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Los Angeles Superior Court

AUG 01 2013

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18 FLO & EDDIE, INC.

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
20 **FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

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

24 Plaintiff,

25 v.

26 SIRIUS XM RADIO, INC., a Delaware
27 corporation; and DOES 1 through 100,

28 Defendants.

Case No. **BC517032**

CLASS ACTION

COMPLAINT FOR:

- 1. MISAPPROPRIATION
[Cal Civ. Code § 980(a)(2) and Common Law];
- 2. UNFAIR COMPETITION
[Cal Bus. & Prof. Code § 17200 and Common Law]; AND
- 3. CONVERSION

DEMAND FOR JURY TRIAL

CIT/CASE: BC517032
LEA/DEF#:

RECEIPT #: CCH448295078

DATE PAID: 08/01/13 03:44 PM

PAYMENT: \$435.00 310

RECEIVED:

CHECK: \$435.00

CASH: \$0.00

CHANGE: \$0.00

CARD: \$0.00

CIT/CASE: BC517032
LEA/DEF#:

RECEIPT #: CCH448295081

DATE PAID: 08/01/13 03:47 PM

PAYMENT: \$1,000.00 310

RECEIVED:

CHECK: \$1,000.00

CASH: \$0.00

CHANGE: \$0.00

CARD: \$0.00

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D-311
Judge Donn Shepard Wiley Jr

12/20/13

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1 Plaintiff FLO & EDDIE, INC. ("Plaintiff" or "Flo & Eddie") files this class action
2 Complaint on behalf of itself and on behalf of all other similarly situated owners of sound
3 recordings of musical performances that initially were "fixed" (*i.e.*, recorded) prior to February 15,
4 1972 (the "Pre-1972 Recordings") against Defendants SIRIUS XM RADIO, INC. ("Defendant" or
5 "SiriusXM") and DOES 1-100, and alleges as follows:

6 **NATURE OF THE ACTION**

7 1. California Civil Code Section 980 (a)(2) provides that "[t]he author of an original
8 work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has
9 an exclusive ownership therein until February 15, 2047, as against all persons except one who
10 independently makes or duplicates another sound recording that does not directly or indirectly
11 recapture the actual sounds fixed in such prior sound recording, but consists entirely of an
12 independent fixation of other sounds, even though such sounds imitate or simulate the sounds
13 contained in the prior sound recording." The unauthorized duplication and exploitation of Pre-
14 1972 Recordings in California constitutes misappropriation, unfair competition and conversion.

15 2. The principals of Flo & Eddie, Mark Volman and Howard Kaylan, have been
16 performing together as The Turtles since 1965 and have recorded numerous iconic hits including
17 "Happy Together," "It Ain't Me Babe," "She'd Rather Be With Me," "You Baby," "She's My
18 Girl," "Elenore," and many others. Since approximately 1971, Flo & Eddie has owned the entire
19 catalog of 100 original master recordings by The Turtles, all of which were recorded prior to
20 February 15, 1972. Notwithstanding the absence of any license or authorization from Plaintiff,
21 The Turtles recordings can be heard every hour of every day by subscribers in California to the
22 satellite and Internet services owned by Defendant known as "Sirius Satellite Radio," "XM
23 Satellite Radio" and "SiriusXM Satellite Radio" (individually and collectively, the "Service").
24 Plaintiff Flo & Eddie brings this class action on its own behalf and on behalf of all other similarly
25 situated owners of Pre-1972 Recordings (the "Class" or "Class Members") to put an end to
26 SiriusXM's wholesale misappropriation of their Pre-1972 Recordings and to obtain damages,
27 including punitive damages.

28 3. The Service is a highly profitable business which engages in the large-scale

