UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV13-5693 PSG (GJSx)	Date	May 8, 2017
Title	Flo & Eddie, Inc. v. Sirius XM Radio, Inc.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **Order GRANTING Plaintiffs' Motions for Final Approval of Class Action Settlement and for Attorneys' Fees, Costs, and Incentive Awards**

Before the Court are Plaintiffs Flo & Eddie, Inc. *et al.*'s motions for final approval of class action settlement, attorneys' fees, expenses, and incentive awards. Dkts. # 686 ("Mot."), 669 ("Fees Mot."). The Court held a final fairness hearing in this matter on May 8, 2017. Having considered the arguments in all of the submissions, the Court GRANTS Plaintiffs' motions.

I. Background

Plaintiffs Flo & Eddie, Inc. *et al*. ("Plaintiffs") filed this action in state court on August 1, 2013, alleging that Sirius XM Radio, Inc. ("Defendant") had unlawfully exploited certain audio recordings made before February 15, 1972 (the "Pre-1972 Recordings") by duplicating and broadcasting those audio recordings through its satellite and internet radio service. Dkt. # 1, *Complaint* ¶¶ 1–2. Asserting that the putative class members own the rights to the Pre-1972 Recordings under California Civil Code § 980(a)(2) and California common law, Plaintiffs brought causes of action for violation of Cal. Civ. Code § 980(a)(2), misappropriation, unfair competition, and conversion.[1] *Id.* ¶¶ 6, 18–34. Defendant subsequently removed this case to federal court. *See* Dkt. # 1.

[1] On August 16, 2013, and September 3, 2013, Plaintiffs filed similar suits in the Southern District of New York (the "New York action") and the Southern District of Florida (the "Florida action"), respectively, raising corresponding claims under New York and Florida state law. *See Flo & Eddie, Inc. v. Sirius XM Radio, Inc., et al.*, No. CV 13-5784 CM (S.D.N.Y.); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc., et al.*, No. CV 13-23182 KMM (S.D. Fla.).

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After conducting discovery on the issue of liability, Plaintiffs moved for summary judgment on all causes of action. *See* Dkt. # 65. On September 22, 2014, the Court granted summary judgment in favor of Plaintiffs on all causes of action, finding that owners of Pre-1972 Recordings have an exclusive performance right under California law. Dkt # 117. Prior to this ruling, no court had ever expressly recognized such a right. *Id.*

After another round of extensive discovery, Plaintiffs moved to certify the case as a class action on behalf of owners of Pre-1972 Recordings that were reproduced, performed, distributed, or otherwise exploited by Defendant. Dkt. # 180. On May 27, 2015, the Court granted Plaintiffs' motion for class certification. Dkt # 225. On April 27, 2016, the Court approved the form and manner of class notice, Dkt. # 317, and on September 8, 2016, the Court granted Defendant's motion for partial summary judgment on Plaintiffs' request for punitive damages and the common law unfair competition claim. Dkt. # 411. A jury trial was then set to commence on November 15, 2016.

This procedural summary presents merely a snapshot of the intense discovery and motion practice that has characterized the litigation of this case, which has included, *inter alia*, voluminous pleadings, motions for summary judgment, certification and decertification briefings, *ex parte* applications, motions for reconsideration, motions to compel, and requests to stay the case pending resolution of various appeals, as well as extensive liability and damages discovery involving tens of thousands of documents and more than 35 depositions of fact and expert witnesses. *Mot*. 3–6. In addition, the parties prepared for trial, thereby litigating 18 motions in limine, designating deposition testimony from 23 witnesses, and preparing witness lists, exhibit lists, jury instructions and other pre-trial filings. *Id*. at 6. After more than three years of arduous and contentious litigation, and extensive arms-length negotiations, the parties reached a settlement agreement less than 48 hours before the jury trial was set to commence. The terms of the agreement are set forth in the parties' Stipulated Class Action Settlement. Dkt. # 666-4, *Declaration of Steven Sklaver*, Ex. 1 ("Settlement Agreement").

The Settlement Agreement provides for a potential $99 million in recovery to the Settlement Class, defined in the Settlement Agreement as:

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

See Settlement Agreement ¶ 42, ¶ IV.

For past damages, Defendant agreed to pay $25 million upon final approval and an additional $5 million for each appeal in which Plaintiffs prevail on the performance right issue in the California, New York, and Florida actions, for a total Settlement Fund of up to $40 million. *Settlement Agreement* ¶ IV.B. There will be no reversion of the Settlement Fund. *Id*. ¶ IV.A.1. The Settlement Agreement also provides for a "Royalty Program" by which a license is granted to Defendant to publicly perform or otherwise exploit the Pre-1972 Recordings for a ten-year period from January 1, 2018 through January 1, 2028 in exchange for cash payments at a royalty rate as high as 5.5% for each Settlement Class member's pro rata share of Defendant's gross revenue.[1] *Id*. ¶ IV.C.1–2.

