GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (State Bar No. 89747)
hgradstein@gradstein.com
MARYANN R. MARZANO (State Bar No. 96867)
mmarzano@gradstein.com
HARVEY W. GELLER (State Bar No. 123107)
hgeller@gradstein.com
DANIEL B. LIFSCHITZ (State Bar No. 285068)
dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
Los Angeles, California 90048
T: 323-776-3100

EVAN S. COHEN (State Bar No. 119601)
esc@manifesto.com
1180 South Beverly Drive, Suite 510
Los Angeles, California 90035
T: 310-556-9800 F: 310-556-9801

Attorneys for Plaintiff
FLO & EDDIE, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

Case No. CV13-05693 PSG (RZx)

FLO & EDDIE, INC.'S *EX PARTE* APPLICATION FOR A LIFTING OF THE STAY FOR THE PURPOSE OF ENTERING:

(1) AN ORDER RESTRAINING AND ENJOINING SIRIUS XM FROM PAYING THE SETTLEMENT FUND TO THE MAJOR LABELS AND INSTEAD REQUIRING IT BE PAID INTO AN ACCOUNT UNDER THE CONTROL OF THE COURT,

(2) AN ORDER IMPOSING A LIEN ON THE SETTLEMENT FUND IN FAVOR OF CLASS COUNSEL,

(3) AN ORDER PERMITTING DISCOVERY OF THE SETTLEMENT, AND

(4) AN ORDER BARRING SIRIUS XM AND ITS COUNSEL FROM HAVING DIRECT OR INDIRECT COMMUNICATIONS WITH CLASS MEMBERS;

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; AND

DECLARATIONS OF HENRY GRADSTEIN AND HARVEY GELLER

[Proposed Order lodged concurrently herewith]

TO DEFENDANT SIRIUS XM RADIO, INC. AND ITS COUNSEL OF RECORD AND TO CAPITOL RECORDS, LLC, SONY MUSIC ENTERTAINMENT, UMG RECORDINGS, INC., WARNER MUSIC GROUP CORP., AND ABKCO MUSIC & RECORDS, INC.:

PLEASE TAKE NOTICE that Plaintiff Flo & Eddie, Inc. ("Flo & Eddie") hereby applies to the Court *ex parte* for a lifting of the stay for the purpose of entering: (1) an order restraining and enjoining Sirius XM Radio, Inc. ("Sirius XM") from paying the Settlement Fund (as defined below) to the Major Labels (as defined below) and instead requiring that the Settlement Fund be paid into an interest-bearing account under the control and direction of this Court; (2) an order imposing a lien on the Settlement Fund in favor of Class Counsel and preserving that fund until the Court has an opportunity to address Class Counsel's fee application; (3) an order permitting discovery regarding the settlement; and (4) an order barring Sirius

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

XM and its counsel from having direct or indirect communication with any Class member.

This Application is made pursuant to All Writs Act (28 U.S.C. § 1651), Fed. R. Civ. P. 65, Cal. Rules of Prof. Conduct Rule 2-100, and the common fund and substantial benefit doctrines on the grounds that (1) Sirius XM's conduct is a threat to this Court's jurisdiction over the Class, and (2) the Major Labels are not entitled to the entirety of the Settlement Fund, as both other members of the Class and Class Counsel have cognizable claims to portions thereof. Accordingly, before the Settlement Fund can be disbursed by Sirius XM, these competing third party claims to the fund must be properly adjudicated.

Relief cannot be sought via a regularly noticed motion because Sirius XM announced on June 26, 2015 that it intends to pay out the Settlement Fund to the Major Labels on or before July 15, 2015, thereby leaving insufficient time to comply with the time requirements set forth for fully noticed and briefed motions.[1] *Ex parte* relief is thus warranted, and Flo & Eddie respectfully requests that the Court grant this Application.

Pursuant to Local Rules 7-19 and 7-19.1 and this Court's Standing Order, Class Counsel gave oral and written notice of this *ex parte* Application to:

Daniel Petrocelli, Esq.
Cassandra Seto, Esq.
O'Melveny & Myers, LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles CA 90067
dpetrocelli@omm.com
cseto@omm.com

Peter Ostroff, Esq.
Sidley Austin, LLP
555 West Fifth Street
Los Angeles CA 90013
postroff@sidley.com

[1] Sirius XM has since indicated in an e-mail to Class Counsel that the Settlement Fund will not be paid until July 31, 2015; however, that still does not leave sufficient time to comply with the time requirements for fully noticed and briefed motions.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

Steven Marks, Esq.
Chief, Digital Business & General Counsel
Recording Industry Association of America
1025 F Street, NW
Washington, DC 20004
smarks@riaa.com

Russell Frackman, Esq.
Mitchell Silberberg & Knupp, LLP
11377 West Olympic Boulevard
Los Angeles, CA 90064
rjf@msk.com

(Declaration of Henry Gradstein ["Gradstein Decl."] ¶ 17, Ex. 2)

In response to that notice, counsel for Sirius XM requested that this Application not be filed until July 8, 2015, and that it be given until July 10, 2015, to file its opposition. Based on counsel for Sirius XM's representation that the Settlement Fund payment date was now July 31, 2015, Class Counsel granted that extension for both Sirius XM and the Major Labels. **(Gradstein Decl., ¶ 18)** Sirius XM and the Major Labels have advised Class Counsel that they will oppose this Application. **(Gradstein Decl., ¶ 19)**

This application is based this Notice, the Memorandum of Points and Authorities attached hereto, the Declarations of Henry Gradstein and Harvey Geller, all pleadings, papers, and records in this Court's files, matters of which this Court may take judicial notice, and upon such oral argument as may be made at the hearing on this Application.

Dated: July 8, 2015

GRADSTEIN & MARZANO, P.C.

