, reasonable, and
17 adequate to, and in the best interests of the members of the Class.

18 **A. The Settlement Class**

19 The Settlement Class is defined as follows:

20 All owners of Pre-1972 Sound Recordings, wherever situated, which
21 have been performed, reproduced, distributed, or otherwise exploited
22 by Sirius XM in the United States from August 1, 2009 through
23 November 14, 2016, other than the Major Record Labels, the Direct
24 Licensors and all persons and entities that submit a timely, valid and
25 properly completed written request to be excluded from the Settlement
26 Class in accordance with Section VI [of the Stipulation].

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1 Stip. at 8 ¶ 1.A.42.³ Excluded from the Settlement Class are: (1) all federal court
2 judges who have presided over this case and any members of their immediate
3 families; (2) Direct Licensors; (3) Major Record Labels; and (4) Sirius XM’s
4 employees, officers, directors, agents, and representatives, and their immediate
5 family members. Stip. at Ex. 1 (Notice), p. 2 ¶ 4.

6 The Certified Class differs only slightly from the Settlement Class, in that the
7 Certified Class was limited to Pre-1972 Recordings that Sirius XM exploited in
8 California, whereas the Settlement Class broadens the territory to the United States.
9 Importantly, all members of the Settlement Class are members of the Certified
10 Class because Sirius XM broadcasts the recordings nation-wide. In other words, the
11 change from California to the United States does not alter who is eligible to
12 participate in the Settlement Class (other than the stated exclusions from the
13 Settlement Class); nor does it alter the Pre-1972 Sound Recordings at issue.

14 **B. The Right to Appeal**

15 In exchange for a contingent payment of an additional \$5 million to the
16 Settlement Class and a 2% increase in the royalty rate otherwise owed, the
17 Settlement provides that Sirius XM preserves its right to appeal the Court’s final
18 judgment of liability on the performance right issue and Commerce Clause issue in
19 this Action, but Sirius XM has also agreed that it will not appeal the Court’s class
20 certification rulings.

21 For similar, potential additional financial benefits to the Settlement Class (\$5
22 million per appeal, and a 2% royalty payment at issue for New York and 1.5%
23 royalty payment at issue in Florida), the parties also preserve their respective rights
24 to proceed with the appeal of two related actions, the New York Action and the
25

26 _____
27 ³ “Pre-1972 Sound Recording” is “a sound recording that was initially fixed prior to
28 February 15, 1972 (without regard to whether that sound recording was
subsequently re-released, re-issued, or re-mastered).” Stip. at 6 ¶ I.A. 32.

1 Florida Action.⁴ The New York Action was appealed to the United States Court of
2 Appeals for the Second Circuit and certified to the New York Court of Appeals on
3 April 13, 2016, Appeal No. CTQ-2016-0001 (“New York Appeal”) on the
4 underlying question of whether Sirius XM is entitled to publicly perform Pre-1972
5 Sound Recordings owned by Plaintiff without having to obtain permission from
6 and pay compensation to Plaintiff (the “Performance Right Issue”) under New
7 York law. Stip. at 5-6 ¶ I.A.26. Oral argument was heard before the New York
8 Court of Appeals on October 18, 2016 and a ruling is expected shortly. The Florida
9 Action was appealed to the Eleventh Circuit and certified to the Florida Supreme
10 Court on June 29, 2016, Appeal No. SC16-1161 (“Florida Appeal”). Stip. at 3-4 ¶
11 I.A.20. The Initial Brief and Answer Brief have been filed, and the Reply Brief is
12 due January 23, 2017.

13 **C. Settlement Benefits**

14 The Settlement, if approved by the Court, will establish a guaranteed cash
15 settlement fund of \$25 million for past Performances through December 31, 2017.
16 Stip. at 15-16 ¶ IV.A.1. The Settlement will also establish a cash settlement fund of
17 up to an additional \$15 million for past Performances, contingent on appellate
18 outcomes:

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⁴ The Stipulation defines the Florida Action as:

the putative class action captioned *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on September 3, 2013 in the United States District Court for the Southern District of Florida (the “Florida Court”), Case No. 13-CV-21382.

Stip. at 3 ¶ I.A.19. The Stipulation defines the New York Action as:

the putative class action captioned *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, filed on August 16, 2013 in the United States District Court for the Southern District of New York (the “New York Court”), case No. 13-CV-5784 (CM).

Stip. at 5 ¶ I.A. 25.

