

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' MEMORANDUM IN SUPPORT OF MOTION FOR DISTRIBUTION OF
THE NET SETTLEMENT FUNDS**

Plaintiffs respectfully submit this motion, pursuant to the Stipulation and Agreement of Settlement [Master Docket No. 109, Exhibit 1] (“Settlement”)¹ between the parties herein, for distribution of the Net Sound Recording Settlement Fund and the Net Musical Composition Settlement Fund (“Net Settlement Funds”) to members of the Sound Recording Settlement Class and Musical Composition Settlement Class (“Classes” or “Class”) who have been determined by the Court-appointed Settlement Administrator, The Garden City Group (“Garden City”), to be eligible to share in the Net Settlement Funds. Counsel for Defendant XM Satellite Radio, Inc. (“XM”) has informed Plaintiffs that XM takes no position on this motion.²

Specifically, Plaintiffs respectfully move this Court to enter the [Proposed] Order for Distribution of The Net Settlement Funds attached as Exhibit A hereto that, among other things: (a) approves the administrative determinations by Garden City concerning Class members’ Proofs of Claim (Exhibit A at ¶1); (b) directs the distribution of the Net Settlement Funds, after deduction of a reserve fund, to the Class members who have submitted claims which Garden City has determined to be eligible to share in the Net Settlement Funds (*id.* at ¶3); and (c) bars any further claims against the Net Settlement Funds. *Id.* at ¶6.

Garden City’s proposed distribution provides members of the Classes who submitted the 4,151 proofs of claims determined by Garden City to be eligible to share in the Net Settlement Funds with an average payout of approximately \$688.12. Declaration of Jennifer M. Keough In Support of Plaintiffs’ Motion For Distribution of the Settlement Funds (“Keough Declaration”) at ¶¶31, 39 attached as Exhibit B hereto.

¹ Capitalized terms used herein are defined in the Settlement Agreement.

² 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.

I. BACKGROUND

A. The Action and Settlement

Plaintiffs filed this class action on June 2, 2007 seeking damages and injunctive relief on behalf of themselves and those similarly situated, independent record companies and independent music publishers who had their sound recordings and/or musical compositions allegedly infringed by XM's conduct in connection with its Recording Devices in violation of the United States Copyright Act, 17, U.S.C. §101 *et seq.* ("Copyright Act"), New York common law and unfair competition law. *See* Docket No. 108 at pp. 3-7 (detailing the allegations of Plaintiffs' Complaint and the procedural history of this action).

On October 15, 2010, Plaintiffs entered into the Settlement with XM. Pursuant to the terms of the Settlement Agreement, XM paid \$5,377,177 for the benefit of the Settlement Classes, made additional payments (which are now complete) for the benefit of the Musical Composition Settlement Class totaling approximately \$122,291.54, and agreed to other relief, including discontinuing certain functions of certain of its Recording Devices, in exchange for dismissal and release of the claims of the Plaintiffs and Settlement Classes against XM. *See* Docket No. 109, Exhibit 1; Keough Declaration ¶32.

B. Preliminary Approval of Settlement

On December 6, 2010 this Court entered an Order that preliminarily approved the proposed Settlement. Docket No. 112. In addition to preliminarily approving the Settlement, the Court's December 6, 2010 Order also: (1) directed implementation of a program of notice to Class members notifying them of the Settlement and their rights thereunder; (2) set certain deadlines leading up to the March 22, 2011 fairness hearing; (3) appointed Garden City as Administrator of the Settlement in order to effectuate the notice provisions and administer the

claims submitted by Class members seeking to share in the Net Settlement Funds; and (4) set a deadline for Class members to submit Proofs of Claim. *Id.*

C. The Notice Provided to Members of the Classes

Pursuant to and consistent with the Court's December 6, 2010 preliminary approval and notice order, Garden City provided notice of the Settlement to members of the Settlement Classes. Keough Declaration ¶¶4-5. On February 22, 2011 the Plaintiffs submitted the Declaration of Jennifer M. Keough Regarding Notice Dissemination and Settlement Administration ("Notice Declaration"). Docket No. 117, Exhibit B. The Notice Declaration detailed Garden City's compliance with the Court-approved program of notice. *Id.* The notice provided to the Classes included: (a) direct mail notice to approximately 64,169 potential members of the Settlements Classes identified in the relevant records of SoundExchange, The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), The Society of European Stage Authors & Composers ("SESAC") and Music and Entertainment Rights Licensing Independent Network B.V. ("Merlin"); (b) publication notice in four music industry trade publications (*i.e.*, *Billboard*, *Variety*, *Daily Variety* and *Music Week*) and (c) the creation of a Settlement website. *Id.* at ¶¶3-13.

D. Final Approval of Settlement

On February 22, 2011, Plaintiffs moved for Final Approval of the Settlement. Docket No. 117. On March 22, 2011 the Court held a fairness hearing and entered a Final Order that, among other things: (1) granted final approval of the Settlement in all respects finding that the Settlement was fair, reasonable and adequate and was in the best interests of Plaintiffs and the Class; (2) found that program of notice provided to the Class was the best notice practicable under the circumstances such that it fully complied with Rule 23 of the Federal Rules of Civil

Procedure and due process of law; and (3) found that the Plan of Allocation was fair, reasonable and adequate. Docket No. 123. To the best of Plaintiffs' knowledge, no objections to any aspect of the Settlement nor any appeals seeking relief from any aspect of the Final Order have ever been filed. Docket *passim*.