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1 distribution and public performance of sound recordings to over 24 million subscribers. The
2 Service is distributed in California to its subscribers through (a) satellite digital transmission
3 directly to subscribers via digital radios manufactured or licensed by SiriusXM; (b) satellite digital
4 transmission to subscribers of other services, such as DIRECTV Satellite Television Service and
5 Dish Network Satellite Television Service via digital set top boxes manufactured or licensed by
6 DIRECTV or Dish; and (c) the Internet, by way of (i) digital media streaming devices, such as
7 Roku, digital radios and home audio systems, such as Sonos; (ii) its website at
8 www.SiriusXM.com; or (iii) computer, smart phone and other mobile applications for various
9 operating systems, including Apple iOS, Android, Windows, Blackberry and HP webOS. In
10 furtherance of the Service, SiriusXM, without any license or authority, has copied Plaintiff's and
11 each Class Members' Pre-1972 Recordings onto the Service's central server(s) and makes such
12 copies available to its subscribers in California. SiriusXM publicly performs these recordings in
13 California via streaming audio transmission through the Service for a fee as part of a subscription
14 plan that currently includes up to 72 different music channels. As part of the Service, many
15 subscribers in California are also able to: (A) download the stream of a selected channel on the
16 Service, allowing later or multiple listenings of the sound recordings previously streamed during
17 the selected time period; (B) download particular sound recordings, allowing later or multiple
18 listenings of such sound recordings; (C) download particular programs incorporating sound
19 recordings as part of the Service's "On Demand" feature, allowing later or multiple listenings of
20 such sound recordings; and (D) allow subscribers to pause, rewind and replay sound recordings
21 using the Service's "Replay" feature.

22 4. Simply stated, SiriusXM has disregarded the Plaintiff's and other Class Members'
23 "exclusive ownership" of their Pre-1972 Recordings in California, impaired their ability to sell,
24 lawfully exploit, or otherwise control their Pre-1972 Recordings as permitted under California law
25 and misappropriated same for its own financial gain. SiriusXM's conduct is causing, and will
26 continue to cause, enormous and irreparable harm to Plaintiff and the other Class Members unless
27 compensatory and punitive damages are awarded against SiriusXM and it is enjoined and
28 restrained from engaging in further misappropriation of the Pre-1972 Recordings.

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1 **THE PARTIES, JURISDICTION AND VENUE**

2 5. Plaintiff Flo & Eddie is a corporation duly organized and existing under the laws of
3 California, with its principal place of business in Los Angeles, California. Plaintiff is engaged in
4 the business of distributing, selling, and/or licensing the reproduction, distribution, sale, and
5 performance of its Pre-1972 Recordings in phonorecords, in audiovisual works, and for streaming
6 (*i.e.*, performing) and downloading over the Internet. Plaintiff invests substantial money, time,
7 effort, and creative talent in creating, advertising, promoting, selling, and licensing its unique and
8 valuable sound recordings.

9 6. Plaintiff possesses exclusive ownership rights in The Turtles Pre-1972 Recordings,
10 the titles of which are specified on the schedule attached hereto as Exhibit A and incorporated
11 herein by reference (“Plaintiff’s Recordings”). The United States Congress expressly has
12 recognized that the states provide exclusive protection through various state law doctrines to
13 recordings “fixed” before February 15, 1972, and that the federal Copyright Act does not “annul[]
14 or limit[] those rights until February 15, 2067.” 17 U.S.C. § 301(c). Accordingly, as quoted
15 above, California Civil Code § 980(a)(2) protects the exclusive ownership of Plaintiff and the
16 other Class Members to their Pre-1972 Recordings in California.

17 7. Upon information and belief, Defendant SiriusXM is a corporation duly organized
18 and existing under the laws of Delaware, with its principal place of business in New York, New
19 York, with offices throughout California, including, without limitation, in Glendale, California
20 and Long Beach, California. The Court has personal jurisdiction over Defendant in that Defendant
21 has multiple offices in Los Angeles County, Defendant is engaged in tortious conduct in
22 California, and Defendant’s conduct causes injury to Plaintiff and the other Class Members in
23 California. Venue of this action is proper in Los Angeles County in that Defendant maintains
24 offices in Los Angeles County.

25 8. The true names and capacities, whether individual, corporate, associate or otherwise,
26 of defendants named herein as Does 1 through 100, inclusive, are unknown to Plaintiff who
27 therefore sues said defendants by such fictitious names (the “Doe Defendants”). Plaintiff will
28 amend this Complaint to allege their true names and capacities when such have been ascertained.

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1 Upon information and belief, each of the Doe Defendants herein is responsible in some manner for
2 the occurrences herein alleged, and Plaintiff's injuries and those of the other Class Members as
3 herein alleged were proximately caused by such defendants' acts or omissions. (All of the
4 Defendants, including the Doe Defendants, collectively are referred to as "Defendants").

5 **CLASS ACTION ALLEGATIONS**

6 9. Plaintiff brings this action as a class action pursuant to Section 382 of the California
7 Code of Civil Procedure on behalf of itself and the other Class Members defined as the owners of
8 Pre-1972 Recordings reproduced, performed, distributed or otherwise exploited by Defendants in
9 California without a license or authorization to do so during the period from August 1, 2009 to the
10 present. Plaintiff reserves the right to modify this definition of the Class after further discovery;
11 the Court may also be requested to utilize and certify subclasses in the interests of ascertainability,
12 manageability, justice and/or judicial economy.

