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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. CV 13-05693 PSG (RZx)

SIRIUS XM RADIO INC.'S OPPOSITION TO FLO & EDDIE'S *EX PARTE* APPLICATION FOR A LIFTING OF THE STAY FOR THE PURPOSE OF ENTERING VARIOUS ORDERS

DECLARATION OF DANIEL M. PETROCELLI FILED CONCURRENTLY HEREWITH

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I. INTRODUCTION

The *ex parte* application filed by Flo & Eddie's counsel has nothing to do with protecting absent class members—it is an unprincipled and groundless attempt to collect attorneys' fees based on the settlement of a separate lawsuit prosecuted by different attorneys on behalf of individual plaintiffs who account for 80% of the pre-1972 recordings historically performed by Sirius XM. The Court should deny Flo & Eddie's *ex parte* application in its entirety.

In 2013, Sirius XM was sued by two separate sets of plaintiffs: (1) five major record companies (the "Record Company Plaintiffs"), represented by Sidley Austin and Mitchell Silberberg & Knupp, filed a lawsuit in Los Angeles Superior Court (the "*Capitol Records* lawsuit"), and (2) Flo & Eddie, represented by Gradstein & Marzano, filed three putative class actions in California, New York, and Florida federal courts (the "*Flo & Eddie* lawsuits"). Last month, Sirius XM participated in separate mediations in the *Capitol Records* and *Flo & Eddie* lawsuits, which took place at the same location before the same mediator, Antonio Piazza. In the *Capitol Records* mediation on June 15 and 16, the parties reached a complete settlement agreement. In the *Flo & Eddie* mediation on June 17, the parties reached an agreement in principle on all material settlement terms—including the amount of cash consideration and the key terms of a prospective licensing arrangement—and spent the next several weeks negotiating a written settlement agreement.

Flo & Eddie's counsel have known since May 7, 2015 about the *Capitol Records* mediation, and have known since June 17, 2015 that Sirius XM and the Record Company Plaintiffs entered into an agreement to settle the *Capitol Records* case. Even so, they proceeded to schedule a separate mediation for the *Flo & Eddie* lawsuits, participate in that mediation, and reach an agreement in principle with Sirius XM that resolved claims *other* than those asserted by the Record Company Plaintiffs in the *Capitol Records* lawsuit. Before now, Flo & Eddie's counsel *never*

objected that Sirius XM was required to include them in the *Capitol Records* mediation and *never* asserted that they were entitled to a portion of the *Capitol Records* settlement. It was not until Flo & Eddie's counsel learned the financial terms of the *Capitol Records* settlement, disclosed in a June 26, 2015 SEC filing, that they attempted to re-trade on their agreement in principle with Sirius XM and extract fees from the *Capitol Records* settlement to which they are not entitled.

There is no basis for *ex parte* relief, as Flo & Eddie's months-long delay in objecting to the *Capitol Records* mediation confirms, and its arguments are frivolous. First, Flo & Eddie claims that Sirius XM was barred by the "no contact" rule from participating in the *Capitol Records* mediation without class counsel present. The "no contact" rule, which prevents defense counsel from directly communicating with unrepresented class members, has no application here. It is *undisputed* that Sirius XM's counsel did not communicate with any of the Record Company Plaintiffs. Sirius XM's counsel communicated with the Record Company Plaintiffs' *attorneys of record in the* Capitol Records *case*—who had filed that lawsuit on behalf of the individual Record Company Plaintiffs separate and apart from the *Flo & Eddie* lawsuits—in connection with a mediation of the *Capitol Records* lawsuit, as the law expressly allows.

Second, Flo & Eddie speculates that the *Capitol Records* settlement agreement, which it has never seen, includes pre-1972 recordings owned by class members other than the Record Company Plaintiffs. Nonsense. The settlement includes recordings that the Record Company Plaintiffs own or control—*i.e.*, through a parent, subsidiary, or affiliate. The Record Company Plaintiffs did not, and indeed could not, release or convey rights in pre-1972 recordings that are owned by third parties. Flo & Eddie's contention that the *Capitol Records* settlement "usurps" rights of the remaining class members in this case is baseless.

Third, Flo & Eddie's counsel assert entitlement to attorneys' fees based on the *Capitol Records* settlement. In their 25-page brief, Flo & Eddie's counsel do

not cite a single rule, case, or other authority entitling them to extract fees from a settlement reached in a separate lawsuit. Instead, they seek to invent a new rule that would allow class counsel to hold absent class members hostage, barring them from opting out of the class to pursue individual litigation or an independent settlement unless they first pay class counsel a ransom. Such a rule would violate basic principles of due process and the purpose of Federal Rule of Civil Procedure 23.

Not only do Flo & Eddie's arguments lack merit, they are completely untethered to the extraordinary relief sought by its *ex parte* application. Flo & Eddie notably fails to identify any reason to lift the stay entered by the Court last month pending Sirius XM's appeal of the Court's class certification ruling, and there is none—Flo & Eddie's arguments are not only meritless, they could be mooted entirely if the Ninth Circuit reverses the class certification ruling. Even if the stay were lifted, Flo & Eddie's request for an injunction on the *Capitol Records* settlement payment is unfounded; its efforts to challenge that settlement fail on the merits, there is no risk of irreparable harm since the only alleged damages are monetary, and this Court cannot enjoin a settlement of a state court lawsuit. Flo & Eddie does not even mention, let alone satisfy, the strict standards for obtaining a lien on the *Capitol Records* settlement payment, modifying the scheduling order and obtaining discovery concerning the confidential *Capitol Records* settlement, or barring all communications with class members.

Flo & Eddie's *ex parte* application must be denied in its entirety.

II. STATEMENT OF FACTS

In August and September of 2013, Flo & Eddie filed three putative class actions in California, New York, and Florida seeking to establish, under the laws of each state, that the owners of pre-1972 recordings have an exclusive right to control all public performances of those recordings. *See* Case No. 13-CV-05693 (C.D. Cal. Aug. 6, 2013); Case No. 13-CV-5784 (S.D.N.Y. Aug. 16, 2013); Case No. 13-CV-23182 (S.D.F.L. Sept. 3, 2013).