By: /s/ Henry Gradstein
Henry Gradstein
Attorneys for Plaintiff
FLO & EDDIE, INC.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

TABLE OF CONTENTS

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

TABLE OF AUTHORITIES

CASES

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

STATUTES

COURT RULES

OTHER SOURCES

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

I. INTRODUCTION.

In a brazen attempt to disrupt and interfere with the class action process and the Court's jurisdiction under Rule 23, ***after*** the Court granted Flo & Eddie, Inc.'s ("Flo & Eddie") motion for class certification, Sirius XM Radio, Inc. ("Sirius XM") and the major record companies (the "Major Labels") – who are all members of the class – participated in a private mediation from which ***Sirius XM*** excluded Class Counsel and the remaining Class members. The exclusion of Class Counsel after class certification was granted was in direct violation of Cal. Rules of Prof. Conduct 2-100. But worse, the attendees at the mediation – Sirius XM's inside and outside counsel, representatives from the Major Labels, and lawyers from Sidley & Austin ("Sidley") and the Recording Industry Association of America ("RIAA") – then proceeded to negotiate a settlement whereby Sirius XM agreed to pay $210 million to the Major Labels (the "Settlement Fund") not only to settle claims arising out of Sirius XM's use of pre-1972 recordings which the Major Labels "own," but also to settle claims for the use of pre-1972 recordings which the Major Labels "control or otherwise have the right to contract with." In other words, Sirius XM and the Major Labels purported to settle claims for the use of pre-1972 recordings owned by *other* Class members, and by doing so usurped the role of the Court and Class Counsel.

The terms of that settlement – which excludes other owners of pre-1972 recordings and Class Counsel from sharing in any portion of it – were kept secret until Sirius XM filed its Form 8-K with the Securities & Exchange Commission ("SEC") on June 26, 2015. **(Gradstein Decl. ¶ 14, Ex. 1)** The settlement raises a number of serious issues that require an immediate lifting of the stay for the purpose of emergency relief requiring Sirius XM to deposit the Settlement Fund with the Court while the Court has an opportunity to address at least the following issues.

First, the settlement resulted directly from a violation of the Rules of Professional Conduct. Once a class has been certified, the rules governing communications apply as though each class member is a client of the Class Counsel.

Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985) (citing *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2nd Cir. 1978), *aff'd*, 444 U.S. 472 (1980)); *Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1083 (C.D. Cal. 2002). That means that counsel for Sirius XM was not permitted to have direct settlement communications with the Major Labels after May 27, 2015, or any other Class members without Class Counsel being present or without approval of the Court. *Hernandez v. Vitamin Shoppe Industries Inc.*, 174 Cal. App. 4th 1441, 1459 (2009).

Second, according to Sirius XM's 8-K filing, the settlement with the Major Labels includes pre-1972 recordings that the Major Labels do not own and which, therefore, belong to other members of the Class. Indeed, as described by Sirius XM, the settlement extends to recordings that the Major Labels "control" and recordings that they "otherwise have the right to contract with." By definition, those recordings are owned by other Class members represented by Class Counsel. It would appear that Sirius XM used the Major Labels as a substitute for dealing with Class Counsel. That is not proper as none of the participants in the mediation had the right to circumvent Class Counsel, do an end run around the Rule 23 procedural requirements with respect to the settlement of class actions, or marginalize this Court's role in the settlement of Class claims.

Third, the Major Labels' attempt to exclude Class Counsel from the settlement (and obtain a fee based upon that settlement) runs directly afoul of the rules governing compensation of Class Counsel, including the common fund and substantial benefit doctrines. Class Counsel is entitled to their fee under these doctrines whether or not the Class was certified, but it most certainly was entitled to its fee because the Class *was* certified. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166-67 (1939); *Boeing Co. v. Van Gemert et al.*, 444 U.S. 472, 478, 100 S. Ct. 745, 749 (1980); *see also Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977). Given that Class Counsel was ***solely*** responsible for the decisions and orders

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

that resulted in the settlement (and did all of the work necessary to obtain those decisions and orders), the exclusion of Class Counsel in the settlement is the epitome of the "incipient free-rider problem" that the First Circuit highlighted in *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig*., 982 F.2d 603, 606 (1st Cir. 1992).

Because Sirius XM stated in its 8-K filing that it intends to pay out the Settlement Fund by July 15, 2015,[2] emergency relief is necessary in order to preserve the fund and to bring transparency to the settlement itself. Accordingly, Flo & Eddie seeks a lifting of the stay for the limited purpose of obtaining: (1) an order restraining and enjoining Sirius XM from paying the Settlement Fund to the Major Labels and instead requiring that the Settlement Fund be paid into an interest-bearing account under the control and direction of this Court; (2) an order imposing a lien on the Settlement Fund in favor of Class Counsel and preserving a percentage of that fund until the Court has an opportunity to address Class Counsel's fee application; (3) an order permitting discovery regarding the settlement; and (4) an order barring Sirius XM and its counsel from having direct or indirect communication with any Class member.

II. STATEMENT OF FACTS.

Sirius XM exploits – without license – pre-1972 recordings as part of its satellite and internet services. Accordingly, on August 1, 2013, Flo & Eddie filed suit against it, alleging on behalf of itself and a class of owners of pre-1972 recordings claims for violation of Cal. Civ. Code § 980(a)(2), misappropriation, conversion, and unfair competition under Cal. Bus. & Prof. Code § 17200. Since pre-1972 recordings are governed on a state-by-state basis, Flo & Eddie also filed two additional federal class actions: one in New York on August 16, 2013, *Flo &*

[2] Counsel for Sirius XM has stated in an e-mail to Class Counsel that this date is now July 31, 2015. **(Gradstein Decl., ¶ 18)**

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

Eddie, Inc. v. Sirius XM Radio, Inc., S.D.N.Y., 13-CIV-5784 (CM) (the "New York Action"), and one in Florida on September 3, 2013, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, S.D. Fla., Case No. 13-CV -23182 (DPG) (the "Florida Action").

After Flo & Eddie filed these three actions, on September 11, 2013, the Major Labels filed a lawsuit in Los Angeles Superior Court entitled *Capitol Records LLC, et al. v. Sirius XM Radio Inc.*, L.A.S.C. Case No. BC520981 (the "Coattail Action").[3] The Coattail Action asserted the same claims as the instant action and was brought only with respect to pre-1972 recordings owned by the Major Labels. **(Geller Decl. ¶ 8, Ex. 1 [*Capitol Records* Complaint 2:26-28, 10:19-23, 13:18-19]).** The Coattail Action did not purport to seek damages for pre-1972 recordings "controlled" by the Major Labels or for pre-1972 recordings that the Major Labels "otherwise have the right to contract with."