II. THE COURT SHOULD APPROVE THE ADMINISTRATIVE DETERMINATIONS OF THE COURT-APPOINTED SETTLEMENT ADMINISTRATOR

A. The Court Appointed Garden City To Act As Settlement Administrator

The Court appointed Garden City as Settlement Administrator.³ Docket No. 112 at ¶13. Garden City's primary duties as Settlement Administrator included: (1) disseminating Notice of the Settlement to the Classes; (2) receiving, reviewing and processing Proofs of Claims submitted by potential Class members seeking to share in the Net Settlement Funds; and (3) calculating Class members' share of the Net Settlement Funds based on the information provided in their Proofs of Claims in a manner consistent with the approved Plan of Allocation. *Id.*

B. The Administrative Determinations of Garden City Are Reasonable and Should Be Approved

Claims Processing. Processing the claims submitted by members of the Classes was laborious and time intensive. As set forth in the accompanying Keough Declaration, Garden City received and processed approximately 6,570 Proofs of Claims and reviewed approximately 67,625 images submitted by potential members of the Settlement Classes. Keough Declaration ¶6. Garden City initially reviewed each Proof of Claim in order to determine whether it was valid and included all required information and documentation. *Id.* ¶¶6-9. In order to process the claims, Garden City ultimately had to identify, for each claim, (a) the number of sound recordings eligible to participate in the settlement (and how many times each sound recording

³ Garden City is a firm specializing in the administration of class action settlements and has previously administered settlements involving copyright infringement claims.

was played by XM during the relevant period) and (b) the number of musical compositions (many of which involved fractional ownership) eligible to participate in the settlement (and how many times each musical composition was played by XM during the relevant period). In total, Garden City loaded the details (manually and electronically) of approximately 366,724 claimed sound recordings and approximately 401,416 claimed musical compositions into its settlement database. *Id.* ¶12.

Deficient Claims. In total, 4,931 claims were determined by Garden City to be deficient in some respect. *Id.* ¶15-18. If Garden City determined that a Proof of Claim was deficient in whole or in part, a “Deficiency Notice” was provided to the person who filed the claim in order to provide an opportunity to cure the deficiency. *Id.* The Deficiency Notice (1) notified the person who filed the claim of the nature of the deficiency (2) requested information necessary to cure the defect and (3) notified the claimant that the defect needed to be cured within twenty days. *Id.* By the end of the response period, a total of 809 claimants submitted mailed responses to Deficiency Notices. *Id.* Garden City also handled over 1,000 e-mail responses to the deficiency mailing and reviewed more than 14,000 additional document submissions from claimants. *Id.*

Late Claims. Through December 31, 2012 Garden City has received 325 claims that were submitted after the June 20, 2011 claims deadline. *Id.* ¶19-20. None of these 325 claims have been rejected because they were received after the deadline for the submission of Proofs of Claim. *Id.* Plaintiffs believe that when the interests of justice are balanced, it would be unfair to prevent an otherwise valid claim from sharing in the Net Settlement Funds solely because it was submitted after the June 20, 2011 claims deadline. However, Garden City has recommended that two claims, one of which was received on March 13, 2013 (approximately twenty months after

the claims deadline) and the other on December 13, 2013 (approximately twenty-nine months after the claims deadline) be rejected. *Id.*

Determination Letters. Between July 2 and August 23, 2013, Garden City mailed “determination letters” to claimants detailing the Settlement Administrator’s determination of each claim and allowing twenty days for claimants who disagreed with the determination to contest the findings. *Id.* ¶¶27-31. Following the mailing of the determination letters, Garden City received and processed responses from over two hundred claimants. *Id.* As a result of claimant responses to the determination letters, Garden City revised its initial determinations with respect to a number of claims. *Id.*

Plaintiffs respectfully submit that the foregoing determinations by Garden City are reasonable and should be approved.

III. THE COURT SHOULD AUTHORIZE THE DISTRIBUTION OF THE NET SETTLEMENT FUND AND SHOULD BAR ANY FURTHER CLAIMS

A. The Results of Garden City’s Administrative Determinations

Garden City has completed the processing of the 6,568 submissions from claimants.

Keough Declaration ¶26. Garden City’s determinations concerning these 6,568 submissions are as follows:

- (1) 4,151 claims should be accepted as eligible to participate in either the Sound Recording Net Settlement Fund and/or the Musical Composition Net Settlement Fund;
- (2) 998 claims should be rejected because they were submitted by an excluded party;
- (3) 442 claims should be rejected because they have unresolved fatal deficiencies such as not signing the Proof of Claim (as set forth in II.B. above, each of these claimants received a deficiency notice and had an opportunity to cure such deficiency);

- (4) 543 claims should be rejected because the claimant did not claim any eligible musical compositions and/or sound recordings;
- (5) 422 claims should be rejected for a combination of two or more of the above reasons, *e.g.*, not eligible for the sound recording class and no eligible musical compositions; and
- (6) 129 claims should be rejected as duplicative, which in most cases arose from a single Class member submitting multiple claim forms claiming the same titles.