In this *Flo & Eddie* California case, the Court granted Flo & Eddie's motion for summary judgment on liability, holding that California Civil Code Section 980(a) grants a performance right to owners of pre-1972 recordings. Dkt. 117 at 1, 10. After prevailing on summary judgment, Flo & Eddie filed a motion for class certification. Sirius XM opposed that motion on various grounds, including that the one-way intervention rule adopted by the Ninth Circuit bars Flo & Eddie from seeking to certify a class after prevailing on the merits. Dkt. 193 at 3-5. On May 27, 2015, the Court granted Flo & Eddie's motion, concluding that Sirius XM had waived the protections of the one-way intervention rule by failing to assert it earlier and by agreeing to a case management schedule in which summary judgment would precede class certification. Dkt. 225 at 1, 7-8.

The Court therefore certified a California class, defined as: "owners of sound recordings fixed prior to February 15, 1972 ('pre-1972 recordings') which have been reproduced, performed, distributed, or otherwise exploited by Defendant Sirius XM in California without a license or authorization to do so during the period from August 21, 2009 to the present." Dkt. 225 at 2. The Court also appointed Gradstein & Marzano class counsel. *Id.* The Court recognized that its ruling on the one-way intervention issue was unprecedented and "raises a serious legal issue warranting [interlocutory] review by the Ninth Circuit," and therefore stayed all trial court proceedings pending resolution of Sirius XM's petition for interlocutory review pursuant to Rule 23(f). Dkt. 237. Sirius XM's Rule 23(f) petition has been fully briefed, but the Ninth Circuit has not yet ruled.

In the *Flo & Eddie* New York case, the court held that New York common law grants a performance right to owners of pre-1972 recordings, but recognized there was "substantial ground for difference of opinion" on this issue and certified its ruling for interlocutory appeal. Case No. 1:13-cv-05784-CM (S.D.N.Y. Feb. 10, 2015). On April 15, 2015, the Second Circuit granted Sirius XM's petition for interlocutory appeal. Case No. 15-1164 (2d Cir. Apr. 15, 2015).

In the *Flo & Eddie* Florida case, the court held that Florida common law does *not* grant a performance right to owners of pre-1972 recordings. 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015). On June 22, 2015, the court granted Sirius XM's motion for summary judgment on liability and closed the *Flo & Eddie* Florida case. *Id*. at *6-*7. Flo & Eddie filed a notice of appeal today.

One month after the first *Flo & Eddie* lawsuit was filed, the Record Company Plaintiffs—Capitol Records, LLC, Sony Music Entertainment, UMG Recordings, Inc., Warner Music Group Corp., and ABKCO Music & Records, Inc.—filed a lawsuit in Los Angeles Superior Court alleging that they own the vast majority of pre-1972 recordings in the United States and asserting claims against Sirius XM similar to Flo & Eddie's claims in this lawsuit. *Capitol Records et al. v. Sirius XM*, L.A.S.C. Case No. BC520981 (Sept. 11, 2013). As is their right, the Record Company Plaintiffs elected to proceed with their individual lawsuit, in which they are represented by individual counsel (Sidley Austin and Mitchell Silberberg & Knupp), rather than participating in this lawsuit as class members.

Earlier this year, the Record Company Plaintiffs proposed that the parties in the *Capitol Records* lawsuit schedule a mediation. Declaration of Daniel M. Petrocelli ("Petrocelli Decl.") ¶ 4. On March 19, 2015, Sirius XM and the Record Company Plaintiffs scheduled a private mediation in the *Capitol Records* lawsuit for June 15 and 16 before Antonio Piazza, a seasoned and respected mediator. *Id.* As they admit, Flo & Eddie's counsel were fully aware of this—Sirius XM's counsel told them on May 7, 2015. *Id.* Ex. A. Flo & Eddie's counsel initially asked to participate in the *Capitol Records* mediation, but Sirius XM declined, as that mediation involved a separate lawsuit. *Id.* ¶¶ 7-8.

At no point did Flo & Eddie's counsel ever contend that the separate *Capitol Records* mediation could not proceed because it was prohibited by ethical rules, class action rules, or any of the positions now asserted. *Id.* ¶ 10. At no time did Flo & Eddie's counsel ever contend the *Capitol Records* mediation could not occur in

their absence. *Id.* At no time did Flo & Eddie's counsel ever indicate any intention to object or seek court relief precluding the *Capitol Records* mediation. *Id.* Instead, Flo & Eddie's counsel agreed to schedule a separate mediation in the three *Flo & Eddie* lawsuits for June 17, using the same mediator and location as the *Capitol Records* mediation. *Id.* ¶ 8.

The *Capitol Records* mediation went forward on June 15 and 16. *Id.* ¶ 11. Sirius XM and the Record Company Plaintiffs reached a settlement in principle on June 16 and signed a written settlement agreement on June 17 (the "*Capitol Records* Settlement"). *Id.* The *Capitol Records* Settlement resolved the *Capitol Records* lawsuit, in addition to any past claims concerning Sirius XM's nationwide use of pre-1972 recordings owned or controlled by the Record Company Plaintiffs, and allowed Sirius XM to perform those recordings nationwide through 2017 (and included an option to enter into license agreements with each individual Record Company through 2022). Gradstein Decl. Ex. 1. In exchange, Sirius XM agreed to make a one-time payment of $210 million to the Record Company Plaintiffs on or before July 31, 2015. *Id.*; Petrocelli Decl. ¶ 11.

As a result of the *Capitol Records* Settlement, the Record Company Plaintiffs are no longer members of the class in this lawsuit, which is defined as owners of pre-1972 recordings who did not authorize Sirius XM to perform those recordings in California. Dkt. 225 at 2. If this Court's certification order is upheld by the Ninth Circuit, the Record Company Plaintiffs will opt out of the class at the appropriate time.