Either because they were impatient or because they did not want to devote the resources to properly prosecuting the Coattail Action, even before Sirius XM filed its Answer, the Major Labels attempted to have the ultimate issue in their case decided; namely, whether California law recognizes a digital performance right in pre-1972 sound recordings. Thus, prior to conducting any discovery or engaging in any other action that would position the Coattail Action for a successful resolution, the Major Labels filed a motion "for a jury instruction regarding a digital performance right." This motion was an ill-conceived strategic blunder that nearly resulted in a disastrous ruling for the owners of pre-1972 recordings and the artists who depend on those recordings for royalties. Indeed, on August 27, 2014, Judge Mary Strobel issued a "Tentative Ruling" denying the Major Labels motion and concluding in the process that there was no performance right in pre-1972 recordings under either Cal. Civ. Code § 980(a)(2) or the common law of California.

[3] The plaintiffs in the Coattail Action are identified as Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records, Inc.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

Fortunately, Flo & Eddie and Class Counsel did not take such a shortsighted approach to their three actions. While the Major Labels were doing nothing, Class Counsel was investing significant time and resources in establishing Sirius XM's liability. Class Counsel conducted extensive discovery (which it shared with the Major Labels pursuant to a September 11, 2013 Common Interest Agreement), engaged in significant motion practice, prepared damages models supported by expert testimony, and positioned each of its cases so that the underlying legal and factual issues could be properly presented in fully briefed motions for summary judgment, resulting in successful liability rulings in the California Action, *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, 2014 U.S. Dist. LEXIS 139053 (C.D. Cal. Sept. 22, 2014), and in the New York Action, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2014 U.S. Dist. LEXIS 166492 (S.D.N.Y. Nov. 14, 2014) and *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 2014 U.S. Dist. LEXIS 174907 (S.D.N.Y. Dec. 12, 2014).

Once Class Counsel's work resulted in a favorable liability ruling in the California Action, the Major Labels took full advantage of that ruling in the Coattail Action. Indeed, on September 23, 2014 (the day after this Court's order issued), the Major Labels filed that ruling with Judge Strobel and asked her to take judicial notice of it. Judge Strobel did more than take judicial notice of it: she specifically adopted it, changed her tentative ruling, and on October 14, 2014, issued a ruling in favor of the Major Labels. **(Dkt. 132-1)** That ruling, however, was limited to finding the jury instruction proper; it did not decide any of the liability issues and left them for another day. Since Judge Strobel's ruling, nothing has happened in the Coattail Action as it was largely stayed while Sirius XM unsuccessfully sought relief from the California Court of Appeals and the California Supreme Court.

While the Coattail Action remained stayed, Class Counsel was continuing to prosecute all three Flo & Eddie actions, including by filing a motion for class certification in the California Action. That motion was set for hearing on May 22, 2015. Counsel for Sirius XM understood that, if the class was certified, the Major

Labels were part of that class and this meant that liability was already decided in their favor as a result of the earlier summary judgment decision in the California Action. Indeed, counsel for Sirius XM expressly relied on that scenario in arguing against class certification based on the one-way intervention rule, stating:

> [We] have completely lost the protections of and have been grievously prejudiced now by the way that this has played out. Because look, for example, the situation with the record companies, the four major record companies that filed their own lawsuit one month after this suit was filed in the state court. They are going to – that case doesn't have any advance to discovery. There's no trial dates set. All they had is a ruling in their favor on a jury instruction.
>
> THE COURT: But it was postured fairly strangely.
>
> MR. PETROCELLI: Excuse me?
>
> THE COURT: It was postured strangely.
>
> MR. PETROCELLI: I agree with that. And one of the issues that I'm going to litigate in that case is that posture. But my point is that they can now wait and see, having – they were able to wait and see, having now seen that this Court has made the performance right determination in the favor of the plaintiff, they may decide – although we would object to this, of course – I'll just opt into this case, or I won't opt out of this case, and hey, my case is like long behind this case. Now I got to see the result. It's a free look, and now I'm going to go in and try to be part of this class that's going to trial presumably in August.

(Geller Decl. ¶ 9, Ex. 2 [May 22, 2015, Hearing Transcript 21:1-22])

On May 27, 2015, the Court granted Flo & Eddie's motion for class certification, certified a class of owners of pre-1972 recordings (the "Class"), and

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

appointed Class Counsel. **(Dkt. 225)** Despite recognizing at the hearing that this meant that the Major Labels were part of the Class, counsel for Sirius XM apparently failed to appreciate the significance of that ruling as it pertains to direct communications with Class members. Indeed, sometime prior to the Class certification ruling, counsel for Sirius XM had secretly begun coordinating with the RIAA to schedule a mediation with the Major Labels alone. Neither Sirius XM, the Major Labels, nor the RIAA elected to disclose the existence of this mediation to counsel for Flo & Eddie. However, on May 7, 2015, after the class certification motion was fully briefed, counsel for Sirius XM revealed for the first time to counsel for Flo & Eddie that a mediation had been scheduled with the Major Labels. **(Geller Decl. ¶ 2)** When counsel for Flo & Eddie insisted that they be part of the mediation, counsel for Sirius XM objected, claiming that Sirius XM wanted to use the mediation to discuss a going-forward relationship and not damages for the past. Counsel for Sirius XM did not change its position even after the Court issued its ruling on May 27 certifying the Class and appointing G&M as Class Counsel. The only thing that counsel for Sirius XM would agree to is to have a separate mediation with Class Counsel after the conclusion of the mediation with the Major Labels. **(Geller Decl. ¶¶ 3-7)**

On June 15 and 16, 2015, Sirius XM mediated with the Major Labels and the RIAA in New York. Class Counsel was in New York prepared to participate in that mediation, but continued to be excluded. **(Gradstein Decl. ¶¶ 10-13)** On June 17, 2015, Sirius XM supposedly reached an agreement with the Major Labels; however, the participants in that mediation (including the RIAA) refused to disclose its terms to Class Counsel. **(Gradstein Decl. ¶ 13)** The participants took this position even though (1) Sirius XM knew that it was obligated to make those terms public, (2) the Major Labels were purporting to settle claims for recordings owned by absent Class members, and (3) the RIAA is a trade association for the recorded music industry

and lists on its website more members than just the Major Labels.[4] The immediate effect of this secret mediation was to dramatically impact the rights of the entire Class and Class Counsel, completely usurping this Court's role in managing the Class that it had just certified.