- 1 • If Plaintiff prevails on appeal of the Performance Right Issue in the New
2 York Action in the New York Court of Appeals, Sirius XM will pay an
3 additional \$5 million into the Settlement Fund. Stip. at 19 ¶ IV.B.1.
- 4 • If Plaintiff prevails on appeal of the Performance Right Issue in the
5 Florida Action in the Florida Supreme Court, Sirius XM will pay into the
6 Settlement Fund an additional \$5 million. Stip. at 19 ¶ IV.B.3.
- 7 • If Plaintiff prevails on appeal of the Performance Right Issue in this
8 Action, Sirius XM will pay into the Settlement Fund an additional \$5
9 million. Stip. at 19 ¶ IV.B.5.

10 The Settlement Payment, together with all interest accruing thereon, the
11 potential amounts of up to \$15 million in additional bonus payments (contingent on
12 appellate outcomes as described above) and all interest accruing thereon, are
13 collectively referred to as the “Settlement Fund.” There will be no reversion to
14 Sirius XM of the Settlement Fund.

15 The parties estimate that the Settlement Class accounts for 15% of the
16 11,808,927 million historical plays of pre-1972 recordings by Sirius XM from
17 August 2009 through October 2016 (1,771,339 historical plays). Stip. at 17-18 ¶
18 IV.A.6-7. By way of comparison, the \$210 million payment to the Major Record
19 Labels for purportedly 80% of the plays of Pre-1972 Sound Recordings through
20 2017, represents a payment of \$2,625,000 for each 1% of the Pre-1972 plays (\$210
21 million / 80). Wallace Decl. at ¶¶ 17-19. Applying this amount to the 15% of such
22 plays estimated to be owned or controlled by the Settlement Class generates an
23 amount of \$39,375,000 (= \$2,625,000 x 15). *Id.* Thus, the potential \$40 million
24 cash settlement provided for in the Settlement is on par with the Major Label
25 Settlement, just considering the past damage component.

26 Additionally, members of the Settlement Class will also license to Sirius XM
27 the right to publicly perform, reproduce, distribute, or otherwise exploit their Pre-
28 1972 Sound Recordings for a ten-year period from January 1, 2018 through January

1 1, 2028, and will be eligible to receive monthly royalty payments during that time
2 period at a royalty rate as high as 5.5%, depending on certain appellate outcomes:

- 3 • In the event Sirius XM prevails on the Performance Right Issue in the
4 New York Court of Appeals, the prospective royalty rate is reduced by
5 2%.
- 6 • In the event Sirius XM prevails on the Performance Right Issue in the
7 Florida Supreme Court, the prospective royalty rate is reduced by 1.5%.
- 8 • In the event Sirius XM prevails on the Performance Right Issue in an
9 appeal of this Action, the prospective royalty rate is reduced by 2%.
- 10 • If Sirius XM prevails regarding its appeal in the U.S. Courts of Appeal for
11 the Second, Ninth, or Eleventh Circuits, or in the United States Supreme
12 Court based on the question of whether it would violate the Commerce
13 Clause of the United States Constitution to apply a state-law right to
14 control and/or demand compensation for the public performance of Pre-
15 1972 Sound Recordings, Sirius XM will not be required to make any
16 prospective royalty payments, but the Settlement Class will keep all
17 royalties previously paid.

18 Stip. at 19 ¶ IV.B.

19 Sirius XM’s payment of royalties pursuant to Part IV.C.2-9 of the Stipulation
20 is referred to as the “Royalty Program.” Stip. at 7 ¶ I.A.36. The 5.5% future license
21 has significant value with estimated potential future royalties between \$45.47
22 million (assuming no revenue growth) and \$59.21 million (assuming continued
23 annual revenue growth) in royalties over the next 10 years based on the assumption
24 that 15% of Sirius XM’s future plays are of Pre-72 Sound Recordings owned by the
25 Settlement Class. Wallace Decl. ¶¶15-16. Again, by way of comparison, the royalty
26 rate of 5.5% is the *highest* royalty rate negotiated by any of the record labels who
27 chose to settle directly with Sirius XM after class certification rather than await the
28 resolution of this case. Wallace Decl. at ¶20. Moreover, only one of those direct

1 licenses expressly provided compensation for past use of Pre-1972 Sound
2 Recordings (for the year 2015). *Id.*

3 Sirius XM also has agreed to pay for the reasonable costs of administering
4 the Settlement Fund and the Notice, up to an additional \$500,000. Stip. at 29 ¶ VII.

5 **D. Settlement Fund Distribution Plan**

6 To qualify for a payment from the Settlement Fund, a Settlement Class
7 Member must timely and validly submit a completed Proof of Claim. The Proof of
8 Claim will require each Settlement Class Member to (1) identify each Pre-1972
9 Sound Recording owned by providing the (i) title, (ii) artist, and (iii) album and/or
10 label; and (2) represent and warrant that it owns all right, title, and interest in such
11 recording(s). The Proof of Claim will be distributed to the Class via first class mail.
12 Any Class Member may also obtain a Proof of Claim on the Internet at the website
13 maintained by the Claims Administrator: www.pre1972soundrecordings.com.