At the *Flo & Eddie* mediation on June 17, Flo & Eddie's counsel were informed of the fact (though not the specific terms) of the *Capitol Records* Settlement. Gradstein Decl. ¶ 12. Indeed, Flo & Eddie's counsel were "down the hall" from the Record Company Plaintiffs' counsel, who were finalizing the written settlement agreement with Sirius XM. *Id.* At no time during the course of the mediation in New York did counsel for Flo & Eddie assert the position now being

advanced that Sirius XM and the Record Company Plaintiffs were prohibited from mediating and settling the *Capitol Records* lawsuit. Petrocelli Decl. ¶ 14. Instead, Flo & Eddie's counsel proceeded with the separate *Flo & Eddie* mediation. *Id.* ¶¶ 12-13. Through the mediator, Mr. Piazza, counsel for Sirius XM and Flo & Eddie engaged in a full day of negotiations and reached an agreement in principle on June 17, including the amount of cash consideration and key terms of a prospective licensing arrangement. *Id.* ¶ 12. For the next several weeks, counsel for Sirius XM and Flo & Eddie negotiated the details of a written settlement agreement. *Id.* ¶ 13. The parties exchanged multiple drafts thereafter. *Id.*

On June 26, Sirius XM filed a Current Report on Form 8-K with the SEC disclosing the material terms of the *Capitol Records* Settlement. Gradstein Decl. Ex. 1. Although Flo & Eddie's counsel had known about the *Capitol Records* mediation since May 7, 2015, and had known about the fact of the *Capitol Records* Settlement since June 17, 2015, it was only this week that they asserted Sirius XM could not go forward with the *Capitol Records* Settlement.

Flo & Eddie's counsel notified Sirius XM's counsel of this *ex parte* application on July 6, 2015. The parties agreed that Flo & Eddie would file the application on July 8 and Sirius XM would file its opposition on July 10. App. at 4. Although Flo & Eddie's *ex parte* application can and should be denied on the papers, should the Court wish to schedule a hearing, Sirius XM respectfully requests that the hearing be scheduled after July 17, 2015, as Sirius XM's lead counsel will be out of the country until then. Petrocelli Decl. ¶ 17.

III. THERE IS NO BASIS FOR *EX PARTE* RELIEF.

In order to justify *ex parte* relief, Flo & Eddie must establish that: (1) its "cause will be irreparably prejudiced if the underlying motion[s are] heard according to regular noticed motion procedures," and (2) it is "without fault in creating the crisis [or] the crisis occurred as a result of excusable neglect." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995); *see*

also Dkt. 12 at 8 ("*Ex parte* applications are solely for extraordinary relief and should be used with discretion."). Flo & Eddie cannot satisfy either requirement.

There is no risk of irreparable prejudice if Flo & Eddie proceeds with a regularly noticed motion to lift the stay and—if that motion is granted—motions imposing a preliminary injunction and lien on the *Capitol Records* Settlement and granting the myriad other relief sought. As set forth below, there is no basis whatsoever to lift the stay, as Sirius XM's Rule 23(f) petition challenging the Court's class certification ruling remains pending, and Flo & Eddie's arguments have no merit. Moreover, Flo & Eddie has failed to identify *any* irreparable harm.

Flo & Eddie argues that its counsel are entitled to some portion of Sirius XM's payment to the Record Company Plaintiffs under the *Capitol Records* Settlement, and thus seeks to impound that payment in an interest-bearing escrow account until its fee application is resolved. Even if Flo & Eddie's counsel were to prevail on this fee application—and they cannot—they do not need *ex parte* relief to ensure recovery of their fees. They can simply go to the Record Company Plaintiffs and demand payment (with interest, if applicable). Flo & Eddie's counsel do not suggest the Record Company Plaintiffs are at risk of being judgment-proof, and any minor delay associated with recovering payment from the Record Company Plaintiffs rather than an escrow account is not sufficient to constitute irreparable harm. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[T]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury."); *Dahl v. Swift Distrib., Inc.*, 2010 WL 1458957, at *11 (C.D. Cal. Apr. 1, 2010) ("An irreparable injury … does not exist where monetary damages would be an adequate remedy.").

Flo & Eddie's months-long delay in seeking *ex parte* relief belies any claim of irreparable prejudice. Flo & Eddie's counsel have known about the *Capitol Records* mediation since May 7, 2015, and have known about the fact of the *Capitol Records* Settlement since June 17, 2015, but did not make any objection or

claim that they were entitled to fees from that Settlement before now. There is no basis for emergency *ex parte* relief in such circumstances.[1] *See Mission Power*, 883 F. Supp. at 493 ("*Ex parte* applications are not intended to save the day for parties who failed to present requests when they should have."); *Charley v. Chevron USA*, 2010 WL 2792486, at *1 (C.D. Cal. July 13, 2010) (*ex parte* application denied because applicant "created the purported 'emergency'"); *Standard v. Wells Fargo Bank, N.A.*, Case No. 15-1797, Dkt. 10 at 2 (C.D. Cal. Mar. 18, 2015) (Gutierrez, J.) ("Plaintiffs' self-made crisis that precludes them from filing a regularly noticed motion at this point in time does not entitle them to *ex parte* relief.").

IV. FLO & EDDIE'S ARGUMENTS HAVE NO MERIT.

A. Sirius XM and the Record Company Plaintiffs Had No Obligation to Include Class Counsel in the *Capitol Records* Mediation.

Flo & Eddie argues that, after this Court certified a California class on May 27, 2015, Sirius XM was barred by the California Rules of Professional Conduct from participating in the *Capitol Records* mediation without class counsel present because the Record Company Plaintiffs had not yet opted out of the class. Of course, Flo & Eddie never made this argument to Sirius XM or the Record Company Plaintiffs before now, even though this Court's class certification order was issued almost three weeks before the *Capitol Records* mediation. And for good reason: Flo & Eddie's argument defies credibility, not to mention the law.