On June 26, 2015, Sirius XM finally made the terms of its settlement with the Major Labels public in its 8-K filing. As set forth by Sirius XM in that filing:

> On June 17, 2015, our subsidiary, Sirius XM Radio Inc., entered into an agreement with Capitol Records LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp. and ABKCO Music & Records, Inc. to settle the case titled Capitol Records LLC et al. v. Sirius XM Radio Inc., No. BC-520981 (Super. Ct. L.A. County), which challenged our use of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"). Pursuant to the settlement, we will pay the plaintiffs, in the aggregate, $210 million on or before July 15, 2015 and the plaintiffs will dismiss their lawsuit with prejudice. The settlement resolves all past claims as to our use of pre-1972 recordings owned or controlled by the plaintiffs and enables us, without any additional payment, to reproduce, perform and broadcast such recordings in the United States through December 31, 2017. As part of the settlement, we have the right, to be exercised before December 31, 2017, to enter into a license with each plaintiff to reproduce, perform and broadcast its pre-1972 recordings from January 1, 2018 through December 31, 2022. The royalty rate for each such license will be determined by negotiation or, if the parties are unable to agree, binding

[4] *See* http://www.riaa.com/aboutus.php?content_selector=aboutus_members

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

> arbitration. The plaintiffs have represented and warranted to us that in the United States they own, control or otherwise have the right to contract with respect to approximately 80% of the pre-1972 recordings we have historically used.

(Gradstein Decl. ¶ 14, Ex. 1) It bears noting that in 2012, David Frear, Sirius XM's chief financial officer, testified before the Copyright Royalty Board that the percentage of sound recordings owned by the "four 'major' record companies" based on "identified spins," was 59%. *See* Written Rebuttal Testimony of David Frear, June 29, 2012, In the Matter of Determination of Rates and Terms For [SDARS]. **(Dkt 203-1.)**

To date, Sirius XM has refused to offer the same settlement terms to the other members of the class. **(Gradstein Decl. ¶ 15)** In addition, the Major Labels and Sirius XM have refused to provide Class Counsel with a copy of their settlement agreement or a list of the pre-1972 recordings it covers. ***Id.***

III. SIRIUS XM WAS NOT PERMITTED TO EXCLUDE CLASS COUNSEL FROM THE MEDIATION WITH THE MAJOR LABELS.

Under the law, this Court's May 27, 2015 class certification order automatically carried with it the restriction that if counsel for Sirius XM wanted to have direct settlement discussions with any members of the class, it could only do so with the permission of Class Counsel or the Court. *Hernandez*, 174 Cal. App. 4th 1441, 1459 (2009).[5] Thus, what might have been proper prior to May 27, 2015, was now no longer proper. Far from complying with this change in circumstances, counsel for Sirius XM continued to bar Class Counsel's participation in settlement

[5] Attorneys practicing in this Court are governed by "standards of professional conduct required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto." *See* C.D. Cal. Loc. R. 83-3.1.2; *White v. Experian Info. Solutions*, 2014 U.S. Dist. LEXIS 61433, *15-16 (C.D. Cal. May 1, 2014).

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

discussions with the Major Labels and never sought permission from the Court to have those discussions. By doing that, counsel for Sirius XM ran afoul of the no contact rule set forth in Cal. R. of Prof. Conduct 2-100(A).

Indeed, one of the most basic rules of professional responsibility is that "while representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer." Cal. R. of Prof. Conduct 2-100(A). This rule was "designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role" and is "necessary to the preservation of the attorney-client relationship and the proper functioning of the administration of justice..." *Mitton v. State Bar of Cal.*, 71 Cal. 2d 525, 534 (1969).

The no contact rule applies to class actions as well. Once a class has been certified, defense counsel may not contact its members without the prior consent of either Class Counsel or the court. *Hernandez*, 174 Cal. App. 4th at 1459 (holding that conditional class certification triggered no contact rule); *Fidel v. National Union Fire Ins. Co.*, 1996 U.S. App. LEXIS 33388, at *22 (9th Cir. Aug. 7, 1996) ("The attorney-client relationship between Class Counsel and appellants began, at a minimum, when the class was certified"); *Jacobs v. CSAA Inter-Insurance*, 2009 U.S. Dist. LEXIS 37153, at *5 (N.D. Cal. May 1, 2009) ("After a court has certified a class, communication with class members regarding the subject of representation must be through counsel for the class."); *Parks*, 235 F. Supp. 2d at 1083 ("Defendants' attorneys are subject to the 'anti-contact' rule, and must 'refrain from discussing the litigation with members of the class as of the date of class certification.'" (quoting *Kleiner*, 751 F.2d at 1207 n.28 (11th Cir. 1985)); *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978) (en banc) ("A certification under Rule 23(c) makes the Class the attorney's client for all practical purposes."); *Resnick v. ADA*, 95 F.R.D.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

372, 376 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the Class Counsel.")

Moreover, the no contact rule does not cease to exist merely because defense counsel wishes to make a settlement offer to individual class members – even if those class members have their own individual counsel or are maintaining individual actions. *In re Shell Oil Refinery*, 152 F.R.D. 526, 536 (E.D. LA 1989) ("Defense counsel have an ethical obligation to make any offers of individual settlement to the [plaintiff Class Counsel], as well as any additional counsel that might have been retained by the class member."); *In re Airline Ticket Comm'n Antitrust Litig.*, 1996 U.S. Dist. LEXIS 20361, at *8 (D. Minn. Aug. 12, 1996) ("Clearly agencies as large as those involved here have, and regularly use, their own attorneys. These attorneys, however, are not the agencies' appointed counsel in this case."); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 926 F. Supp. 2d 1143, 1157-58 (C.D. Cal. 2013) (maintenance of a separate lawsuit initiated prior to an opt-out period does not serve as an opt-out).

Here, the violation of the no contact rule by counsel for Sirius XM has resulted in a settlement agreement that prejudices the rights of the absent Class members by purporting to settle and release their claims, interferes with counsel's performance of its role as Class Counsel to obtain a fair recovery for *all* Class members, and interferes with Class Counsel's right to be compensated for its work. Counsel for Sirius XM was not communicating with class members who had properly opted out of the Class (the period for which had yet to even occur); rather, counsel improperly communicated with them in order to *procure* their opt-out.