14 Any disputes concerning ownership or control that cannot be resolved will be
15 referred to a magistrate judge appointed by the Court pursuant to Fed. R. Civ. P. 53.
16 Stip. at 9 ¶ 47. The Special Master will resolve disputes regarding the ownership
17 and/or control of Pre-1972 Sound Recordings between, amongst, or involving
18 Settlement Class Members who submit a timely, valid, and properly completed
19 claim for payment from the Settlement Fund. *Id.* All decisions by the Special
20 Master concerning ownership or control may be appealed to the Court. *Id.* at 28 ¶
21 VI.C.

22 All members of the Settlement Class who have established their entitlement
23 to participate in the Settlement will be entitled to a pro rata share of the Settlement
24 Payment based on the number of historical plays of the Settlement Class Members'
25 Pre-1972 Sound Recordings.

26 **E. Royalty Program Distribution Plan**

27 To qualify for a payment from the Royalty Program, a Settlement Class
28 Member must be a Bona Fide Claimant as defined in the Stipulation. Stip. at 1 ¶

1 I.A.3. A Bona Fide Claimant must properly submit an uncontested claim to specific
2 Pre-1972 Sound Recording(s) it claims to own or control by identifying each Pre-
3 1972 Sound Recording owned by providing the (i) title, (ii) artist, (iii) album, (iv)
4 label, (v) ISRC (if known), and (vi) date first fixed, in each case for each applicable
5 Pre-1972 Sound Recording owned. *Id.* at 5 ¶ I.A.23. A Bona Fide Claimant must
6 represent and warrant that it owns all right, title, and interest in such recording(s).
7 *Id.* at 1 ¶ I.A.3. Such a claim will be considered uncontested so long as no other
8 person or entity claims to own or control the same specific Identified Pre-1972
9 Sound Recording(s). *Id.* Because the royalty program begins in January 2018,
10 depending on the timing of final approval, the parties will have substantial time to
11 set-up administration and implementation details of the program.

12 Any disputes concerning ownership or control for the Royalty Program will
13 be referred to the Special Master, in the same manner and procedure as the
14 Settlement Fund. To the extent that Sirius XM has a reasonable, good faith basis to
15 believe that a claimant does not own or control an Identified Pre-1972 Sound
16 Recording(s) (on grounds other than a claimed public domain status of the
17 Recording(s)), it may contest the claim to the Special Master, bearing all of its own
18 attorneys' fees and costs. *Id.* at 1 ¶ I.A.3. All decisions by the Special Master
19 concerning ownership or control may be appealed to the Court. *Id.* at 28 ¶ VI.C.

20 Claim forms for participating in the Royalty Program will be distributed to
21 the Class via first class mail. Any Class Member may also obtain a Royalty
22 Program claim form on the Internet at the website maintained by the Claims
23 Administrator: www.pre1972soundrecordings.com. The Claims Administrator will
24 also maintain a toll-free number that Class Members can use to ask questions.

25 Sirius XM will account for the "Pro Rata Share" of royalties allocable to its
26 use of Identified Pre-1972 Sound Recordings owned by Bona Fide Claimants,
27 calculated as follows:

28 for any particular sound recording and for any applicable accounting

1 period, a fraction of which the numerator is the total number of
2 Performances of that particular Pre-1972 Sound Recordings in that
3 accounting period on the Reference Channels, and the denominator of
4 which is the total number of Performances of all sound recordings
5 broadcast by Sirius XM in that accounting period on the Reference
6 Channels.

7 *Id.* at 7 ¶ I.A.34.

8 The Royalty Program will be administered by the “Royalty Administrator”—
9 an independent company to be mutually agreed upon by the parties, or absent
10 agreement by the Parties, selected by the Court. *Id.* at 7 ¶ I.A.35. The parties have
11 narrowed the selection of the Royalty Administrator to two highly-respected and
12 experienced candidates, Royalty Review Council and Music Reports, are
13 considering their respective proposals, and are working diligently to reach
14 agreement as to the selection of the Royalty Administrator. The Royalty
15 Administrator shall develop and maintain a Royalty Claims Website, calculate,
16 prepare, and distribute royalty statements based on the usage information provided
17 by Sirius XM, and distribute payments to Bona Fide Claimants and any applicable
18 Court-approved fees to Class Counsel from the Royalty Program. The Royalty
19 Administrator has audit rights to examine the books and records of Sirius XM to
20 verify the accuracy of royalty accountings, with any disputes to be resolved by the
21 Court.