California Rule of Professional Conduct 2-100(A) provides that a party's counsel "shall not communicate directly ... 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." The purpose of this "no contact" rule is to preserve attorney-

[1] Moreover, 48 hours is not sufficient time to address all of the arguments raised in Flo & Eddie's 25-page *ex parte* application, which is yet another reason it is improper. To the extent the Court is inclined to consider any of Flo & Eddie's arguments—and it should not—Sirius XM requests further briefing.

client relationships and prevent attorneys from taking advantage of unrepresented, unsophisticated non-attorneys. *See U.S. v. Talao*, 222 F.3d 1133, 1138 (9th Cir. 2000). The "no contact" rule has no application whatsoever here, since it is *undisputed* that Sirius XM's counsel did not "communicate directly … with a party." Rather, Sirius XM's outside counsel communicated with the Record Company Plaintiffs' outside counsel in connection with a mediation of the Record Company Plaintiffs' individual *Capitol Records* lawsuit.

Nor do the Rules of Professional Conduct require defense counsel to communicate with class counsel about an absent class member's individual lawsuit in which it is represented by separate counsel. *Cf. McCubbrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 68 (N.D. Cal. 1976) (noting communications between defendant's counsel and absent class members' counsel regarding parallel litigation). Such a rule would make no sense, as it would effectively prevent absent class members from pursuing individual litigation with counsel of their choice. That is plainly not the law. *See Gates v. Cook*, 234 F.3d 221, 227 (5th Cir. 2000) (class members have fundamental right to counsel of choice).

Even where there is no individual lawsuit pending, defense counsel can *always* communicate with an absent class member's attorney, regardless of whether that attorney is also serving as class counsel. *See, e.g.*, *Dodona I, LLC v. Goldman, Sachs & Co.*, 300 F.R.D. 182, 187-88 (S.D.N.Y. 2014) (defense counsel can communicate with attorneys of absent class members, "whether those attorneys are serving in this action as class counsel or are otherwise serving the class members in a representative capacity [such as in-house or private counsel]"); *see also* Paul W. Vapnek et al., *Restrictions on Speech and Behavior Outside Courtroom*, Cal. Prac. Guide Prof. Resp. Ch. 8-D at 8:772 (2014) (attorney can communicate with organization's in-house counsel).[2]

[2] Many of Flo & Eddie's cases involve situations where, unlike here, an attorney was directly communicating with unrepresented absent class members. *See*

Even if the "no contact" rule did apply here—and it does not—class counsel lacks standing to assert it on behalf of the Record Company Plaintiffs. *See, e.g.*, *Miller v. Material Scis. Corp.*, 986 F. Supp. 1104, 1107 (N.D. Ill. 1997) ("no contact" rule "was not fashioned to protect third-parties" who lack standing to allege violation). The Record Company Plaintiffs are represented by Sidley Austin and Mitchell Silberberg, and have no attorney-client relationship with Gradstein & Marzano. An attorney-client relationship does not form between class counsel and absent class members until the opt-out period has expired. *See, e.g.*, *Krzesniak v. Cendant Corp.*, 2007 WL 4468678, at *3 (N.D. Cal. Dec. 17, 2007) ("[T]here is nothing that prevents class members from contacting a defendant's counsel *before the expiration of the opt-out period*. Until then, the class members are not represented by plaintiff's counsel and plaintiff cannot 'freeze' opposing counsel's right to communicate.") (emphasis added). This case is nowhere close to that stage. Sirius XM has filed a Rule 23(f) petition with the Ninth Circuit challenging this Court's class certification ruling, and this Court stayed all further proceedings pending its resolution. Class notice has not been drafted, approved, or circulated. And the opt-out period has not commenced, much less expired.

Ignoring the facts and the law, Flo & Eddie argues that Sirius XM's counsel was not permitted to engage in settlement discussions with the Record Company Plaintiffs "even if those class members have their own individual counsel or are

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Hernandez v. Vitamin Shoppe Indus., Inc., 174 Cal. App. 4th 1441, 1459 (2009) (attorney urging absent class members to opt out and retain him); *Jacobs v. CSAA Inter-Ins.*, 2009 WL 1201996, at *3 (N.D. Cal. May 1, 2009) (barring attorney in individual lawsuit from communicating directly with class members in separate lawsuit); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 377 (N.D. Ill. 1982) (barring direct communications between defense counsel and absent class members). The other cases Flo & Eddie cites are likewise inapposite, as those cases either *permitted* communications between defense counsel and absent class members, *see Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1083-84 (C.D. Cal. 2002), or contain no discussion about what communications are permissible, *see Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 (2d Cir. 1978); *Fidel v. Nat'l Union Fire Ins. Co.*, 1996 WL 742482, at *6-*8 (9th Cir. Dec. 19, 1996).

maintaining individual actions." App. at 11. Flo & Eddie cites no authority for this proposition—because there is none—and the three cases it does cite are inapposite.

In *In re Shell Oil Refinery*, the court held that an attorney-client relationship formed between class counsel and absent class members *at the time the opt-out period expired*, and after that point defendants' attorneys could not communicate directly with absent class members about settlement. 152 F.R.D. 526, 528, 535 (E.D. La. 1989). Here, the opt-out window has not even opened, let alone expired, and thus there is no attorney-client relationship between class counsel and the Record Company Plaintiffs. Moreover, *In re Shell* recognized that, even after the opt-out period has expired, absent class members like the Record Company Plaintiffs can negotiate independent settlements. *Id.* at 535.[3] And unlike in *In re Shell*, the Record Company Plaintiffs have filed an individual lawsuit in which they are represented by separate counsel. Class counsel cannot interfere with settlement of that individual lawsuit.

In re Airline Ticket Communications Antitrust Litigation is likewise inapposite because it involved a situation where, unlike here, defendants' attorneys communicated directly with absent class members after the opt-out period had expired. 1996 U.S. Dist. LEXIS 20361, at *5-*6, *9-*10 (D. Minn. Aug. 12, 1996). The court expressly distinguished the situation here: "Had [the absent class members] wished to opt out of the case, or seek a private settlement with defendants, *they were free to do so prior to expiration of the opt-out period*." *Id.* at *9-*10 (emphasis added).