IV. AS DISCLOSED BY SIRIUS XM, THE SETTLEMENT IS BROADER THAN RECORDINGS OWNED BY THE MAJOR LABELS.

Neither Sirius XM nor the Major Labels have provided a copy of their settlement agreement to Class Counsel or a list of the pre-1972 recordings covered by that agreement. However, Sirius XM's 8-K filing reveals that the settlement agreement covers pre-1972 recordings beyond those owned by the Major Labels

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

(which are the only recordings for which they seek damages in the Coattail Action). Indeed, according to Sirius XM, the agreement also covers recordings that are "owned or controlled" by the Major Labels and those that the Major Labels "own, control or otherwise have the right to contract with."

As the Supreme Court has held, terms connected by the disjunctive "or" ordinarily have separate meanings. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Woods*, 134 S.Ct. 557, 567 (2013). Faced with the same "owned or controlled" language, the court in *Armkel, LLC v. Pfizer Inc.*, 2005 U.S. Dist. LEXIS 22877, *38 (D.N.J. Sept. 29, 2005) stated the obvious:

> [T]he disjunctive "or" between the words "owned" and "controlled" suggests that the parties intended the words to have different meanings and for either concept to apply. The word "owned" clearly requires ownership or possession; however, the word "control" is broader and does not necessarily implicate ownership. When an entity owns something, it has a property right in that object; however, an entity is able to control – direct or regulate – something without owning it.

See also Huffman v. City of Poway, 84 Cal. App. 4th 975 (2000) (holding that because statutory language "property owned or controlled by the public entity" is in the disjunctive, those terms means different things); *In re Cabrera*, 96 B.R. 304, 305 (Bankr. D. Mont. 1988) (relying on the plain meaning of the word "or" to conclude that statutory language was in the disjunctive).

That Sirius XM wanted the settlement agreement to cover more than just the pre-1972 recordings directly owned by Major Labels is not surprising and fully explains the use of the word "or" to describe the recordings being settled. But this has now resulted in a settlement agreement that impacts the rights of Class members other than the Major Labels, as the Major Labels purported to settle claims for the use of pre-1972 recordings owned by these *other* Class members, thereby usurping

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

the role of the Court and Class Counsel. That alone should have caused Sirius XM to recognize that the agreement required the involvement of the Court and Class Counsel. However, doing that would run counter to Sirius XM's goal of fracturing the Class, destroying the leverage of the absent Class members to obtain a settlement on similar terms, and preventing Class Counsel from receiving a fee. The requirements of Rule 23 are not that easily manipulated. Therefore, the Court should enter an order restraining and enjoining Sirius XM from paying the Settlement Fund to the Major Labels and instead requiring it be paid into an interest-bearing account under the control and direction of this Court until these matters can be adjudicated by the Court.

V. BASED ON THE COMMON FUND AND SUBSTANTIAL BENEFIT DOCTRINES, CLASS COUNSEL IS ENTITLED TO THEIR FEE.

It cannot be disputed that the Major Labels' settlement, on their own behalf and on behalf of the owners of recordings they "control or otherwise have the right to contract with," resulted entirely and directly from the work of Class Counsel. Yet, to obtain the benefit of that work without paying for it (and, thus, reaping where they have not sown), the Major Labels entered into a settlement that compensates them and excludes Class Counsel. Even if their settlement is not considered a class settlement (and it should be given its descriptions by Sirius XM), a percentage of it is still owed to Class Counsel pursuant to the "common fund" and "substantial benefit" doctrines. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 275 (1975). Those doctrines are grounded in equity and exist to protect against the unjust enrichment that would result if the Major Labels were permitted to free ride.

A. Attorney Fees Are Appropriately Awarded Where a Litigant's Efforts Create a Common Fund or Confer a Substantial Benefit on a Class.

1. The Supreme Court Has Approved Both Doctrines.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

The common fund doctrine is "part of the historic equity jurisdiction of the federal courts," *Sprague*, 307 U.S. at 164, which contemplates "fair and just allowances for expenses and counsel fees." *Trustees v. Greenough*, 105 U.S. 527, 536 (1881). It springs from the equitable notion that "persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Boeing*, 444 U.S. at 478 (1980); *see also Chem. Bank v. City of Seattle*, 19 F.3d 1291, 1300 (9th Cir. 1994) (explaining that the common fund doctrine negates unjust enrichment by mandating that "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it."). To be sure, "[s]ince the Supreme Court's decision in *Cent. R.R. & Banking Co. of Ga. v. Pettus*, 113 U.S. 116 [(1885)], it is well settled that the lawyer who creates a common fund is allowed an *extra* reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit." *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) (emphasis in original). The common fund doctrine is further complemented by the equitable supervisory authority that Fed. R. Civ. Proc. Rule 23 grants federal courts in class actions. *See* 7B Wright & A. Miller, Fed. Prac. & Proc. Civ. § 1803 (3d ed).

The common fund doctrine was first recognized in *Greenough* when the plaintiff bondholder benefited other bondholders by successfully having a receiver appointed over a trust and unwinding several of its conveyances after the trust's assets had been improperly dissipated. The Supreme Court found that the plaintiff should be reimbursed for his efforts out of the recovered fund, stating:

> It would be very hard on [the plaintiff] to turn him away without any allowance except the paltry sum which could be taxed under the fee-bill. It would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for

> himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.

105 U.S. at 532. Thus, the Court held, when a common fund is created, the beneficiaries of the fund are liable for the costs of its production.

Three years later, *Greenough* was expanded in *Pettus* to permit an award of fees not to a successful plaintiff, but rather to plaintiff's counsel directly, payable out of a fund recovered for a beneficiary class. *Pettus* involved a class action that was filed to secure repayment of bonds owned by clients of the petitioning attorneys and other similarly-situated unsecured creditors. The Court held that the plaintiffs' lawyers could petition for fees directly from a common fund created through their efforts because they had a cause of action for such an award *independent* of any similar reimbursement rights held by their clients. *Pettus*, 113 U.S. at 125–27. The Court found it irrelevant that the absent class members lacked fee contracts with plaintiffs' attorneys, as they were aware of the lawsuit's class action nature and "every ground of justice" required reasonable payment by those who "accepted the fruits" of other people's labors. *Id.* at 126-27. To assure payment of their fee award, the attorneys were granted a lien on a percentage of the assets that were salvaged by the Court's decree for the benefit of the class of creditors. *Id.* at 128.