After the Court granted preliminary approval on January 27, 2017, *see* Dkt. # 676, the United States Court of Appeals for the Second Circuit held that the New York Court of Appeals' December 20, 2016 ruling that "New York common law does not recognize a right of public performance for creators of pre-1972 sound recordings" was "determinative" of Plaintiffs' performance claims. *See* Dkt. 678, Ex. A. The Second Circuit then issued an order instructing the district court to grant summary judgment in favor of Defendant and dismiss the case with prejudice. *Id*. at 6; *see also Mot*. 1 n.1. Accordingly, because Plaintiffs did not prevail on the performance right issue in the New York appeal, under the terms of the Settlement Agreement, the Settlement Class is no longer entitled to an additional $5 million cash payment for the New York action and the prospective royalty rate is reduced by 2%. *Settlement Agreement* ¶ IV.B1–B.2. Therefore, the Settlement Fund now amounts to a maximum of $35 million (25 million guaranteed cash payment plus $10 million pending outcomes of the California and Florida appeals), s*ee Mot*. 1, and the Royalty Program now provides for a royalty rate of 3.5%. According to Plaintiffs' expert, the 3.5% licensing royalty could generate between $28.94 million to $37.68 million in additional cash payments to the Settlement Class over the next 10 years, depending on Defendant's annual revenue growth. Dkt. # 686-2, *Declaration of Michael*

[1] If Defendant prevails on the performance right issue in the New York Court of Appeals, the prospective royalty rate is reduced by 2%. If Defendant prevails on the performance right issue in the Florida Supreme Court, the prospective royalty rate is reduced by 1.5%. If Defendant prevails on the performance right issue in an appeal of this action, the prospective royalty rate is reduced by 2%. If Defendant prevails in its appeal in the U.S. Courts of Appeal for the Second, Ninth or Eleventh Circuits, or in the United States Supreme Court on the question of whether it would violate the Commerce Clause to apply state-law rights to control public performances of Pre-1972 Recordings, Defendant will not be required to make any prospective royalty payments to the Settlement Class. *See Settlement Agreement* ¶ IV.B.

Wallace ("Wallace Decl.") ¶ 21. Therefore, as it stands now, the maximum possible recovery amounts to approximately $73 million. *Mot.* 1.

In addition to the Settlement Fund and Royalty Program, the Settlement Agreement also provides that Defendant will pay up to $500,000 for reasonable costs of administration and notice. *Settlement Agreement* ¶ VII. The Settlement further provides that Class Counsel may request reimbursement of attorneys' fees of up to one-third of the total cash benefits from the Settlement Fund and Royalty Program, as well as incentive awards in the amount of $25,000 for each of the two principals of Plaintiff Flo & Eddie, Inc. *Id*. To qualify for payment, a Settlement Class member must submit a timely and valid claim form identifying each Pre-1972 Recording owned. *Id*. ¶ IV.C.4. The claim forms will be distributed to the Settlement Class via first class mail and are also available on the settlement website, *www.pre1972soundrecordings.com*. *Id*.; *Mot*. 11, 12. All members of the Settlement Class who establish their entitlement to participate in the Settlement Agreement will receive a pro rata share of the Settlement Fund based on the number of historical plays of the their Pre-1972 Recordings. *Mot*. 11. Similarly, in order to participate in the Royalty Program, each participating class member must properly submit an uncontested claim to specific Pre-1972 Recordings it owns and must represent and warrant that it owns all rights in such recordings. *Settlement Agreement* ¶ I.A.3.

In consideration of the Settlement Agreement, Settlement Class members covenant not to sue and will be barred through January 1, 2028 from pursuing their own lawsuits based on Defendant's performance and exploitation of their Pre-1972 Recordings, with the exception of pursuing appeals related to the additional cash payments provided for in the Settlement Agreement. *Mot*. 14.

On January 27, 2017, the Court granted preliminary approval of the Settlement Agreement, provisionally certified the Settlement Class, approved Garden City Group LLC as the Claims Administrator, preliminarily approved administration costs, attorneys' fees, and incentive awards requests, and approved the form and manner of notice. Dkt. # 676. On February 6, 2017, the Claims Administrator sent notice via first class mail to 330 potential class members, posted the notice on the settlement website, published the notice in several periodicals, and issued a press release. *Mot*. 16; *see also* Dkt. # 690, *Declaration of Eric Kierkegaard* ("Kierkegaard Decl.") ¶¶ 3–7. The notice informed the class members of the terms of the Settlement Agreement and provided them with an opportunity to request exclusion or object to the proposed settlement. *Mot.* 17. As of April 21, 2017, only one class member requested exclusion and no class member filed an objection. *Id*.; *Kierkegaard Decl.* ¶ 10.