Negrete does not help Flo & Eddie, either. That case merely states that an absent class member's maintenance of an individual lawsuit does not automatically

[3] As several courts have recognized, a defendant is free to discuss settlement with individual class members, even after expiration of the opt-out period, so long as communications are directed "to class counsel *or any other attorney retained by the class member*." William B. Rubenstein, Newberg on Class Actions § 9:9 (5th ed. 2015) (emphasis added).

serve as an opt-out from a proposed class settlement. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 926 F. Supp. 2d 1143, 1157-58 (C.D. Cal. 2013). Again, the Record Company Plaintiffs have not yet had any opportunity to opt out of the class in this case, though they will do so if and when Sirius XM's Rule 23(f) petition is denied, class notice is distributed, and the opt-out period has commenced.

As Flo & Eddie's own cases confirm, its counsel have no attorney-client relationship with the Record Company Plaintiffs, and thus lack standing to even assert the "no contact" rule. And even if they did, as explained above, there is no Rule of Professional Conduct or other authority that prevents Sirius XM from settling an individual lawsuit with the Record Company Plaintiffs through the Record Company Plaintiffs' counsel of choice.

B. The *Capitol Records* Settlement Does Not, and Indeed Could Not, Include Pre-1972 Recordings Owned by Class Members Other than the Record Company Plaintiffs.

Flo & Eddie's *ex parte* application is premised on an erroneous, straw man argument that the *Capitol Records* Settlement includes pre-1972 recordings owned by class members other than the Record Company Plaintiffs. This is nonsense.

In the *Capitol Records* lawsuit, the Record Company Plaintiffs allege that they "own or … possess exclusive ownership interests" in the vast majority of pre-1972 recordings, which account for 80% of the pre-1972 recordings historically played by Sirius XM.[4] *See* Geller Decl. Ex. 1 ¶ 10 (alleging that Record Company Plaintiffs "own the majority of commercially exploited recorded music in the United States, and are the successors-in-interest or the owners of many classic and famous record labels such as Mercury, RCA Victor, Reprise, Columbia, Blue Note, Motown, Decca, Elektra, and Sire"); Gradstein Decl. Ex. 1. In many cases, these

[4] Flo & Eddie's suggestion that this 80% figure may be lower, App. at 8, reads out of context testimony by a Sirius XM executive stating that four of the five Record Company Plaintiffs account for 59% of identified "spins" of *post*-1972 recordings.

pre-1972 recordings are owned by one of the five named Record Company Plaintiffs themselves, though in other cases, the recordings may be owned by a parent, subsidiary, or affiliate. For that reason, Sirius XM's Form 8-K states that the *Capitol Records* Settlement encompasses pre-1972 recordings "owned or controlled" by the Record Company Plaintiffs, *id.—i.e.*, owned by one of the Record Company Plaintiffs or a parent, subsidiary, or affiliate. The *Capitol Records* Settlement covers performances of those pre-1972 recordings *nationwide*, unlike this lawsuit, which only involves performances in *California*.

Flo & Eddie's suggestion that the *Capitol Records* Settlement includes pre-1972 recordings owned by class members other than the Record Company Plaintiffs is not only baseless—Flo & Eddie has never seen the *Capitol Records* Settlement, which is confidential—it is nonsensical. It is hornbook law that the Record Company Plaintiffs could not release or convey rights in pre-1972 recordings that are owned by third parties. *See, e.g.*, 4 Witkin Summ. Cal. Law Sales § 214 (10th ed. 2010) (where seller conveys property without authority or consent of true owner, agreement is void *ab initio*); *Richlin v. MGM Pictures, Inc.*, 531 F.3d 962, 972 (9th Cir. 2008) (ownership prerequisite to disposition of common-law copyright). The *Capitol Records* Settlement only includes pre-1972 recordings owned or controlled by the Record Company Plaintiffs and thus encompassed by the Record Company Plaintiffs' individual lawsuit. It does *not* include pre-1972 recordings owned or controlled by the remaining class members in this lawsuit or "usurp," App. at 23, any of those class members' rights.

Moreover, even if the *Capitol Records* Settlement did include pre-1972 recordings owned by other class members (and it does not), as Flo & Eddie's own cases establish, that would be irrelevant because those class members would still be able to proceed with their ownership claims in this case. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986) (non-consenting parties' claims survive court's approval of consent decree

settlement because "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement"); *E.E.O.C. v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506 (9th Cir. 1990) (same). So long as a class member can prove ownership of a pre-1972 recording, the *Capitol Records* Settlement would not impede or prejudice its ownership claim in any way.

C. The Common-Fund and Substantial-Benefit Doctrines Do Not Allow Class Counsel to Extract Attorneys' Fees From the *Capitol Records* Settlement.

There is no basis for Flo & Eddie's counsel to obtain attorneys' fees based on the *Capitol Records* Settlement under the common-fund or substantial-benefit doctrines. Those doctrines merely provide that an attorney who has obtained a common fund or substantial benefit in an action for a class of people can seek attorneys' fees in *that* action. That is not what happened here. The *Capitol Records* Settlement was the product of an entirely separate lawsuit, which was brought by different plaintiffs—the Record Company Plaintiffs, who account for approximately 80% of the pre-1972 recordings historically performed by Sirius XM—and prosecuted by different attorneys.