The common fund doctrine was expanded yet again in *Sprague*, in which the plaintiff sued a bank for disbursement of certain bonds that secured money she had deposited in a trust fund. 307 U.S. at 162. The Supreme Court recognized that the lawsuit, through the principle of *stare decisis*, "established the claims of fourteen other trusts" pertaining to the same bonds. *Id*. at 166. It further found that even though the plaintiff "neither purported to sue for a class nor formally established by litigation a fund available to the class," its discretion allowed it to grant her an award from the bonds' disbursement. *Id*. The Court reasoned that "when such a

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

fund is for all practical purposes created for the benefit of others, the formalities of the litigation – the absence of an avowed class suit or the creation of a fund…hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." *Id*. at 167. And recently, in *US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537, 1550 (2013), the Supreme Court reaffirmed that "[t]his Court has 'recognized consistently' that someone 'who recovers a common fund for the benefit of persons other than himself' is due 'a reasonable attorney's fee from the fund as whole.' [Citation]. We have understood that rule as 'reflect[ing] the traditional practice in courts of equity.' [Citation.]. And we have applied it in a wide range of circumstances as part of our inherent authority. [Citations]."

As the common fund doctrine continued to expand, it also gave rise to a new equitable theory by which to grant a fee award: the substantial benefit doctrine. That doctrine permits reimbursement where a litigant "has conferred a substantial benefit on the members of an ascertainable class and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills*, 396 U.S. at 393-94. In *Mills*, a shareholder prevailed in an action to set aside a corporate merger that violated securities fraud rules, and the Court thereafter shifted the shareholder's attorney fees to the corporation because the suit conferred a substantial benefit on all shareholders, who benefited from vindication of the law. *Id.* at 395. By requiring the payment of attorney fees from the corporate treasury, all beneficiaries were taxed their proportionate share of the costs through lowered dividends. *See also*, *Hall v. Cole*, 412 U.S. 1, 6 (1973) (holding that shifting a plaintiff union member's counsel fees to the other members he vindicated the free speech rights of is justified "because 'to allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'" (quoting *Mills*, 396 U.S. at 392).

2. The Ninth Circuit Routinely Relies On Both Doctrines.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

The common fund and substantial benefit doctrines also have a long history in the Ninth Circuit, which has consistently applied them in cases where a litigant's efforts "create, discover, increase or preserve a fund to which others also have a claim," or have "conferred a substantial benefit on the members of an ascertainable class." *Vincent*, 557 F.2d at 768 n.7, 769; *see also Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1139-40 (9th Cir. 1979) (noting that the doctrines apply outside class actions suits); *Lewis v. Anderson*, 692 F.2d 1267, 1271-72 (9th Cir. 1982) (finding substantial benefit even where no actual fund has been created).

In *Vincent*, after a midflight collision killed the occupants of a commercial airliner, the family of one of the decedents filed suit in the Central District of California, seeking to act as class counsel. *Id*. at 762. Following this filing, other litigants initiated their own separate suits related to the accident. *Id* at 762-63. The original claimant's litigation was used as the vehicle by which to globally determine the defendant's liability, and the District Court consequently ordered all class members (including those represented by their own attorneys) to deposit a fixed percentage of any judgment or settlement they received with the clerk of the court to cover class counsel's attorney fees. *Id.* at 763-64. The District Court ultimately awarded the fund on deposit to class counsel, holding that the work and efforts of class counsel benefited all claimants. *Id.* at 765. Affirming the District Court's award, the Ninth Circuit identified seven elements of a common fund:

> (1) "the original client's attorney's fees are not shifted to – or the attorney's personal claim for an extra fee is not lodged against – the adversary-losing party; rather, fees are shifted to third parties, people viewed as beneficiaries of the fund in some way"; (2) "no contractual relationship exists between the original attorney and the third parties"; (3) "the beneficiaries are expected to pay litigation costs in proportion to the benefits that the litigation produced for them"; (4) "as a general rule, if the third parties hire

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

> their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees"; (5) "the third parties are not personally liable for the litigation costs. Any claim must be satisfied out of the fund"; (6) "there must exist some identifiable assets on which a court can impose a charge"; and (7) "the court can legitimately exercise authority or control over the asset."

Id. at 770. The Ninth Circuit found that all of the elements were satisfied with the exception of the fourth one, which it held could be disregarded because there are problems with allowing third parties to "purchase immunity" by hiring separate counsel. *Id.* at 771. "[W]here the contributions of the original or lead attorneys and the attorneys hired by the 'stranger' beneficiaries are unequal," an exception to the element is warranted for reasons "identical to the purpose of the broader common fund doctrine itself: avoidance of unjust enrichment." *Id*. at 771-72.

3. California Courts Have Also Approved Both Doctrines.

Like federal courts, California courts also rely on the common fund and substantial benefit doctrines to award attorney's fees. *Tract 19051 Homeowners Assn. v. Kemp*, 60 Cal. 4th 1135, 1142 n.2 (2015).[6] The common fund doctrine was first approved in *Fox v. Hale & Norcross S. M. Co*., 108 Cal. 475 (1895) and has been applied by California courts ever since. *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977). The primary requirement under California's common fund doctrine is that "the activities of the party awarded fees have resulted in the preservation or recovery of a certain or easily calculable sum of money – out of which sum or fund

[6] California's common fund doctrine is actually broader than the Ninth Circuit's, entitling a litigant to an award even where his "success" is limited to operating as "a catalyst motivating defendants to provide the primary relief sought" or "an important right is vindicated by activating defendants to modify their behavior." *Graham v. DaimlerChrysler Corp*., 34 Cal. 4th 553, 589 (2004) (citations omitted).

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

the fees are to be paid." *Long Beach City Emps. Assn. v. City of Long Beach*, 120 Cal. App. 3d 950, 960 (1981) (quotation marks and citation omitted). Considerations underlying the doctrine include "fairness to the successful litigant," "correlative prevention of an unfair advantage to the others who are entitled to share in the fund," and "encouragement of the attorney for the successful litigant." *City & City of San Francisco v. Sweet*, 12 Cal. 4th 105, 111 (1995).