Plaintiffs now seek final approval of the Settlement Agreement, as well as attorneys' fees, costs and incentive awards. *Mot.*; *Fees Mot.*

II. Discussion

A. Final Approval

i. Legal Standard

A court may finally approve a class action settlement "only after a hearing and on finding that the settlement . . . is fair, reasonable and adequate." Fed. R. Civ. P. 23(e)(2). In determining whether a settlement is fair, reasonable, and adequate, the district court must "balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of proceedings; the experience and views of counsel; the presence of a government participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *Officers for Justice v. Civil Serv. Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that the list of factors is "by no means an exhaustive list").

The district court must approve or reject the settlement as a whole. *See Hanlon*, 150 F.3d at 1026 ("It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness."). The Court may not delete, modify, or rewrite particular provisions of the settlement. *Id.* The district court is cognizant that the settlement "is the offspring of compromise; the question . . . is not whether the final product could be prettier smarter or snazzier, but whether it is fair, adequate and free from collusion." *Id.* The Ninth Circuit had noted that "there is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Synocor ERISA Litig.*, 516 F.3d 1095, 1011 (9th Cir. 2008).

ii. Discussion

a. Strength of Plaintiffs' Case

"An important consideration in judging the reasonableness of a settlement is the strength of plaintiffs' case on the merits balanced against the amount offered in the settlement." *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 488 (C.D. Cal. 2010) (internal quotation

marks omitted). Although Plaintiffs have prevailed on the issue of liability, Plaintiffs also understand their case still faces substantial obstacles given the inherent risks associated with class certification, the intensely disputed scope of damages that was to be presented at trial, and the likelihood of favorable rulings being overturned on appeal. *Mot.* 22. In light of such considerations, the Settlement Agreement provides a significant benefit to the class members who will receive monetary payments that Plaintiffs' counsel believes exceed the amount that could have been achieved at trial, especially considering the agreement's Royalty Program which, unlike damages obtained at trial, will provide class members with cash payments based on Defendant's future gross revenue for a period of 10 years. *Id*. Despite this case's progression to the eve of trial, the Court is confident that there remain ample areas of disagreement among the parties so as to counsel in favor of settlement.

Therefore, the Court agrees with Plaintiffs that this factor weighs in favor of approving the Settlement Agreement.

b. Risk, Expense, Complexity, and Duration of Further Litigation

The second factor in assessing the fairness of the proposed settlement is the complexity, expense, and likely duration of the lawsuit if the parties had not reached a settlement agreement. *Officers for Justice*, 688 F.2d at 625. This litigation has already been underway for more than three years, and a trial on the hotly disputed scope of damages, as well as a possible appeal, would only push recovery further down the road. Given these considerations, the Court agrees with Plaintiffs that this factor also weighs in favor of approving the settlement.

c. Risk of Maintaining Class Action Status through Trial

The Court already granted class certification on May 27, 2015, *see* Dkt. # 225, and conditionally certified a class for settlement purposes only in granting preliminary approval on January 27, 2017. *See* Dkt. # 676. Under Federal Rule of Civil Procedure 23(c)(1)(C), an "order that grants or denies class certification may be altered or amended before the final judgment." Fed. R. Civ. P. 23(c)(1)(C). Although Plaintiffs believe they would be successful in maintaining class action status through trial and appeal, Defendant has vigorously opposed class certification, previously filed a motion to decertify, and indicated its intention to challenge certification again. *See* Dkts. # 345, 594. Given the risk that Defendant may prove successful in attacking class certification, this factor favors final approval of the Settlement Agreement.

d. Amount Offered in Settlement

The fourth factor in assessing the fairness of the proposed settlement is the amount of the settlement. "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624. The Ninth Circuit has explained that "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Id.* at 625 (citations omitted). Any analysis of a fair settlement amount must account for the risks of further litigation and trial, as well as expenses and delays associated with continued litigation.

The parties have agreed to settle all claims for $25 million for past performances, an additional $5 million for each ruling in favor of Plaintiffs in the California and Florida appeals, and cash payments pursuant to a 10-year licensing agreement with Defendant at a royalty rate of up to 3.5%. This amount includes individual settlement payments, class counsel fees and costs, settlement administration costs, and lead plaintiffs' incentive awards. Depending on the outcomes of pending appeals and Defendant's revenue growth over the next ten years, the total settlement amount may be as high as $73 million. The Court finds these amounts reasonable in light of the significant legal and procedural challenges, including the vigorously contested scope of damages, associated with continued litigation in this case. Therefore, this factor too counsels in favor of approving the settlement.

e. The Extent of Discovery Completed and the Stage of Proceedings

This factor requires the Court to gauge whether Plaintiffs have sufficient information to make an informed decision about the merits of their case. *See Dunleavy*, 213 F.3d at 459. The more discovery that has been completed, the more likely it is that the parties have "a clear view of the strengths and weaknesses of their cases." *Young v. Polo Retail, LLC*, No. C 02-4546 VRW, 2007 WL 951821, at *4 (N.D. Cal. Mar. 28, 2007) (internal quotation marks and citations omitted).