Flo & Eddie does not cite a single case in which class counsel recovered attorneys' fees from an individual lawsuit simply because the plaintiffs in that lawsuit *could* have been class members. Nor does such a case exist, as this would allow class counsel to effectively bar absent class members from opting out to pursue individual litigation or an independent settlement without first paying a ransom to class counsel.[5] This would violate basic principles of due process, which

[5] Class counsel are always aware of the possibility that, if a parallel lawsuit is resolved first, their potential fees will be reduced or eliminated. *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 472 (2000); Newberg, *supra*, § 10:34. For this reason, races to settlement or judgment are commonplace. *Id.* Flo & Eddie's argument that the counsel who achieves class certification first is entitled to tax all subsequent settlements and judgments is not correct.

ensure that class members can freely opt out of a class, and prevent class counsel from imposing barriers to opt-outs. *See* Newberg, *supra*, § 9:38 (freedom to opt out is a "central definitional characteristic of the class suit, indeed a core component of its constitutional legitimacy"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) ("The right to participate, or to opt-out, is an individual one … and may not be usurped by the class representative or class counsel.").

Flo & Eddie's argument also turns Rule 23 on its head. That rule was designed to *benefit* putative class members by offering an efficient alternative to individual litigation, not to tie their hands and *force* litigation on an aggregate basis. *See In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. Ohio 2000) ("Rule 23(b)(3) … strikes a balance between the value of aggregating similar claims and the right of an individual to have his or her day in court."); Newberg, *supra*, § 9:40 ("[T]hose with significant injuries are most likely to want their own day in court—and hence opt out—while those with less significant injuries will prefer to take advantage of the litigation cost savings that the class suit provides."); *Drelles v. Metro. Life Ins. Co.*, 357 F3d 344, 346 (3d Cir. 2003) ("opt-out plaintiffs" who have "consciously and purposefully refused to join a class action" must be permitted to individually litigate claims).

The cases Flo & Eddie cites are wholly inapposite. Not one of those cases provides, or even suggests, that the common-fund or substantial-benefit doctrine allow counsel from one lawsuit to recover a portion of a settlement from another lawsuit brought by separate counsel. Flo & Eddie's cases all involve factually distinct situations, in which:

- Counsel sought reimbursement from a common fund created in a class action in which it served as class counsel;[6]

[6] *See Boeing Co. v. Gemert*, 444 U.S. 472, 480 (1980); *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 127 (1885); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294 (9th Cir. 1994); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

- A member of an organization achieved a substantial benefit on the organization's behalf and sought reimbursement for its efforts;[7]
- Lead counsel sought reimbursement for overseeing consolidated actions;[8]
- The costs of third-party recoveries were allocated between insurers and beneficiaries;[9] or
- Active counsel sought to recover attorneys' fees from intervening parties.[10]

Moreover, Flo & Eddie's own authorities confirm that the common-fund doctrine has no application where "there are no passive beneficiaries." *Walsh v. Woods*, 187 Cal. App. 3d 1273, 1276-77 (1986) (the "common fund doctrine rewards an active litigant only where there are other, passive members of the group who benefit from the outcome"). Here, the Record Company Plaintiffs hired qualified counsel who actively prosecuted the *Capitol Records* lawsuit for the past two years—which is yet another reason the common-fund doctrine does not apply.

V. IN ANY EVENT, THERE IS NO BASIS FOR THE EXTRAORDINARY RELIEF SOUGHT.

A. There Is No Basis for Injunctive Relief or a Lien.

Flo & Eddie's demand for an order "restraining and enjoining Sirius XM from paying the Settlement Fund to the Major Labels" and "imposing a lien on the Settlement Fund in favor of Class Counsel," App. at 3, is wholly unjustified.

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[7] *See Hall v. Cole*, 412 U.S. 1, 8-9 (1973); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 389-90 (1970); *Southerland v. Int'l Longshoreman's & Warehousemen's Union, Local 8*, 845 F.2d 796, 802 (9th Cir. 1987); *Lewis v. Anderson*, 692 F.2d 1267, 1270 (9th Cir. 1982); *Reiser v. Del Monte Props. Co.*, 605 F.2d 1135, 1137-40 (9th Cir. 1979); *Fox v. Hale & Norcross Silver Mining Co.*, 108 Cal. 475, 477 (1895); *Long Beach City Emps. Ass'n v. City of Long Beach*, 120 Cal. App. 3d 950, 961-62 (1981).

[8] *See Vincent v. Hughes Air West*, 557 F.2d 759, 762-65 (9th Cir. 1977); *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605-08 (1st Cir. 1992).

[9] *See U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1550 (2013).

[10] *See Internal Imp. Fund Trusts.*, 105 U.S. 527, 536 (1881).

As a threshold matter, Flo & Eddie's requested injunction is expressly prohibited by the Anti-Injunction Act and Ninth Circuit case law. *See* 28 U.S.C. §§ 1651, 2283; *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097-1101 (9th Cir. 2008). The *Capitol Records* Settlement resolves the Record Company Plaintiffs' separate *state* court lawsuit, releases Sirius XM from claims under the laws of all 50 states, and allows Sirius XM to perform the Record Company Plaintiffs' pre-1972 recordings nationwide. This Court has no authority to enjoin that Settlement.

Negrete is instructive. In that case, Negrete filed a putative class action against Allianz in a California district court challenging its sale of deferred annuities. Parallel actions were filed by other plaintiffs in different federal district courts, and by the Minnesota Attorney General in Minnesota state court. The California district court certified a class. Thereafter, parties to the Minnesota action and the other federal actions attended a mediation with Allianz. After learning of that mediation, Negrete sought and obtained an injunction from the California district court providing that: (1) only class counsel could conduct or authorize settlement discussions "that would affect any claims brought in this [California] litigation," and (2) the California district court must review and approve "[a]ny proposed settlement that resolves, in whole or in part, the claims brought in this action." 523 F.3d at 1095.