California's take on the substantial benefit doctrine is also similar to the federal version. *See Lewis*, 692 F.2d at 1270; *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 944 (1979). "It applies when no common fund has been created, but a concrete and significant benefit, although nonmonetary in nature, has nonetheless been conferred on an ascertainable class." *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Mkts., Inc.*, 127 Cal. App. 4th 387, 397 (2005). As such, the doctrine permits a court to grant a "contingent, percentage award" of fees even in the absence of an existing "fund" from which to draw upon. *Knoff v. City etc. of S.F.*, 1 Cal. App. 3d 184, 203 (1969). Similar to the common fund doctrine, it "rests on the principle that those who have been 'unjustly enriched' at another's expense should under some circumstances bear their fair share of the costs entailed in producing the benefits they have obtained." *Woodland Hills*, 23 Cal. 3d at 943.

B. <u>An Award of Attorney Fees Is Appropriate In This Case.</u>

1. A Common Fund Was Created.

It is indisputable that Flo & Eddie helped to "create, discover, increase or preserve" the Settlement Fund, as the efforts of Class Counsel were not only instrumental in establishing Sirius XM's liability, they were the cause-in-fact of the settlement. *See Vincent*, 557 F.2d at 771. Indeed, Flo & Eddie's litigation against Sirius XM resulted in the first ruling in California specifically addressing and establishing a performance right in pre-1972 recordings. That litigation also established Sirius XM's liability and the dismissal of Sirius XM's affirmative defenses **(Dkts. 117, 225),** certification of the putative class itself **(Dkt. 225)**, and

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

endorsement of a damages model based on Sirius XM's gross revenues **(*Id.*)**, whereas (to quote counsel for Sirius XM) "[a]ll [the major labels] had is a ruling in their favor on a jury instruction." **(Geller Decl. ¶ 9, Ex. 2 [May 22, 2015, Hearing Transcript 21:7-8]))**. In fact, before this Court found for Flo & Eddie on liability, the Major Labels were on the verge of *losing* in state court on that very same issue. The Major Labels then used this Court's ruling to reverse their impending loss, and subsequently all of Flo & Eddie's rulings to obtain the settlement from Sirius XM.

This case could not present a clearer common fund, as "(1) the class of beneficiaries is sufficiently identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted with some exactitude to those benefiting." *Paul*, 886 F.2d at 271 (citing *In re Petition of Hill*, 775 F.2d 1037, 1041 (9th Cir. 1985)). Here, the beneficiaries of the fund are the Major Labels and other Class members whose recordings they "control or otherwise have the right to contract for," the benefits they received from Flo & Eddie can be clearly and accurately traced through the litigation record before this Court, and any fee award to Flo & Eddie can be borne by the Major Labels based on their respective shares of the common fund, which are mathematically ascertainable. Nothing more is required. *Id*.

Use of the common fund doctrine would also comport with the considerations articulated by the Ninth Circuit in *Vincent*. (1) The award would shift Flo & Eddie's costs not to Sirius XM, but rather to the Major Labels as beneficiaries of the fund. *See Paul*, 886 F.2d at 271; *Vincent*, 557 F.2d at 770; *Winslow v. Harold G. Ferguson Corp.*, 25 Cal. 2d 274, 283-84 (1944). (2) Flo & Eddie have no contractual relationship with the Major Labels for compensation. *Vincent*, 557 F.2d at 770**.** (3) The Major Labels would be expected to pay the award in proportion to their shares of the common fund. *Id.* (4) The Major Labels retention of separate counsel is irrelevant given their ultimate reliance on Flo & Eddie for every factual and legal determination enabling their settlement. *See Walsh v. Woods*, 187 Cal. App. 3d 1273, 1278 (1986) ("mere retention of separate counsel is not enough to

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

defeat the common fund doctrine."); *Vincent*, 557 F.2d at 771-72. (5) The claim would be satisfied from the Major Labels' settlement with Sirius XM rather than upon any personal liability. *Vincent*, 557 F.2d at 770**.** (6) The fund created by Sirius XM to settle with the Major Labels constitutes an identifiable asset on which the Court can impose a charge. *Id*. at 770**.** (7) The Court can legitimately exercise authority or control over the asset, as it maintains jurisdiction over both Sirius XM as the defendant in this action and the party that controls the fund. *Id.* at 770, 774 n.15; *see also* Alan Hirsch and Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* 68 (2d ed. 2005) (noting jurisdiction over a common fund is "generally satisfied by jurisdiction over a party that controls the fund").

2. Substantial Benefits Were Conferred.

It is also indisputable that Flo & Eddie's litigation conferred substantial benefits to the Major Labels and other owners of recordings they "control or otherwise have the right to contract for," by confirming the existence of a public performance right in pre-1972 sound recordings. Prior to this case, "the facts that would prompt a court to rule on th[at] issue ha[d] simply never been presented in a California court," creating what this Court called a "judicial void" on the subject. **(Dkt. 117, p. 7)** Indeed, according to Sirius XM, this void indicated that California law had *never* provided copyright owners with an exclusive right of public performance. **(Dkt. 106, p. 9)** Flo & Eddie's litigation was both the first to recognize such a right existed and was instrumental in persuading the state court to join in that assessment. As a result, the Major Labels possessed a newly validated property right under California law as well as a liability ruling against Sirius XM.

Bringing about the foregoing could not be anything other than a "substantial service" to the owners of pre-1972 sound recordings, making applicability of the substantial benefit doctrine obvious. *Hall*, 412 U.S. at 7. The litigation conferred a substantial benefit on the members of an ascertainable lass **(see e.g. Dkt. 225, pp. 8-12)**, and the court's jurisdiction over the subject matter makes possible an award that

will operate to spread the costs proportionately among the class. *Southerland v. Int'l Longshoremen's & Warehousemen's Union, Local 8*, 845 F.2d 796, 798 (9th Cir. 1987); *Woodland Hills*, 23 Cal. 3d at 943-44. Indeed, the damage model developed in this case makes it possible for each member's recovery to be proportionally calculated and the Court's jurisdiction over the Class makes it possible to spread the costs of any such award proportionate to that recovery. **(*Id.*, pp. 20-23)** Accordingly, even in the absence of a common fund, the Major Labels would still be required to compensate Class Counsel for benefits conferred through Flo & Eddie's litigation. *Consumer Cause*, 127 Cal. App. 4th at 397.