The settlement in this case was reached less than 48 hours before trial, after more than three years of litigation that included extensive discovery, class certification and decertification motions, several motions for summary judgment, numerous *ex parte* applications, motions to compel, and extensive pre-trial filings, including 18 motions in limine. *See Mot.* 23. Given the intense and thorough scope of this litigation where no point went uncontested, the Court is confident that Plaintiffs had enough information to make an informed decision about settlement based on the strengths and weaknesses of their case. This factor weighs in favor of granting final approval.

f. The Experience and Views of Counsel

The recommendations of Plaintiffs' counsel are given a presumption of reasonableness. *See, e.g.*, *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted). "Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *In re Pac. Enter Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

Here, Class Counsel have substantial experience in litigating complex actions, *see* Dkt. # 671, *Declaration of Henry Gradstein* ("Gradstein Decl.") ¶ 18; Dkt. # 672, *Declaration of Steven G. Sklaver* ("Sklaver Decl.") ¶ 2, and endorse the settlement as "fair, reasonable and adequate to the Class." *See Mot.* 23. The Court sees no reason to rebut the presumption that Class Counsel's recommendation should be regarded as reasonable. This factor thus weighs in favor of final approval.

g. The Presence of a Government Participant

Because no government entities are participants in this case, this factor is neutral.

h. Class Members' Reaction to the Proposed Settlement

In evaluating the fairness, adequacy, and reasonableness of settlement, courts also consider the reaction of the class to the settlement. *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528–29 (C.D. Cal. 2004); *see also Arnold v. Fitflop USA, LLC*, CV 11-0973 W (KSCx), 2014 WL 1670133, at *8 (S.D. Cal. Apr. 28, 2014) (concluding that the reaction to the settlement "presents the most compelling argument favoring settlement").

Class Counsel retained Garden City Group, LLC ("GCG") to provide notice and administration services for this litigation. *See generally Kierkegaard Decl*. GCG mailed class action notices to 330 potential class members by first-class mail on February 6, 2017. *Id.* ¶ 3. If the mailings returned undeliverable, GCG conducted additional research to identify the most updated addresses for class members. *Id.* ¶ 4. To date, GCG reports than 46 notices are undeliverable. *Id*. In addition, GCG published the notice on the settlement website and in several music industry periodicals, and issued a press release. *Id.* ¶¶ 5–6. As of April 24, 2017, GCG had received only one request for exclusion and no objections to the settlement. *Mot.*

23–24; *Kierkegaard Decl.* ¶ 10–11. This response is an indicator that class members find the settlement to be fair, reasonable, and adequate. *See, e.g.*, *Hanlon*, 150 F.3d at 1027 ("[T]he fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness."). This factor thus weighs in favor of approval.

i. Fair and Honest Negotiations

Evidence that a settlement agreement is the result of genuine "arms-length, non-collusive, negotiated resolution" supports a conclusion that the settlement is fair. *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). Here, the parties engaged in many rounds of negotiations in what has been a vigorously contested and demanding case. *Mot.* 24. Having presided over much of the litigation, the Court is confident that the parties engaged in arms-length negotiations and that this factor too favors settlement.

j. Conclusion

Having reviewed the relevant factors and found that none counsel against approval of final settlement, the Court GRANTS Plaintiffs' motion for final approval of the class action settlement.

B. Motions for Attorneys' Fees, Costs, and Incentive Awards

Plaintiffs request that the following be disbursed from the settlement amount: (1) 30%, or $7.65 million, of the guaranteed initial $25.5 million,[1] along with 30% of any additional cash payments from the Settlement Fund and Royalty Program paid to the class; (2) reimbursement for litigation expenses in the amount of $1,679,587.55; and (3) a $25,000 incentive award for

[1] Plaintiffs include the settlement administration costs of $500,000 in the minimum guaranteed initial sum for a total of $25.5 million. *Fees Mot.* 2.

each of Flo & Eddie's founders and principals, Howard Kaylan and Mark Volman. *See Fees Mot.* 1–3; *see also* Dkt. # 691 ("Fees Rep.").[1]

i. Legal Standard

Awards of attorneys' fees in class action cases are governed by Federal Rule of Civil Procedure 23(h), which provides that after a class has been certified, the Court may award reasonable attorneys' fees and nontaxable costs. The Court "must carefully assess" the reasonableness of the fee award. *See Staton*, 327 F.3d at 963; *see also Browne v. Am. Honda Motor Co., Inc.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499073, at *3–5 (C.D. Cal. Oct. 5, 2010) (explaining that in a class action case, the court must scrutinize a request for fees when the defendant has agreed to not oppose a certain fee request as part of a settlement).