22 **F. License and Covenant Not To Sue**

23 Upon final approval, the Settlement Class will license and grant to Sirius XM
24 through January 1, 2028, in the United States, its territories, possessions,
25 commonwealths, and military bases, the right, through to the listener, to broadcast
26 and publicly perform by means of digital audio transmission and to make
27 reproductions, distributions, and other exploitations necessary or incident thereto,
28 any of all of the Pre-1972 Sound Recordings owned or controlled by the Settlement

1 Class in connection with Sirius XM's satellite digital audio radio service, Sirius
2 XM's Internet Service, Sirius XM's multi-channel video programming distributors
3 service, or Sirius XM's commercial business establishment service, including any
4 such service offered by agents or representatives on behalf of Sirius XM. Any sale,
5 assignment, transfer, or other disposition of a Pre-1972 Sound Recordings owned
6 or controlled by the Settlement Class shall be subject to such license. Upon final
7 approval, Plaintiff and each and every other Settlement Class Member covenant not
8 to sue and will be barred through January 1, 2028, from pursuing their own lawsuits
9 based on Sirius XM's performance, distribution, reproduction, or other exploitation
10 of their Pre-1972 Sound Recordings in the United States, with the exception of
11 pursuing the appeals related to the millions in additional cash payments provided
12 for in the Settlement.

13 **G. Costs and Fees**

14 The Settlement provides that Sirius XM will pay up to \$500,000 in notice
15 and administration costs of the Settlement, and that a portion of the Settlement
16 amount may be used to pay for any additional notice and administration costs. The
17 Settlement provides that Class Counsel may request incentive awards of up to
18 \$25,000 each for the two principals of Plaintiff Flo & Eddie, Inc. to be paid from
19 the Settlement Fund for their services as representatives on behalf of the Class.
20 The Settlement also provides that Class Counsel may seek reimbursement of
21 expenses and an award of up to one-third of the total cash benefits conferred by the
22 Settlement from the Settlement Fund and Royalty Program. Class Counsel will file
23 a motion seeking reimbursement of their costs, counsel fees, and incentive awards,
24 which will be scheduled to be heard at the same time as the final approval hearing.
25 Class members will be given an opportunity to object to that application prior to the
26 final approval hearing. No such costs, fees, or awards will be distributed without a
27 Court order.

28

1 **IV. PRELIMINARY APPROVAL OF THE SETTLEMENT IS**
2 **WARRANTED**

3 There are three steps to be taken by the Court in considering approval of a
4 tentative class action settlement: (i) the Court must preliminary approve the
5 proposed Settlement; (ii) members of the Class must be given notice of it; and (iii)
6 a final hearing must be held, after which, the Court must decide whether the
7 tentative settlement is fair, reasonable, and adequate. *See* MANUAL FOR COMPLEX
8 LITIGATION (FOURTH) § 21.632, at 320-21 (4th ed. 2004) (“MANUAL”).
9 “Preliminary approval is thus the first stage of the settlement process, and the
10 court’s primary objective at that point is to establish whether to direct notice of the
11 proposed settlement to the class, invite the class’s reaction, and schedule a final
12 fairness hearing.” NEWBERG ON CLASS ACTIONS § 13:10 (5th ed.).

13 Plaintiff and Class Counsel request that this Court preliminarily approve the
14 Settlement Agreement not only because public policy favors the settlement of
15 complex class actions such as this one, but also, as demonstrated herein, because
16 the Settlement has achieved excellent results for the Settlement Class. Plaintiffs and
17 Class Counsel respectfully submit that the proposed settlement is fair, reasonable,
18 and adequate and warrants preliminary approval by this Court.

19 **A. Legal Standard for Preliminary Approval of Settlement**

20 Federal Rule of Civil Procedure 23(e) requires judicial approval for any
21 compromise or settlement of class action claims. Approval of a proposed class-
22 action settlement is a matter within the sound discretion of the district court. *See,*
23 *e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Create-*
24 *A-Card, Inc. v. Intuit, Inc.*, 2009 U.S. Dist. LEXIS 93989, at *7 (N.D. Cal. Sept. 22,
25 2009) (addressing final approval). This discretion should be exercised in the
26 context of a public policy which strongly favors the pretrial settlement of class
27 action lawsuits. *City of Seattle*, 955 F.2d at 1276; *see also Van Bronkhorst v. Safeco*
28 *Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (stating that “there is an overriding public

1 interest in settling and quieting litigation,” and this “is particularly true in class
2 action suits”).