VI. A PRELIMINARY INJUNCTION IS WARRANTED.

Because the Major Labels' settlement with Sirius XM circumvented Class Counsel and purportedly settled class claims by sweeping in pre-1972 recordings owned by other class members whose recordings they "control or otherwise have the right to contract with," and because the imminent payment of the Settlement Fund threatens to dissipate the common fund from which Class Counsel is entitled to a fee award, good cause exists for the court to exercise its discretion to lift the current stay, *Sierra Med. Servs. Alliance v. Maxwell-Jolly*, 2011 U.S. Dist. LEXIS 97363, *7 (C.D. Cal. Aug. 29, 2011), and to issue a temporary restraining order and an injunction enjoining the payment of the Settlement Fund to the Major Labels and requiring those funds be paid into an interest-bearing account under the control and direction of this Court. *See Savoie v. Merchants Bank*, 84 F.3d 52, 58 (2d Cir. 1996). This type of injunctive relief is available under both the All Writs Act (28 U.S.C. § 1651), which permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," as well as under Fed. R. Civ. Proc. Rule 65.[7] The preservation of

[7] Because such an injunction would not stay the proceedings in the Coattail Action, but merely require that the Settlement Funds be preserved under the jurisdiction of

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

the status quo and preventing the irreparable loss of rights are critical here, which is exactly what prohibitory injunctive relief is designed to accomplish. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984).

The elements of injunctive relief are not in dispute. The party seeking a preliminary injunction must establish a likelihood of success on the merits, that irreparable harm is likely in the absence of preliminary relief, that the balance of equities tips in favor or the moving party, and that an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008).[8] Flo & Eddie has established all of these elements.

With respect to the likelihood of success on the merits, Flo & Eddie has made the necessary showing two different ways. ***First***, by purporting to settle with Sirius XM as to sound recordings it does not own, the Major Labels have impermissibly usurped the rights of other members of the Class and are attempting to settle those members' claims without court approval as required by Rule 23. Even outside of the class context, "[p]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party…without that party's agreement." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506 (9th Cir. 1990) (A settlement "cannot prejudice the rights of persons who are strangers to the proceeding, even though they may have actual knowledge of the settlement or the underlying litigation."). ***Second***, under both the common fund and

---

this Court until third party claims to them are resolved, the Anti-Injunction Act (28 U.S.C. § 2283) is not implicated by Flo & Eddie's application or request. *See Iantosca v. Step Plan Servs., Inc.*, 604 F.3d 24, 32 (1st Cir. 2010).

[8] The court may apply a sliding scale test in its application of these elements, under which "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

substantial benefit doctrines, Flo & Eddie has established Class Counsel's entitlement to a portion of the Settlement Fund for its fees. Flo & Eddie's litigation efforts resulted in and were the cause-in-fact of (a) creating, discovering, increasing or preserving the Settlement Fund, and (b) obtaining judicial recognition of an extraordinarily valuable property right, thereby bestowing clear benefits upon an ascertainable class that can bear the fee award (out of the recovered fund or otherwise) proportionate to the benefits each member received. *Long Beach*, 120 Cal. App. 3d at 960; *Vincent*, 557 F.2d at 771; *Paul*, 886 F.2d at 271.

Flo & Eddie has also clearly demonstrated irreparable harm in the absence of an injunction. Sirius XM intends to disburse the Settlement Fund to the Major Labels "on or before July 15, 2015," which threatens to dissipate funds owed to third party sound recording owners and to Class Counsel. Such risk of dissipation has been repeatedly held to constitute irreparable harm warranting injunctive relief. *See, e.g., Harley-Davidson Credit Corp. v. Monterey Motorcycles, Inc.*, 2012 U.S. Dist. LEXIS 53192, *7-8 (N.D. Cal. Apr. 16, 2012) (citing *In re Focus Media Inc.*, 387 F.3d 1077 (9th Cir. 2004)); *Kremen v. Cohen*, 2011 U.S. Dist. LEXIS 141273, *19 (N.D. Cal. Dec. 7, 2011); *Thomas, Head & Greisen Emples. Trust v. Buster*, 95 F.3d 1449, 1456 (9th Cir. 1996).

The balance of equities also tips sharply in favor of granting an injunction in this case. "To determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Univ. of Haw. Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). Here, while the harms in denying the injunction include the wrongful extinguishing of third party rights and prejudicing Class Counsel's ability to collect fees owed to it under both federal and state law, the only conceivable hardship in granting the injunction is that the Majors Label will have to wait slightly longer to receive their proper share of the Settlement Fund. *See Johnson v. Couturier*, 2008 U.S. Dist. LEXIS 82902, *13 (E.D. Cal.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100

Sept. 26, 2008) (granting injunction and noting that the "funds to which the individual [claimants] would be entitled upon a favorable judgment are not going anywhere"). The balance thus clearly tips in Flo & Eddie's favor.

Finally, the public interest is squarely behind Flo & Eddie in this case. Indeed, the Major Labels' attempt to settle claims of other Class members and to deprive Class Counsel of compensation is both unfair and violative of public policy. California has taken a strong public policy stance to provide both fairness towards, and encouragement of counsel for, a successful litigant, as well as prevention of an unfair advantage to those who benefit from counsel's work by ensuring they contribute to the costs of its production. *Sweet*, 12 Cal. 4th at 111; *Serrano*, 20 Cal. 3d at 38. These considerations are vindicated under both state and federal law by preventing the Major Labels from obtaining the benefit of Flo & Eddie's lawsuit, which produced the property right and liability rulings upon which their settlement is predicated, without contributing to its cost. *Boeing*, 444 U.S. at 478; *Woodland Hills*, 23 Cal. 3d at 943; *Vincent*, 557 F.2d at 772.

VI. CONCLUSION.

In light of the foregoing, Flo & Eddie's *ex parte* Application should be granted in full and the orders requested issued by the Court accordingly.

Dated: July 8, 2015

GRADSTEIN & MARZANO, P.C.

By: /s/ Henry Gradstein
Henry Gradstein
Attorneys for Plaintiff
FLO & EDDIE, INC.

GRADSTEIN & MARZANO, P.C.
6310 San Vicente Blvd, Suite 510
Los Angeles, California 90048
Telephone: 323-776-3100