Where litigation leads to the creation of a common fund, courts can determine the reasonableness of a request for attorneys' fees using either the common fund method or the lodestar method. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 944–45 (9th Cir. 2011) (finding that when a settlement establishes a common fund for the benefit of a class, courts may use either method to gauge the reasonableness of a fee request, but encouraging courts to employ a second method as a cross-check after choosing a primary method). The Court will analyze Class Counsel's fee request under both theories.

ii. Discussion

a. Percentage of the Common Fund

Under the percentage-of-recovery method, courts typically calculate 25 percent of the fund as a benchmark for a reasonable fee award. *See In re Bluetooth*, 654 F.3d at 942. The percentage can range, however, and courts have awarded more than 25 percent of the fund as attorneys' fees when they have deemed a higher award to be reasonable. *See Singer v. Becton Dickinson and Co.*, No. 08-CV-821-IEG (BLMx), 2010 WL 2196104, at *8 (S.D. Cal. 2010)

[1] Plaintiffs initially filed their motion for attorneys' fees on December 30, 2016. *Fees Mot.* Defendant then submitted a limited response to Plaintiffs' motion, challenging Plaintiffs' position regarding the outcome of the New York appeal, which at the time of filing had not yet been decidedly ruled on by the Second Circuit. *See* Dkt. # 673. In light of the Second Circuit's subsequent determinative ruling, the issues raised in Defendant's limited response are now moot. On April 24, 2017, Plaintiffs filed a Reply, thereby supplementing their opening brief in support of their motion for attorneys' fees, costs, and incentive awards. Dkt. # 691.

(finding as reasonable an award of 33.3 percent of the common fund because Class Counsel took the case on a contingent basis and litigated for two years, awards usually range from 20 percent to 50 percent, and no class member objected to the award); *Gardner v. GC Services, LP*, No. 10CV0997-IEG (CAB), 2012 WL 1119534, at *7 (S.D. Cal 2012) (finding as reasonable a departure from the 25 percent benchmark where the results achieved were favorable, the risks of litigation were substantial, and the case was complex).

When assessing fee awards' reasonableness under the common fund theory, courts consider "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases." *In re Omnivision Technologies*, 559 F.Supp. at 1046 (citing *Viscaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002)). Plaintiffs request that the Court approve an attorneys' fee award amounting to 30 percent of the total settlement amount. *Fees Mot.* 1. Because Plaintiffs ask the Court to depart from the "benchmark" of 25 percent, the Court must evaluate each of the five factors set out in *Viscaino*. *See Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000).

Reviewing each factor in turn, the Court finds the results achieved favorable to the class. Plaintiffs recovered a guaranteed $25.5 million recovery for past damages, a potential additional $10 million pending outcomes of the California and Florida action appeals, and a prospective royalty rate of 3.5% in exchange for Defendant's 10-year license to perform the Pre-1972 Recordings. *Fees Mot.* 10–11. Moreover, no class members objected to the settlement terms. *Mot*. at 24. Second, Plaintiffs have faced substantial legal and procedural obstacles in litigating a case of first impression, and have obtained favorable rulings on the question of liability and class certification. *Mot*. 12. The risks of litigation, including the risk of proving damages at trial, maintaining class status, and the possibility of favorable rulings being overturned on appeal, as evidenced by the adverse outcome of the New York action, are real and substantial. *Fees Mot.* 2; *Rep*. 6. Third, the duration of the case—now more than three and a half years—counsels in favor of a large attorneys' fees award. Fourth, Class Counsel took the case on a contingent basis and have, to date, invested $8,727,094.80 in time and $1,679,587.55 in expenses litigating this case. *Fees Mot.* 13; *Rep*. 2. Fifth, the request for attorneys' fees in the amount of 30 percent falls within the 30 to 33 percent range allowed in common fund cases. *See, e.g.*, *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000), as amended (June 19, 2000) (upholding district court's award of 33 1/3 percent of the settlement fund); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. MDL 3:07-md-1827 SI, 2011 WL 7575003, *1 (N.D. Cal. Dec. 27, 2011) (awarding attorneys' fees in the amount of 30 percent of $405 million settlement fund); *Knight v. Red Door Salons, Inc.*, No. 08-1520 SC, 2009 WL 248367, at *17 (N.D. Cal. Feb. 2, 2009) ("nearly all common fund awards range around 30%"); *In re Heritage*

Bond Litig., No. 02-ML-1475 DT, 2005 WL 1594403, at *21 (C.D. Cal. June 10, 2005) (awarding attorneys' fees in the amount of 33 1/3 percent where "[v]arious issues litigated in this case concerned relatively uncharted territory.").

Given the above considerations, the Court finds Class Counsel's attorneys' fees reasonable under the common fund theory. The Court grants an upward departure from the 25 percent benchmark in light of the results achieved, the complexities and risks of litigation, the contingent nature of the fee, and the financial burden carried by Class Counsel.

b. Lodestar Cross-Check

To determine attorneys' fees under the lodestar method, a court must multiply the reasonable hours expended by a reasonable hourly rate. *In re Washington Public Power Supply System Securities Litig.*, 19 F.3d 1291, 1294 n.2 (9th Cir. 1994). The Court may then enhance the lodestar with a "multiplier," if necessary, to arrive at a reasonable fee. *Id.*