3 “At the preliminary approval stage, the court ‘evaluates the terms of the
4 settlement to determine whether they are within a range of possible judicial
5 approval.’” *Friedman v. Guthy-Renker, LLC*, Case No. CV 14-06009- ODW, 2016
6 WL 6407362, at *6 (C.D. Cal. Oct. 28, 2016) (quoting *Spann v. J.C. Penney Corp.*,
7 314 F.R.D. 312, 319 (C.D. Cal. 2016)). Preliminary approval does not require the
8 Court to answer the ultimate question of whether a tentative settlement is fair,
9 reasonable and adequate. That decision is instead made only at the final-approval
10 stage, after notice of the Settlement has been given to the Class Members and they
11 have had an opportunity to voice their views. *See* 5 JAMES WM. MOORE, MOORE’S
12 FEDERAL PRACTICE § 23.83(1), at 23-336.2 to 23-339 (3d ed. 2002). Preliminary
13 approval is merely the prerequisite to giving notice so that members of a class have
14 “a full and fair opportunity to consider the proposed [settlement] and develop a
15 response.” *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).

16 “Preliminary approval is appropriate if the proposed settlement appears to be
17 the product of serious, informed, non-collusive negotiations, has no obvious
18 deficiencies, does not improperly grant preferential treatment to class
19 representatives or segments of the class, and falls within the range of possible
20 approval.” *Downey Surgical Clinic, Inc. v. Ingenix, Inc.*, Case No. CV 09-5457
21 PSG, 2015 WL 12645755, at *6 (C.D. Cal. Nov. 10, 2015) (internal quotation
22 marks deleted). Courts have consistently noted that the standard for preliminary
23 approval is *less rigorous* than the analysis at final approval. Courts employ a
24 “threshold of plausibility” standard intended to identify obvious deficiencies. *See,*
25 *e.g., Kakani v. Oracle Corp.*, 2007 U.S. Dist. LEXIS 47515, at *16 (N.D. Cal. June
26 19, 2007).

27 Unless the Court’s initial examination “discloses[s] grounds to doubt its
28 fairness or other obvious deficiencies,” the Court should order that notice of a

1 formal fairness hearing be given to settlement class members under Rule 23(e). *See*
2 MANUAL, § 21.633 at 321-22.

3 **B. The Proposed Settlement Is Within the Range of Possible**
4 **Approval**

5 To determine whether a settlement is fair, adequate, and reasonable, “a
6 district court must [ultimately] consider a number of factors, including: the strength
7 of plaintiffs’ case; the risk, expense, complexity, and likely duration of further
8 litigation; the risk of maintaining class action status throughout the trial; the amount
9 offered in settlement; the extent of discovery completed, and the stage of the
10 proceedings; the experience and views of counsel; the presence of a governmental
11 participant; and the reaction of the class members to the proposed settlement.”
12 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and
13 quotation marks omitted); *see In re Heritage Bond Litigation*, 546 F.3d 667, 674
14 (9th Cir. 2008); *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC, 2014
15 WL 360196, at *4 (C.D. Cal. Jan. 31, 2014).

16 Plaintiff and Class Counsel respectfully submit that the proposed Settlement
17 plainly meets all of these standards.

18 **1. The strength of plaintiffs’ case and the amount offered in**
19 **settlement.**

20 The proposed Settlement provides substantial economic benefits to the Class.
21 Given the inherent risks associated with class certification, the liability issues found
22 by the Court as a matter of law which could be overturned on appeal, and any trial,
23 let alone an intensely disputed trial on the scope of damages which could produce
24 highly variable results from a jury, the monetary payments provided for in the
25 Settlement potentially exceeds the relief the Class could receive in a successful
26 trial.

1 **2. The risk, expense, complexity, and likely duration of further**
2 **litigation.**

3 The risk, expense, complexity, and likely duration of further litigation are
4 very significant. This second factor also weighs heavily in favor of preliminary
5 (and, ultimately, final) approval of the Settlement.

6 At trial, Sirius XM planned to offer testimony that Plaintiff's damages must
7 be measured by the alleged detriment, if any, caused by Sirius XM. *See, e.g.*, Dkt.
8 521 at 1. Sirius XM intended to present evidence demonstrating that Plaintiff
9 cannot show that it lost any sales due to Sirius XM's use of its property, that Sirius
10 XM did not prevent Plaintiff from granting other non-exclusive licenses, and that
11 Sirius XM's use of Plaintiff's recordings enhanced Plaintiff's ability to profit from
12 their recordings. *Id.* at 8-9. Sirius XM planned to offer expert testimony that the
13 appropriate measure of damages was a reasonable royalty rate, less any deduction
14 for Plaintiff's failure to mitigate damages. Dkt. 644 at 2. Sirius XM's expert
15 calculated the royalty to be vastly lower (*i.e.*, tens of millions of dollars lower) than
16 Plaintiff's damages model. At trial, jurors would have been left to choose between
17 two immensely differing and competing damages models: Plaintiff's model based
18 on Sirius XM's gross revenues and Sirius XM's model based on a royalty
19 calculated against a greatly reduced revenue base. If this matter went to a damages
20 verdict, a lengthy appeal period would certainly result. The proposed Settlement
21 guarantees a substantial recovery for the Class now while obviating the need for an
22 uncertain trial and appeal. *See Create-A-Card, Inc. v. Intuit, Inc.*, 2009 U.S. Dist.
23 LEXIS 93989, at *13 (N.D. Cal. Sept. 22, 2009).

