

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re XM SATELLITE RADIO COPYRIGHT LITIGATION

MASTER DOCKET
06 Civ. 3733 (LAK)

This Document Relates to: 07 Civ. 4682 (LAK)

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**PLAINTIFFS' MOTION FOR A FINAL DISTRIBUTION
OF THE NET SETTLEMENT FUNDS**

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The undersigned Court-appointed counsel for the Settlement Classes (“Class Counsel”) respectfully submit this motion pursuant to the Court’s October 19, 2016 Order (*see* ECF Nos. 133, 129) to request approval for a *cy pres* distribution of \$6,908.82 in residual settlement funds that remain after two prior Court-approved distributions that dispersed more than 99.7% of available settlement monies to eligible Class members. Attached as Exhibit A hereto is a [Proposed] Order for a Final Distribution of the Net Settlement Funds. Counsel for Defendant XM Satellite Radio, Inc. (“XM”) has informed Plaintiffs that XM takes no position on this motion.¹ In support of this motion, Class Counsel respectfully state as follows.

I. BACKGROUND

1. **The Settlement.** On March 22, 2011, the Court granted final approval of the Stipulation and the Agreement of Settlement (ECF No. 109, Ex. 1, “Settlement”)² between the parties herein. ECF No. 123. Pursuant to the terms of the Settlement, XM paid \$5,377,177 for the benefit of the Settlement Classes, made certain additional payments for the benefit of the Musical Composition Settlement Class and agreed to other relief, including discontinuing certain functions of certain of its Recording Devices. ECF Nos. 109; 127-2, ¶32.

2. **The Initial Distribution.** On April 9, 2014, the Court approved an initial pro rata distribution of settlement monies to the members of the Classes who submitted the 4,151 proofs of claim determined by the Court-appointed Settlement Administrator Garden City Group, LLC (“GCG”) to be eligible to share in the Net Settlement Funds. ECF No. 128. After GCG’s execution of the initial distribution, \$89,224.42 in settlement monies remained available for further distribution to eligible Class members. ECF No. 131, ¶18.

¹ On January 12, 2011, XM Satellite Radio Inc., a Delaware corporation and wholly-owned subsidiary of Sirius XM Radio Inc., merged with and into Sirius XM Radio Inc.

² Capitalized terms used herein are defined in the Settlement Agreement.

3. **The Second Distribution.** On October 19, 2016, the Court approved a second pro rata distribution to approximately 462 eligible Class members who cashed their check as part of the initial distribution and whose pro rata share was greater than or equal to \$25. *Compare* ECF Nos. 133; 130-1, ¶1 with ECF No. 132, ¶18. Following GCG's execution of the second distribution, a total of 68 checks remain uncashed. *See* Declaration of Eric N. Kierkegaard dated December 28, 2017 and submitted concurrently herewith ("Kierkegaard Decl.") at ¶4. All checks issued in connection with the second distribution stated that if they were not cashed within forty-five days of the issue date the funds would revert back to the settlement fund. *Id.*

4. **Residual Settlement Monies.** As a result of the first and second distributions, more than 99.7% of the settlement funds available for distribution have been dispersed to eligible Class members. ECF Nos. 127-2, ¶38; 131, ¶18; Kierkegaard Decl., ¶6. The residual amounts remaining in the Net Sound Recording Settlement Fund and Net Musical Composition Settlement Fund total \$6,908.82. Kierkegaard Decl., ¶6.

II. THE PROPOSED FINAL DISTRIBUTION

5. Plaintiffs' motion for a second distribution, which was granted by the Court, requested as follows:

To the extent that the second distribution does not result in a full and final distribution of all the remaining funds in the Net Settlement Funds, Plaintiffs respectfully request that there be a further distribution of any remaining monies in the Net Settlement Funds to those eligible Class members who cashed their checks issued in connection with the second distribution and whose pro rata share(s) of the remaining Sound Recording Settlement Fund and/or Musical Composition Net Settlement Fund is greater than or equal to \$25. Proposed Order, ¶4. To the extent that such further pro rata distribution would not be cost effective, Plaintiffs will report to the Court and recommend an alternative final distribution of any remaining funds in the Net Settlement Funds. *Id.*

ECF No. 130, ¶9; ECF No. 133 (Order granting second distribution).

6. Class Counsel and GCG respectively submit that a third pro rata distribution

would not be cost effective. There is a small amount of residual settlement monies (*i.e.*, \$6,908.82) relative to GCG's estimated minimum cost of a further distribution (*i.e.*, \$1,750 to \$2,750). Kierkegaard Decl., ¶7. Furthermore, there is no guarantee that a third pro rata distribution would exhaust the residual settlement monies, thereby requiring a further distribution. *Id.*

7. Accordingly, Class Counsel respectfully requests that the Court approve a *cy pres* distribution of the remaining settlement monies to The ASCAP Foundation in order to support music education programs throughout the country. Ex. A, Proposed Order, ¶1. The ASCAP Foundation is a 501(c)(3) charitable organization that supports programs that impact a large number of music creators. See <https://ascapfoundation.org/about>

8. District courts have discretion to allocate residual settlement funds under the doctrine of *cy pres* where distribution to class members would be economically impracticable. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). In the class action context, *cy pres* designees must “reasonably approximate” the interests of the class. *In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 849-852 (S.D.N.Y. 2016), *appeal dismissed sub nom. ATD Grp. v. Frank*, No. 16-2850, 2017 WL 4014951 (2d Cir. Mar. 29, 2017).

9. The members of the Classes here include musicians, record labels and other entities that own interests in copyrighted musical works. ECF No. 92, ¶34 (Class definition). Thus, Class Counsel respectfully submit that The ASCAP Foundation's charitable work supporting music education programs reasonably approximates the interests of the Classes whose members own interests in copyrighted musical works. The ASCAP Foundation has been previously approved as a *cy pres* designee in connection with a prior class action that settled claims alleging copyright infringement of musical works. See *Steiner, et al. v. ABC, Inc., et al.*,

00-cv-5798, ECF No. 171, p. 2 (Jan. 5, 2009 C.D. Cal.) attached as Exhibit B hereto.

10. Finally, Class Counsel respectfully requests that the Court authorize GCG, no earlier than sixty (60) days after the final distribution contemplated herein, (a) to discard/destroy all copies of the claim forms and any supporting documents and other correspondence, in whatever form or media they are maintained, and (b) to close the post office box, disconnect the telephone number and remove the Settlement website and e-mail address from the internet, which were all specifically designed and created for the Settlement. Ex. A, Proposed Order, ¶2.

11. Class Counsel has instructed GCG to post this motion and its supporting documentation on the official Settlement website so that it may be viewed by Class members.

CONCLUSION

Class Counsel respectfully requests that the Court enter the [Proposed] Order for a Final Distribution of the Net Settlement Funds attached as Exhibit A hereto.

Dated: New York, New York
December 29, 2017

Respectfully submitted,

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