1. Reasonable Rate

The reasonable hourly rate is the rate prevailing in the community for similar work. *See Gonzalez v. City of Maywood*, 729 F.3d 1196, 1200 (9th Cir. 2013) ("[T]he court must compute the fee award using an hourly rate that is based on the prevailing market rates in the relevant community.") (citations omitted); *Viveros v. Donahue*, CV 10-08593 MMM (Ex), 2013 WL 1224848, at *2 (C.D. Cal. 2013) ("The court determines a reasonable hourly rate by looking to the prevailing market rate in the community for comparable services."). The relevant community is the community in which the court sits. *See Schwarz v. Sec. of Health & Human Servs.*, 73 F.3d 895, 906 (9th Cir. 1995). If an applicant fails to meet its burden, the court may exercise its discretion to determine reasonable hourly rates based on its experience and knowledge of prevailing rates in the community. *See, e.g.*, *Viveros*, 2013 WL 1224848, at *2; *Ashendorf & Assocs. v. SMI-Hyundai Corp.*, CV 11-02398 ODW (PLAx), 2011 WL 3021533, at *3 (C.D. Cal. 2011); *Bademyan v. Receivable Mgmt. Servs. Corp.*, CV 08-00519 MMM (RZx), 2009 WL 605789, at *5 (C.D. Cal. 2009).

Here, Plaintiffs are represented by counsel at two law firms: Gradstein & Marzano, P.C. ("Gradstein & Marzano"), and Susman Godfrey L.L.P. ("Susman Godfrey"). Gradstein & Marzano is a law firm with fewer than fifty attorneys and one office in Los Angeles, California. *See Gradstein Decl.* ¶ 1, 3, 16. Through the declaration of counsel, Gradstein & Marzano asserts that the attorneys who worked on this case had hourly rates ranging from $350 to $700. *See id.* ¶ 15; *Fees Mot.* 19. Susman Godfrey is a law firm with more than fifty attorneys with

offices in Los Angeles, Seattle, Houston and New York. Through the declaration of counsel, Susman Godfrey asserts that its attorneys and paralegals are entitled to an hourly rate between $250 and $700, with the exception of one partner whose hourly rate is $1,200. *Sklaver Decl*. Ex. 1.

The Court turns to the Real Rate Report as a useful guidepost to assess the reasonableness of these hourly rates in the Central District. *See Eksouzian v. Albanese*, CV 13-728 PSG (AJWx), at *4–5 (C.D. Cal. Oct. 23, 2015); *Carbajal v. Wells Fargo Bank, N.A.*, CV 14-7851 PSG (PLAx), at *5 (C.D. Cal. July 29, 2015). As Judge Fisher explained in *Hicks v. Toys 'R' Us-Delaware, Inc.*, the Real Rate Report is persuasive because it:

> identifies attorney rates by location, experience, firm size, areas of expertise, and industry, as well as the specific practice areas, . . . [and] it is based on actual legal billing, matter information, and paid and processed invoices from more than 80 companies—a much better reflection of true market rates than self-reported rates in all practice areas as part of a national survey of top firms.

No. CV 13-1302 DSF (JCGx), 2014 WL 4670896, at *1 (C.D. Cal. Sept. 2, 2014). The 2016 Real Report provides a number of useful data points for assessing the reasonableness of Class Counsel's attorneys' fees requests. In Los Angeles, a partner with a focus on intellectual property (other than patent and trademark) has an average hourly rate between $556 and $870. *See* 2016 Real Rate Report, at p. 149. Similarly situated associates earn an average hourly rate between $343 and $568. *See id.* All paralegals in Los Angeles earn a mean real rate of $227 per hour. *See id.* 196.

Accordingly, the Court finds that Gradstein & Marzano's hourly rates ranging from $350 for associates to $700 for partners, and Susman Godfrey's hourly rates ranging from $250 for paralegals, $350–$375 for associates, to $700 for partners, fall within the acceptable range suggested by the Real Rate Report. While Class Counsel also seeks approval of one partner's hourly rate of $1,200, *see Sklaver Decl*. Ex. 1., which is higher than the prevailing rates indicated by the Real Rate Report, the Court nonetheless finds the rate reasonable in light of this partner's extensive skill and experience. The Court further notes that this rate pertains to only 21 hours of work expended in this case, and therefore represents only a small fraction of the overall fee request. *See id*.

In sum, the Court finds Class Counsel's hourly rates reasonable because they fall within the range of prevailing rates in the Central District of California for the type of work performed in this case.

2. Reasonable Hours

An attorneys' fees award should include compensation for all hours reasonably expended prosecuting the matter, but "hours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132, 1135 (9th Cir. 2012). "[T]he standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839 (9th Cir. 1982).