The Ninth Circuit reversed in full, holding that the district court's injunction interfered with proceedings in other courts in violation of the Anti-Injunction Act, which is "based upon considerations of federalism" and "designed to preclude unseemly interference with state court proceedings." *Id*. at 1100. As the Ninth Circuit emphasized, the fact that "settlements in other courts might draw the fangs from at least a portion of the class action case" pending before the California district court did not justify an injunction against other federal and state court proceedings. *Id.* The Ninth Circuit also rejected Negrete's argument, which Flo & Eddie advances here, that the All Writs Act authorized the California district court

to enjoin proceedings in other courts, noting "the mere fact that some other court might complete its proceedings before the district court was able to complete the proceedings in this case does not justify an injunction."[11] *Id.* at 1099 n.13 (citing *Vendo Co. v. Lektro–Vend Corp.*, 433 U.S. 623, 641–42 (1977)).[12] *Negrete* is controlling here, and expressly precludes the relief sought by Flo & Eddie.

Even if Flo & Eddie's request for injunctive relief were not facially improper, it could not satisfy the high standard for injunctive relief. In order to obtain injunctive relief, Flo & Eddie must establish: (1) a likelihood of success on the merits, (2) a risk of irreparable harm, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Frontline Med. Assocs., Inc. v. Coventry Healthcare Workers Comp., Inc.*, 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009). Flo & Eddie cannot meet any of these requirements.

First, Flo & Eddie cannot show any likelihood of success on the merits. Its arguments are groundless for the reasons discussed above. In addition, Flo & Eddie does not cite any authority or facts supporting its request for an equitable lien, and there are none. An equitable lien—which is "a right to subject property not in the possession of the lienor to the payment of a debt as a charge against that property"—is only warranted where the plaintiff establishes: (1) a "promise to pay from a specific fund," and (2) "detrimental reliance or unjust enrichment." *Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 453, 455 (1997).

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[11] *Negrete* also held that the Anti-Injunction Act "cannot be evaded by addressing the order to the parties," since "ordering the parties not to proceed is tantamount to enjoining the proceedings." *Id.* at 1098. This forecloses Flo & Eddie's argument that its requested injunction "would not stay the proceedings" in California state court and thus does not implicate the Anti-Injunction Act. App. at 22 n.7.

[12] *Savoie v. Merchants Bank*, 84 F.3d 52, 57-58 (2d Cir. 1996), is inapposite. That case merely confirms that a district court has subject matter jurisdiction even if a complaint fails to state a claim. Although the court mentions a separate state-court action, it did not enjoin any settlement or other proceedings in the state court, or involve any of the Anti-Injunction Act problems present here.

Flo & Eddie does not assert, and cannot show, that Sirius XM or the Record Company Plaintiffs made any promise to pay class counsel a portion of the *Capitol Records* Settlement. This would have made no sense, since the Record Company Plaintiffs have always been represented by separate counsel in the *Capitol Records* lawsuit. And Flo & Eddie cannot establish detrimental reliance or unjust enrichment based on a promise that was never made. *See id.* (reliance exists where a plaintiff "forego[es] pursuing rights … on the strength of express or implied promises of payment"); *compare McCafferty v. Gilbank*, 249 Cal. App. 2d 569, 574 (1967) (plaintiff relied on promise to pay proceeds from settlement agreement and did not seek lien).

Second, Flo & Eddie cannot show a likelihood of irreparable harm. Flo & Eddie argues that "Sirius XM intends to disburse the Settlement Fund to the Major Labels 'on or before July [31], 2015,' which threatens to dissipate funds owed to third party sound recording owners and to Class Counsel." App. at 24. The law is settled, however, that "the temporary loss of income ... does not usually constitute irreparable injury" and the "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90; *see also Dahl*, 2010 WL 1458957, at *11 ("An irreparable injury ... does not exist where monetary damages would be an adequate remedy.").

In re Vioxx Products Liability Litigation, 2008 WL 3285912 (E.D. La. Aug. 7, 2008), is instructive. In that case, ERISA health benefit providers claimed to have paid Vioxx-related medical expenses on behalf of their clients, some of whom settled with the manufacturers of Vioxx. *Id*. at *4. The providers asserted that they (and not their clients) were entitled to these settlement payments and, like Flo & Eddie, sought to enjoin distribution of those payments until they could establish such entitlement. *Id.* The court held there was no likelihood of irreparable harm. *Id.* at *16. "Mere injuries, however substantial, in terms of money, time and energy

... are not enough." *Id.* The possibility that "adequate compensatory or other corrective relief will be available at a later date" precludes a finding of irreparable harm and the "extraordinary and drastic remedy of a preliminary injunction." *Id.* at *16-*18 (quoting *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975)).

All of the cases Flo & Eddie cite involved situations in which injunctive relief was necessary to prevent the complete loss of all assets that could satisfy a judgment. App. at 24. *See Harley-Davidson Credit Corp. v. Monterey Motorcycles, Inc.*, 2012 U.S. Dist. LEXIS 53192, at *7-*8 (N.D. Cal. Apr. 16, 2012) (defendant selling off inventory to destroy plaintiff's security interest and prevent recovery of judgment); *Kremen v. Cohen*, 2011 U.S. Dist. LEXIS 141273, at *19 (N.D. Cal. Dec. 7, 2011) (fraudulent transfers with intent of avoiding judgment); *Thomas, Head & Greisen Emps. Trust v. Buster*, 95 F.3d 1449, 1456 (9th Cir. 1996) (risk that defendants would dispose of $125,000 before resolution of fraudulent conveyance action); *Johnson v. Couturier*, 2008 U.S. Dist. LEXIS 82902, at *13 (E.D. Cal. Sept. 26, 2008) (release of litigation funds would effectively preclude plaintiffs from ever being compensated given risk of defendants' insolvency); *cf. Sierra On-line, Inc. v. Phoenix Software Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (irreparable harm undisputed where plaintiff's competitor was using similar mark and causing customer confusion).

Third, the balance of equities and public interest favor Sirius XM. As discussed above, no rights or assets are at risk of being extinguished, and the only "harm" Flo & Eddie identifies is a delay in receiving attorneys' fees it has no entitlement to in the first place. Flo & Eddie's months-long delay in raising any objection to the *Capitol Records* mediation or Settlement confirms there is no true hardship. *See Standard*, Case No. 15-1797, Dkt. 10 at 2 (rejecting *ex parte* application for order restraining foreclosure sale where plaintiffs knew of defendants' plan to foreclose on property but failed to act promptly); *Hanger Prosthetics v. Capstone Orthopedic, Inc.*, 2007 WL 3340935, at *2 (E.D. Cal. Nov.