13 10. This action may be properly brought and maintained as a class action because there
14 is a well-defined community of interest in the litigation and the Class Members are readily
15 ascertainable from Defendant SiriusXM's database files and records. Plaintiff is informed and
16 believes, and on that basis alleges, that Defendants have engaged Rovi Corporation to supply the
17 metadata, including the metadata relating to Pre-1972 Recordings unlawfully streamed to
18 subscribers in California, and that such metadata contains the name and location of the owners
19 thereof. The Class members are further ascertainable through methods typical of class action
20 practice and procedure.

21 11. Plaintiff is informed and believes, and alleges thereon, that the Pre-1972 Recordings
22 misappropriated in California by Defendants number in the millions and are owned by many
23 thousands of Class Members. It is therefore impractical to join all of the Class Members as named
24 Plaintiffs. Further, the claims of the Class Members may range from smaller sums to larger sums.
25 Accordingly, using the class action mechanism is the most economically feasible means of
26 determining and adjudicating the merits of this litigation.

27 12. The claims of Plaintiff are typical of the claims of the Class Members, and Plaintiff's
28 interests are consistent with and not antagonistic to those of the other Class Members it seeks to

1 represent. Plaintiff and the other Class Members have all been subject to misappropriation of their
2 Pre-1972 Recordings in California, have sustained actual pecuniary loss and face irreparable harm
3 from Defendants' continued misappropriation of their Pre-1972 Recordings.

4 13. Plaintiff has no interests that are adverse to, or which conflict with, the interests of
5 the other Class Members and is ready and able to fairly and adequately represent and protect the
6 interests of the other Class Members. Plaintiff believes strongly in the protection of artists' rights
7 in connection with their creative work. Plaintiff has raised viable claims for misappropriation,
8 unfair competition and conversion of the type well established in California and reasonably
9 expected to be raised by Class Members. Plaintiff will diligently pursue those claims. If
10 necessary, Plaintiff may seek leave of the Court to amend this Complaint to include additional
11 class representatives to represent the Class or additional claims as may be appropriate. Plaintiff is
12 represented by experienced, qualified and competent counsel who are committed to prosecuting
13 this action.

14 14. Common questions of fact and law exist as to all Class Members that plainly
15 predominate over any questions affecting only individual Class Members. These common legal
16 and factual questions, which do not vary from Class Member to Class member, and which may be
17 determined without reference to the individual circumstances of any Class Member include,
18 without limitation, the following:

19 (A) Whether Defendant SiriusXM reproduced, performed, distributed or
20 otherwise exploited Pre-1972 Recordings in the California;

21 (B) Whether Defendant SiriusXM's reproduction, performance, distribution or
22 other exploitation of Pre-1972 Recordings in California constitutes misappropriation under
23 California Civil Code Section 980(a)(2);

24 (C) Whether Defendant SiriusXM's reproduction, performance, distribution or
25 other exploitation of Pre-1972 Recordings in the California constitutes unlawful or unfair
26 business acts or practices in violation of California Business & Professions Code Section
27 17200;

28 (D) Whether Defendant SiriusXM's reproduction, performance, distribution or

1 other exploitation of Pre-1972 Recordings in California constitutes conversion under
2 California common law;

3 (E) The basis on which restitution and/or damages to all injured members of the
4 Class can be computed;

5 (F) Whether Defendant SiriusXM's violation of California Civil Code Section
6 980(a)(2) entitles the Class Members to recover punitive damages;

7 (G) Whether Defendant SiriusXM's violation of California Civil Code Section
8 980(a)(2) is continuing, thereby entitling Class Members to injunctive or other equitable
9 relief;

10 (H) Whether Defendant SiriusXM's violation of California Business &
11 Professions Code § 17200 entitles the Class Members to recover punitive damages;

12 (I) Whether Defendant SiriusXM's violation of California Business & Professions
13 Code § 17200 is continuing, thereby entitling Class Members to injunctive or other relief;

14 (J) Whether Defendant SiriusXM's violation of California's common law of
15 conversion entitles Class Members to recover punitive damages; and

16 (K) Whether Defendant SiriusXM's violation of California's common law of
17 conversion is continuing, thereby entitling Class Members to injunctive or other relief.