Here, the records demonstrate that Class Counsel collectively spent 15,286.50 hours litigating this case through April 20, 2017. *See* Dkt. #691-1, *Supplemental Declaration of Steven G. Sklaver* ("Sklaver Supp. Decl.") ¶ 4. Class Counsel at Gradstein & Marzano has spent 10,805.30 hours litigating this case, and Class Counsel at Susman Godfrey has spent 4,481 hours litigating this case through April 20, 2017. *Gradstein Decl.* ¶ 15; *see also* Dkt. # 691-2, *Supplemental Declaration of Henry Gradstein* ("Gradstein Supp. Decl.") ¶ 6; *Sklaver Decl.*¶ 19; *Sklaver Supp. Decl*., Ex. 1. This case originated in 2013 and has been intensely litigated for more than three and a half years in California, Florida and New York. During that time in the California action alone, counsel engaged in extensive discovery and motion practice, reviewed tens of thousands of documents, conducted or defended over 35 depositions, brought motions for summary judgment and class certification, opposed two motions for partial summary judgment, litigated 18 motions in limine, prepared for trial, prepared the Settlement Agreement and related papers, and worked extensively with the Claims Administrator to further assist the Class and disbursement of the settlement. Class Counsel engaged in extensive motion practice in the Florida and New York actions as well, consisting of, *inter alia*, summary judgment motions, amicus brief filings, and briefing and oral argument in connection with those actions' appeals. *See Gradstein Decl.* ¶ 8–11; *Sklaver Decl*., Ex. 2; *Gradstein Supp. Decl*. ¶ 2–3. After reviewing the declarations submitted by both firms, and considering the duration, scope and complexity of this case, the Court finds the 15,286.50 hours reasonable.

3. Multiplier

The lodestar amount in this case is $8,727,094.80. *Rep*. 4; *Sklaver Supp. Decl*. ¶ 4. Class Counsel requests 30 percent in attorneys' fees from the total settlement amount which, pending appeals and administration of the 10-year Royalty Program, ranges from a guaranteed minimum amount of $25.5 million to a maximum possible amount of approximately $73 million. *Rep.* 2. The minimum case, based on a $25.5 million settlement amount, yields a negative multiplier of

.87.[1] The maximum case, based on a $73 million total settlement amount, yields a multiplier of 2.5.[2]

Given the duration of the litigation, the contingent nature of the representation, and Class Counsel's diligence in pursuing this case, the Court finds the multipliers ranging from .87 on the low end to 2.5 on the high end more than justified and well within the range of approval. *See Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir. 2007) (noting that a 6.85 lodestar multiplier fell well within the range of multipliers that courts have allowed); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 244, 255 (2001) ("Multipliers can range from 2 to 4 or even higher."); *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 512 (2009) (affirming attorney fee award with 2.52 multiplier). Moreover, the Court anticipates that the multiplier will be even further reduced by virtue of the additional fees that will accrue with Class Counsel's continued efforts in the pending California and Florida action appeals.

Therefore, having assessed the reasonableness of the hourly rates, the hours worked, and the multiplier, the Court finds that the requested fee amount is reasonable under both the common fund and lodestar theories, and GRANTS Plaintiffs' motion for attorneys' fees.

c. Litigation Costs

In addition to attorneys' fees, Class Counsel requests reimbursement of $1,679,587.55 for expenses incurred prosecuting this action in California, Florida, and New York. *Rep*. 2; *Sklaver Supp. Decl.* ¶ 7. Gradstein & Marzano's costs total $228,622.08 and Susman Godfrey's costs total $1,450,965.47. *Gradstein Decl.* ¶ 16; *Gradstein Supp. Decl.* ¶ 7; *Sklaver Decl.* ¶ 21; *Sklaver Supp. Decl*., Ex.2. A significant expense for both firms was incurred in conjunctions with discovery, the services of experts and specialist appellate counsel, mediation, travel, technology support costs, a mock trial, and the cost of computer research and services. *Gradstein Decl.* ¶ 16; *Sklaver Decl.* ¶ 23, Ex. 2.; *Gradstein Supp. Decl*. ¶ 7. Class Counsel indicate that the expenses are reflected in the books and records of the firms, and they attest that the request is accurate under penalty of law. *Sklaver Decl*. ¶ 22; *Skalver Supp. Decl*. ¶ 8; *Gradstein Supp. Decl*. ¶ 7. Given the duration, scope, and vigor of this litigation, the Court is satisfied that the costs are reasonable, and therefore GRANTS Plaintiffs' motion for costs in the amount of $1,679,587.55.

d. Incentive Awards for Plaintiffs

[1] Minimum case: ($25,500,000 * 30%) / $8,727,094.80 = .87
[2] Maximum case: ($73,000,000 * 30%) / $8,727,094.80 = 2.5

Plaintiffs Howard Kaylan ("Kaylan") and Mark Volman ("Volman"), Flo & Eddie, Inc.'s principals, also request that the Court award each of them an incentive award in the amount of $25,000. *See Fees Mot.* 22. "Incentive awards are fairly typical in class action cases." *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (citations omitted); *see In re Toys R Us-Delaware, Inc. Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014). When considering requests for case contribution awards, courts consider five factors:

> (1) the risk to the class representative in commencing suit, both financial and otherwise; (2) the notoriety and personal difficulties encountered by the class representative; (3) the amount of time and effort spent by the class representative; (4) the duration of the litigation; (5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Van Vraken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995). Although Kaylan and Volman do not provide declarations in support of their request, Class Counsel's declaration offers an overview of their participation and efforts undertaken in this case. *See Sklaver Decl.* ¶ 24.