24 **3. The risk of maintaining class action status throughout the trial.**

25 Sirius XM previously indicated its intention to move to decertify the Class
26 yet again. *See* Dkt. 594. Plaintiff believes it would be successful in maintaining
27 class action status through the trial and into an appeal, but there is a risk that Sirius
28 XM would prove successful in attacking class certification, either during or after

1 trial or on appeal. Pursuant to this Settlement, Sirius XM will not appeal the issue
2 of certification.

3 **4. The extent of discovery completed and the stage of proceedings**

4 This matter has been intensely litigated. This Settlement was reached after
5 the end of the discovery period, on the eve of trial. Dozens of depositions have
6 been taken of Plaintiffs, Defendant, numerous third parties and absent class
7 members, and the parties' respective experts. Sirius XM and third parties have
8 produced thousands of pages of documents. The parties both designated damages
9 experts, each of whom produced two reports and were deposed twice, including on
10 the brink of trial. Numerous motions were filed with the Court, including discovery
11 motions; a class certification motion; two summary judgment motions; a motion to
12 decertify the class; and multiple motions *in limine*. Both parties filed memoranda of
13 contentions of law and fact, trial briefs, exhibit lists, witness lists, jury instructions,
14 verdict forms, and competing statements of the case.

15 Given the advanced stage of these proceedings, there can be no question that
16 Class Counsel has a clear view of the strengths and weaknesses of the Class's
17 claims and damage approaches to recommend the Settlement.

18 **5. The experience and views of counsel**

19 Class Counsel is comprised of attorneys who have substantial experience
20 serving as counsel in numerous complex actions. They fully endorse the Settlement
21 as fair, reasonable and adequate to the Class.

22 **6. The reaction of the class members to the proposed settlement.**

23 Because Class Members have not yet received notice of the Settlement, this
24 factor cannot yet be evaluated fully. However, the Class Representatives Mark
25 Volman ("Flo") and Howard Kaylan ("Eddie") have reviewed and signed the
26 Stipulation and fully support the Settlement.

27

28

1 **C. The Proposed Settlement is the Result of Arduous, Arm’s-length**
2 **Negotiations Conducted by Experienced and Capable Counsel**

3 In addition to the factors just discussed, the Court must also be satisfied that
4 “the settlement is not the product of collusion among the negotiating parties.” *In re*
5 *Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011).
6 Factors considered here include: (1) whether the settlement resulted from arm’s-
7 length negotiations between experienced, capable counsel, *see City P’ship Co. v.*
8 *Atlantic Acquisition Ltd. P’ship*, 100 F.3d 1041, 1043 (1st Cir. 1996) (a
9 presumption of correctness attached to a class settlement reached in arm’s-length
10 negotiations between experienced, capable counsel); *Flinn v. FMC Corp.*, 528 F.2d
11 1169, 1173 (4th Cir. 1975) (“While the opinion and recommendation of
12 experienced counsel is not to be blindly followed by the trial court, such opinion
13 should be given weight in evaluating the proposed settlement.”); *see also*
14 *Newberg* § 13.53, at 477-79; (2) the end result achieved, *see Mars Steel Corp. v.*
15 *Continental Ill. Nat’l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987)
16 (“[r]ather than attempt to prescribe the modalities of negotiation, the district judge
17 permissibly focused on the end result of the negotiation. . . . The proof of the
18 pudding was indeed in the eating.”); *see also In re “Agent Orange” Prod. Liab.*
19 *Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984) (the most important concern for the
20 court in reviewing a settlement of a class action is the strength of the plaintiffs’
21 case if it were fully litigated), *aff’d*, 818 F.2d 145 (2d Cir. 1987); and (3) whether
22 counsel are to receive a disproportionate distribution of the settlement under a
23 “clear sailing” arrangement providing for the payment of attorneys’ fees separate
24 and apart from class funds where fees not awarded revert to defendants rather than
25 to the class. *In re Bluetooth*, 654 F.3d at 947.

26 The parties have actively engaged in many rounds of arm’s-length
27 negotiations, involving the exchange of numerous proposals and counter-proposals
28 over a period of months. The end result—a cash portion of up to \$40 million, plus a

1 10-year license at up to 5.5% for a total value of up to approximately \$99 million—
2 is fair, appropriate, and in the best interests of the Class.