9, 2007) ("Plaintiff does not explain why it should not be considered the cause of its own predicament").

Flo & Eddie's assertion that public policy favors compensating class counsel for their work, App. at 25, wrongly assumes that class counsel are entitled to any compensation for the settlement of a separate lawsuit in which they were not involved. Public policy favors efficient resolution of litigation and enforcement of settlement agreements. *See Wise v. Winn*, 2006 WL 2694962, at *2 (E.D. Cal. Sept. 20, 2006). Allowing class counsel to tie up the *Capitol Records* Settlement runs afoul of these policies. *See In re Vioxx*, 2008 WL 3285912, at *20 (against the public interest to permit health care providers "to wait on the sidelines for years and then enjoin the settlement proceedings at the last minute of the eleventh hour").

To the extent the Court entertains Flo & Eddie's request for an injunction—and it should not—it should allow additional briefing to establish the amount of a proper bond for potential damages sustained should it be determined that Sirius XM has been wrongfully enjoined. *See* Fed. R. Civ. P. 65(c); *In re Woodside Grp., LLC*, 427 B.R. 817, 851 (Bankr. C.D. Cal. 2010).

* * *

Flo & Eddie does not even mention, let alone satisfy, the strict standards for lifting the stay, modifying the scheduling order and obtaining discovery concerning the confidential *Capitol Records* Settlement, or barring all communications with class members—which is reason alone to deny its application. In any event, Flo & Eddie is not entitled to any of the relief it requests.

B. <u>There Is No Basis to Lift the Stay.</u>

The Court has authority to lift a stay "[w]hen the circumstances have changed such that the reasons for imposing the stay are nonexistent or inappropriate." *j2 Global, Inc. v. Integrated Global Concepts, Inc.*, 2013 WL 3272922, at *1 (C.D. Cal. June 27, 2013); *accord Akeena Solar Inc. v. Zep Solar Inc.*, 2011 WL 2669453, at *2 (N.D. Cal. July 7, 2011). Just last month, this Court

issued a blanket stay to allow Sirius XM to pursue its Rule 23(f) petition. After briefing and argument, this Court correctly determined that a stay was appropriate because "the Court's ruling on the one-way intervention rule raises a serious legal issue warranting review by the Ninth Circuit," "Sirius XM is likely to suffer irreparable harm in the absence of a stay," and the public interest "is served by staying the case to avoid costly and potentially unnecessary litigation ... while the Ninth Circuit decides whether the one-way intervention rule precludes class certification." Dkt. 237 at 4-6; *see also Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300, at *1 (N.D. Cal. Nov. 15, 2012) (setting forth legal standard to prevail on a motion to stay).

Nothing has changed. Sirius XM's Rule 23(f) petition remains pending before the Ninth Circuit. Flo & Eddie's arguments, which concern class counsel's entitlement to fees, have no bearing on the Court's reasoning for issuing the stay (and fail on the merits in any event). Indeed, if the Ninth Circuit grants Sirius XM's petition and reverses this Court's class certification ruling, Flo & Eddie's fee request would be entirely moot. This is a reason to *maintain* the stay, not lift it, as Flo & Eddie's own case confirms. *Sierra Med. Servs. Alliance v. Maxwell-Jolly*, 2011 U.S. Dist. LEXIS 97363, at *10 (C.D. Cal. Aug. 29, 2011) (denying request to lift stay because cases that were pending on appeal would "ultimately impact the outcome of the present matter").

C. <u>There Is No Basis to Modify the Scheduling Order or Allow Discovery Into Confidential Settlement Discussions.</u>

Flo & Eddie fails to explain why discovery into the *Capitol Records* Settlement is justified or permissible. It is not. Discovery has been closed for months. If Flo & Eddie wishes to reopen discovery, it must seek leave to amend the scheduling order, which requires a showing of good cause. Fed. R. Civ. P. 16(b)(4); *see, e.g., Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992). Good cause is plainly lacking here. The law is clear that

settlement documents and communications are privileged and not discoverable. *See Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9th Cir. 2000) (denying discovery and confirming "communications in preparation for and during the course of a mediation with a neutral must be protected"); *Microsoft Corp. v. Suncrest Enter.*, 2006 U.S. Dist. LEXIS 21269, at *6-7 (N.D. Cal. Jan. 6, 2006) (denying discovery into "the substance of any communications made in preparation for and during the mediation"); *see also* 28 U.S.C. § 652(d) (prohibiting "disclosure of confidential dispute resolution communications"); C.D. Cal. L.R. 16-15.8(a) (mediation documents and communications cannot be disclosed or "used for any purpose"); Fed. R. Evid. 408 ("conduct or a statement made during compromise negotiations" is inadmissible); Cal. Evid. Code § 1119 ("[N]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery").

D. <u>There Is No Basis to Bar All Communications with Class Members</u>.

Flo & Eddie's request for a blanket bar on any future communications between Sirius XM and class members is not supportable. As explained above, the ethical rules restrict the ability of defense counsel to directly communicate with unrepresented class members, but that has not happened here. There is no rule barring Sirius XM's counsel from communicating with the Record Company Plaintiffs' counsel (or for that matter, any other class member's counsel). Moreover, the parties themselves—including non-lawyers employed by Sirius XM and the putative class members—are always free to communicate. *See* Cal. R. Prof. Conduct, Discussion of Rule 2-100 ("no contact" rule "is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rules prevents a member from advising the client that such communication can be made"); ABA Model R. of Prof. Conduct,

Comment on Rule 4.2 ("Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make."). There is no reason or basis to bar such permissible communications.

VI. CONCLUSION

For all of the foregoing reasons, the Court should deny Flo & Eddie's *ex parte* application.

Dated: July 10, 2015

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