Keough Declaration ¶¶26, 31.

A list of the claims submitted and their ultimate disposition is attached as Exhibit B to the Keough Declaration. *Id.* ¶31. Exhibit B-1 lists all filed, provisionally accepted Claims and states their estimated share of the settlement proceeds as a percentage of the respective Net Settlement Funds. *Id.* Exhibit B-2 lists all wholly rejected or ineligible Claims, and states the reason for their rejection or ineligibility. *Id.* For privacy reasons, Exhibit B only identifies claimants by their claim number. *Id.*

Upon approval by the Court, Garden City is prepared to mail checks to claimants who have been determined eligible to share in the Net Settlement Fund for their *pro rata* share of the Net Settlement Funds.

Plaintiffs respectfully request that the Court direct that the distribution of the Net Settlement Funds be made to the claimants that Garden City has determined to be eligible to share in the Net Settlement Funds and that such distribution be in the amounts estimated in Exhibit B-1 to the Keough Declaration.

B. Garden City's Out-of-Pocket Expenses and Fees Should Be Approved

To date, Garden City (as Court-appointed settlement administrator) has received payment of its fees and out-of-pocket expenses in the amount of \$322,313.68. Keough Declaration ¶34.

As of November 31, 2013, Garden City has incurred an additional \$322,222.26 in fees and expenses for which it has not yet received payment. *Id.* Finally, Garden City estimates that it will invoice an additional \$27,085.64 in fees and out of pocket expenses to carry out its proposed distribution. *Id.* The Court should approve payment of Garden City's remaining fees and out-of-pocket expenses.⁴

C. Merlin's Expenses Should Be Approved

Merlin is a non-profit organization that represents the interests of a significant number of members of the Sound Recording Settlement Class. As part of the Settlement, Plaintiffs and Merlin entered into a stipulation (the "Merlin Agreement") and agreed to work together in order to obtain a settlement with XM that encompassed the entire Sound Recording Settlement Class (including Merlin's members). *See* Settlement Agreement, Exhibit I (Merlin Agreement). Pursuant to Section 4 of the Merlin Agreement, Class Counsel agreed to petition the Court for reimbursement (from the Sound Recording Settlement Fund) of Merlin's reasonable expenses incurred in connection with its assistance with the claims administration process.

As part of the claims process, Merlin coordinated the preparation of an omnibus proof of claim on behalf of its members who were also members of the Sound Recording Class. *See* Declaration of Charlie Lexton, Esq. attached hereto as Exhibit C. In preparing such proof of claim, Merlin undertook an extensive data matching process whereby it matched its members' sound recordings against those recordings eligible to participate in the Settlement. *Id.* ¶4. Due to the high volume of sound recordings owned by Merlin members and played on XM during the relevant period, this matching process was extensive. *Id.* As part of Merlin's preparation of the omnibus claim, Merlin engaged an accountancy firm to provide data processing services and

⁴ Class Counsel estimate that they have spent more than 150 hours in connection with the claims administration process since the final approval hearing on March 22, 2011. However, Class Counsel are not seeking an award of attorneys' fees for such time.

incurred out of pocket costs of \$21,600 for which it seeks reimbursement. *Id.* ¶5. Had Merlin not prepared an omnibus proof of claim for its members, Garden City would have had to process individual claims from Merlin members who own or control substantial volumes of sound recordings.

Accordingly, Plaintiffs respectfully request payment of Merlin's out-of-pocket expenses in the amount of \$21,600, which, if approved, are to be paid from the Sound Recording Settlement Fund.

D. The Creation of Reserve Funds

Plaintiffs and Garden City also request the establishment of reserve funds in the amount of \$25,000 for the Sound Recording Settlement Fund and \$25,000 for the Musical Composition Settlement Fund to be used to adjust errors in payments, to make other necessary equitable adjustments, and to pay any additional costs resulting from the foregoing. Keogh Declaration ¶38. In the event that the reserve funds are not exhausted, Class Counsel will petition the Court for an equitable distribution of any such remaining funds.

E. The Court Should Bar Any Further Claims Against The Net Settlement Funds

Finally, in order to allow for a full and final distribution of the Net Settlement Funds, Plaintiffs request that the Court bar any further claims against the Net Settlement Funds, including, without limitation, any further claims or responses submitted in connection with any deficiency letters. *See* [Proposed] Distribution Order ¶6.

F. Notice of Distribution Motion

Class Counsel has instructed Garden City to post this motion and its supporting documentation on the Settlement website so that it may be viewed by members of the Settlement Classes.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that this Court should grant Plaintiffs' motion and enter the [Proposed] Order For Distribution of The Net Settlement Funds attached hereto as Exhibit A.

Dated: New York, New York
March 6, 2014

Respectfully submitted,

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