3 **V. THE PROPOSED NOTICE FAIRLY APPRISES CLASS MEMBERS**
4 **OF THE TERMS OF THE SETTLEMENT AND THEIR RIGHTS**

5 Plaintiff requests that this Court approve the proposed form of notice, which
6 will, *inter alia*, advise Class Members of the proposed settlement and Class
7 Counsel’s application for a fee and expense award and for an incentive
8 compensation award to Plaintiff. Plaintiff and Class Counsel agree that the form of
9 notice is fair and adequate under the circumstances.

10 Reasonable notice must be provided to the Class to allow class members an
11 opportunity to object to the proposed Settlement. *See Durrett v. Housing Auth. of*
12 *Providence*, 896 F.2d 600, 604 (1st Cir. 1990). “The content and method of the
13 notice should be designed to apprise class members of the settlement terms and
14 class members’ rights.” *Ma v. Covidien Holding, Inc.*, No. SACV 12-02161-DOC,
15 2014 WL 360196, at *5 (C.D. Cal. Jan. 31, 2014) (citing *Mullane v. Cent. Hanover*
16 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

17 In a settlement of a class maintained under Rule 23(b)(3), class notice must
18 meet the requirements of both the Federal Rules of Civil Procedure 23(c)(2) and
19 23(e). *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa.
20 1993) (stating that requirements of Rule 23(c)(2) are stricter than requirements of
21 Rule 23(e) and arguably stricter than the due process clause). Rule 23(c)(2) sets
22 forth several elements of the “proper” content of notice. If these requirements are
23 met, a notice satisfies due process, Fed. R. Civ. P. 23(c)(2), and Fed. R. Civ. P.
24 23(e), and binds all members of the Class. The notice should, among other things:
25 describe the essential terms of the settlement; disclose any special benefits or
26 incentives to the class plaintiffs; provide information regarding attorneys’ fees;
27 indicate the time and place of the hearing to consider approval of the settlement,
28 and the method for objection to or opting out of the settlement; explain the

1 procedures for allocating and distributing settlement funds; and explain the
2 procedures for allocating and distributing settlement funds; and prominently
3 display the address of class counsel and the procedure for making inquiries. *See*
4 MANUAL § 21.312 at 295. “Notice is satisfactory ‘if it generally describes the terms
5 of the settlement in sufficient detail to alert those with adverse viewpoints to
6 investigate and to come forward and be heard.’” *Ma*, 2014 WL 360196, at *5
7 (quoting *Churchill Village, L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.
8 2004)). “Notice that is mailed to each member of a settlement class ‘who can be
9 identified through reasonable effort’” constitutes reasonable notice. *Id.* (quoting
10 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1973)).

11 The proposed notice program provides “the best notice that is practicable
12 under the circumstances, including individual notice to all members who can be
13 identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The proposed
14 long form notice (Sklover Decl. Ex. 2), is clear, precise, informative, and meets the
15 foregoing standards. The notice is written in plain English, is easy to read, and
16 states who the members of the Settlement Class are and provides the terms of the
17 Settlement. It includes other information such as: a short, plain statement of the *Flo*
18 *& Eddie v. Sirius XM* cases; information regarding attorney’s fees and costs, and
19 how class members may object to the settlement or the application for fees and
20 costs; the impact of the proposed Settlement on the pending *Flo & Eddie* cases; the
21 effect of the covenant not to sue included in the proposed Settlement; and a
22 statement that any judgment entered whether favorable or unfavorable to the
23 Settlement Class shall include, and be binding on, all Settlement Class Members,
24 even if they objected to the proposed Settlement.

25 Notice will be provided to the Class Members using a three-part notice plan
26 generally consistent with the plan approved by the Court on June 16, 2016, *see* Dkt.
27 317, including: (i) a long form of class notice to be disseminated to all prospective
28 members of the Settlement Class for whom direct mailing addresses have already

1 been confirmed through direct mailing, no later than 10 days after the Court’s
2 entry of the Preliminary Approval Order (*see* Sklaver Decl. Ex. 2); (2) a short form
3 of class notice for use in publications and periodicals targeted to reach an audience
4 likely to include members of the Settlement Class (*see* Sklaver Decl. Ex. 3); and (3)
5 a press release and website setting forth essential details concerning the settlement
6 and opt-out requirements. Notice via first class mail, publication in periodicals and
7 newspapers, and website publication are avenues for notice that have been
8 approved by various courts. *See, e.g., White v. NFL*, 822 F. Supp. 1389, 1400 (D.
9 Minn. 1993) (notice by mail to identified Class members and publication once in
10 *USA Today* “clearly satisfy both Rule 23 and due process requirements”); *Lake v.*
11 *First Nationwide Bank*, 156 F.R.D. 615, 628 (E.D. Pa. 1994) (approving as
12 reasonable notice by third class mail to identified Class members and publication
13 two times in the national edition of *USA Today*); *In re Michael Milken & Assocs.*
14 *Sec. Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993) (notice by mail to identified Class
15 members and publication in *USA Today*); *Mullane v. Central Hanover Bank &*
16 *Trust Co.*, 339 U.S. 306, 317 (1950) (“This Court has not hesitated to approve of
17 resort to publication as a customary substitute in another class of cases where it is
18 not reasonably possible or practicable to give more adequate warning.”).