Class Counsel states that Kaylan and Volman spent "significant time and effort supporting this litigation." *Id.* They prepared for and traveled to depositions, responded to numerous discovery requests, produced documents, assisted Class Counsel with communicating with other class members, and traveled to Los Angeles to help prepare for trial. *Id.* Class Counsel further points out that they undertook the risk that their efforts would not produce a successful result, therefore potentially causing professional backlash in the music industry for commencing this suit. *Fees Mot.* 22.

The Court also notes that the incentive award is reasonable because the combined total of $50,000 comprises only .2 percent of the $25.5 million minimum recovery, and that given the relatively small class size of approximately 330 members, each Class Member will receive a substantial payment from the settlement fund. *See West v. Circle K Stores, Inc.*, 2006 WL 1652598, at *12 (E.D. Cal. June 13, 2006) (finding that enhancement payment was not unfair when it would not "significantly reduce the amount of settlement funds available to the rest of the class"); *see also Friedman v. Guthy-Renker, LLC*, No. 214CV06009ODWAGRX, 2016 WL 6407362, at *8 (C.D. Cal. Oct. 28, 2016) (approving $57,500 incentive awards to four named plaintiffs which constituted .22% of the total settlement fund); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (approving incentive awards to five named plaintiffs ranging from $80,000 to $120,000 each).

Accordingly, the Court GRANTS Plaintiffs' motion for incentive awards.

III. Conclusion

For the reasons stated above, Plaintiffs' motions for final approval of class settlement, and for approval of attorneys' fees, expenses, and incentive awards are GRANTED. Accordingly, it is HEREBY ORDERED AS FOLLOWS:

1. The Court approves settlement of the action between Plaintiffs and Defendant, as set forth in the Settlement Agreement as fair, reasonable, and adequate. The Parties are directed to perform their settlement in accordance with the terms set forth in the Settlement Agreement;

2. Class Counsel is awarded 30 percent of the total settlement amount in attorneys' fees and $1,679,587.55 in costs. Additionally, Flo & Eddie, Inc.'s principals are awarded $25,000 each. The Court finds that these amounts are warranted and reasonable for the reasons set forth in the moving papers before the Court and the reasons stated in this Order;

3. Without affecting the finality of this judgment in any way, this Court hereby retains exclusive jurisdiction over Defendants and the Settlement Class members for all matters relating to this litigation, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Order.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV13-5693 PSG (GJSx)	Date	May 8, 2017
Title	Flo & Eddie, Inc. v. Sirius XM Radio, Inc.		

AB for WH

Nikki Kustok

From: cacd_ecfmail@cacd.uscourts.gov
Sent: Tuesday, May 09, 2017 8:42 AM
To: ecfnef@cacd.uscourts.gov
Subject: Activity in Case 2:13-cv-05693-PSG-GJS Flo & Eddie Inc v. Sirius XM Radio Inc et al Order on Motion for Attorney Fees

UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered on 5/9/2017 at 8:41 AM PDT and filed on 5/8/2017
Case Name: Flo & Eddie Inc v. Sirius XM Radio Inc et al
Case Number: 2:13-cv-05693-PSG-GJS
Filer:
Document Number: 694

Docket Text:
MINUTES (IN CHAMBERS) Order GRANTING Plaintiffs' Motions for Final Approval of Class Action Settlement and for Attorneys' Fees, Costs, and Incentive Awards by Judge Philip S. Gutierrez granting [669] MOTION for Attorney Fees; granting [686] MOTION for Settlement: For the reasons stated above, Plaintiffs' motions for final approval of class settlement, and for approval of attorneys' fees, expenses, and incentive awards are GRANTED. Accordingly, it is HEREBY ORDERED AS FOLLOWS: 1. The Court approves settlement of the action between Plaintiffs and Defendant, as set forth in the Settlement Agreement as fair, reasonable, and adequate. The Parties are directed to perform their settlement in accordance with the terms set forth in the Settlement Agreement; 2. Class Counsel is awarded 30 percent of the total settlement amount in attorneys' fees and $1,679,587.55 in costs. Additionally, Flo and Eddie, Inc.'s principals are awarded $25,000 each. The Court finds that these amounts are warranted and reasonable for the reasons set forth in the moving papers before the Court and the reasons stated in this Order; 3. Without affecting the finality of this judgment in any way, this Court hereby retains exclusive jurisdiction over Defendants and the Settlement Class members for all matters relating to this litigation, including the administration, interpretation, effectuation, or enforcement of the Settlement Agreement and this Order. (bm)

2:13-cv-05693-PSG-GJS Notice has been electronically mailed to:

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