19 The parties have selected Garden City Group LLC (“GCG”) to continue to
20 serve as the Claims Administrator in this case. Stip. at 1 ¶ I.A.1. GCG has already
21 served as the court-appointed Claims Administrator and provided the prior notice to
22 the Class of the Court’s class certification order. GCG is one of the premier class
23 action settlement administration firms in the country and has years of experience in
24 crafting notice plans.

25 Plaintiff and Class Counsel believe that the proposed Notice fully comports
26 with the requirements of Rule 23(c)(2)(VB) and (e)(1) and will fairly apprise Class
27 Members of the Settlement and their options relating thereto, and therefore should
28 be approved by the Court.

1 **VI. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED**

2 The Court has already certified the following class:

3 The owners of sound recordings fixed prior to February 15, 1972 ...
4 which have been reproduced, performed, distributed, or otherwise
5 exploited by Defendant Sirius XM in California without a license or
6 authorization to do so during the period from August []1, 2009 to the
7 present.

8 Dkt. 180 at 2. The Settlement Class is defined to include owners of sound
9 recordings that Sirius XM performed in the United States. Because Sirius XM
10 broadcasts its recordings nationwide, this change does not alter membership of the
11 Class. That is, the Certified Class and the Settlement Class are the same group of
12 persons or entities who own the same Pre-1972 Sound Recordings. Neither
13 membership in the class, nor the Pre-1972 Sound Recordings at issue will change.

14 Specifically, the Settlement Class is defined as follows:

15 All owners of Pre-1972 Sound Recordings, wherever situated, which
16 have been performed, reproduced, distributed, or otherwise exploited
17 by Sirius XM in the United States from August 1, 2009 through
18 November 14, 2016, other than the Major Record Labels, the Direct
19 Licensors and all persons and entities that submit a timely, valid and
20 properly completed written request to be excluded from the Settlement
21 Class in accordance with Section VI.

22 Stip. at 8 ¶ 42.

23 Although the Settlement Class will not cover a class different from that
24 certified, the Court should certify the above proposed Settlement Class for purposes
25 of settlement, for the same reasons set forth in the Court's Order Granting
26 Plaintiff's Motion for Class Certification, Dkt. 225, in Plaintiff's Motion for Class
27 Certification, Dkt. 180, and in Plaintiffs' Opposition to Sirius XM's Motion for
28 Decertification, Dkt. 396. The Settlement Class, comprised of the same members of

1 the Certified Class, satisfies the requirements of Fed. R. Civ. P. 23(a), as well as the
2 requirement of Fed. R. Civ. P. 23(b)(3) that the question of law or fact common to
3 class members predominate, and that a class action is superior to other available
4 methods for fairly and efficiently adjudicating the controversy. *See Jenkins v. Pech*,
5 No. 8:14CV41, 2015 WL 6738624, at *1 (D. Neb. Nov. 4, 2015) (certifying class
6 for reasons stated in court’s prior order on certification, where earlier certified class
7 differed from the settlement class only with respect to the persons excluded).

8 **VII. CONCLUSION**

9 For all the above-stated reasons, Plaintiff respectfully requests that the Court
10 enter an order: (i) granting preliminary approval of the Settlement; (ii) certify the
11 Settlement Class for the purpose of effectuating the settlement; (iii) appointing
12 Gradstein & Marzano and Susman Godfrey L.L.P. as Settlement Class Counsel;
13 and (iv) approving the form and method of notice of the Settlement and directing
14 that Notice be provided to the Class in accordance with the notice plan.

15
16 Dated: November 28, 2016

17 By: /s/ Steven G. Sklaver

18 GRADSTEIN & MARZANO, P.C.
19 Henry Gradstein
20 Maryann R. Marzano
21 Daniel B. Lifschitz

22 SUSMAN GODFREY L.L.P.
23 Stephen E. Morrissey
24 Steven G. Sklaver
25 Kalpana Srinivasan
26 Rachel S. Black, *Admitted PHV*
27 Michael Gervais, *Admitted PHV*
28 *Co-Lead Class Counsel*