18 15. A class action is superior to all other available methods for the fair and efficient
19 adjudication of this controversy, since individual litigation of the claims of all Class Members is
20 highly impractical. Even if every Class Member could afford to pursue individual litigation, the
21 Court system could not. It would be unduly burdensome to the courts in which individual
22 litigation of numerous cases would proceed. Individualized litigation would also present the
23 potential for varying, inconsistent or contradictory judgments and would magnify the delay and
24 expense to all parties and to the court system resulting from multiple trials of the same factual
25 issues. By contrast, maintenance of this action as a class action, with respect to some or all of the
26 issues presented herein, presents few management difficulties, conserves the resources of the
27 parties and of the court system, and protects the rights of each Class Member. Plaintiff anticipates
28 no difficulty in the management of this action as a class action.

1 as alleged above, Plaintiff and the Class Members have been damaged in an amount that is not as
2 yet fully ascertained but which Plaintiff is informed and believes, and alleges thereon, exceeds
3 \$100,000,000, according to proof.

4 22. Plaintiff is informed and believes, and alleges thereon, that in engaging in the
5 conduct described above, the Defendants acted with oppression, fraud and/or malice. The conduct
6 of the Defendants has been despicable and undertaken in conscious disregard of the Plaintiff's and
7 each Class Member's rights. Accordingly, Plaintiff and the Class members are entitled to an
8 award of punitive damages against Defendants in an amount sufficient to punish and make an
9 example of them according to proof.

10 23. Defendants' conduct is causing, and unless enjoined and restrained by this Court,
11 will continue to cause, Plaintiff and each Class Member great and irreparable injury that cannot
12 fully be compensated or measured in money. Plaintiff and the other Class Members are entitled to
13 temporary, preliminary and permanent injunctions, prohibiting further violation of Plaintiff's and
14 Class Members' exclusive ownership of their Pre-1972 Recordings in California.

15 **SECOND CAUSE OF ACTION**

16 **(For Statutory and Common Law Unfair Competition)**

17 24. Plaintiff hereby incorporates the allegations set forth in paragraphs 1 through 23,
18 above, as though set forth herein.

19 25. The acts and conduct of Defendants alleged above constitute an appropriation and
20 invasion of the property rights of Plaintiff and each Class Member to their Pre-1972 Recordings in
21 California, and constitute unfair competition under California Business & Professions Code §
22 17200 and common law. Defendants have engaged in unfair competitive business practices
23 forbidden by law.

24 26. As a direct and proximate result of Defendants' conduct, Plaintiff and the Class
25 Members are entitled to recover all proceeds and other compensation received or to be received by
26 Defendants from their misappropriation of the Pre-1972 Recordings. Plaintiff and the members of
27 the Class have been damaged, and Defendants have been unjustly enriched, in an amount that is
28 not as yet fully ascertained but which Plaintiff is informed and believes, and alleges thereon,

1 exceeds \$100,000,000, according to proof at trial. Such damages and/or restitution and
2 disgorgement should include a declaration by this Court that Defendants are constructive trustees
3 for the benefit of Plaintiff and the other Class Members, and an order that Defendants convey to
4 Plaintiff and Class Members the gross receipts received or to be received that are attributable to
5 Defendants misappropriation of the Pre-1972 Recordings.

6 27. Plaintiff is informed and believes, and alleges thereon, that in engaging in the
7 conduct as described above, the Defendants acted with oppression, fraud and/or malice. The
8 conduct of the Defendants has been despicable and undertaken in conscious disregard of
9 Plaintiff's rights. Accordingly, Plaintiff and the Class Members are entitled to an award of
10 punitive damages against Defendants, and each of them, in an amount sufficient to punish and
11 make an example of them according to proof at trial.

12 28. Defendants' conduct is causing, and unless enjoined and restrained by this Court,
13 will continue to cause, Plaintiff and the Class Members great and irreparable injury that cannot
14 fully be compensated or measured in money. Plaintiff and the other Class Members are entitled to
15 temporary, preliminary and permanent injunctions, prohibiting further violation of Plaintiff's and
16 the other Class Members right to exclusive ownership of their Pre-1972 Recordings and further
17 acts of unfair competition pursuant to California Business & Professions Code § 17203.

18 **THIRD CAUSE OF ACTION**

19 **(For Conversion)**

20 29. Plaintiff hereby incorporates the allegations set forth in paragraphs 1 through 28,
21 above, as though set forth in full herein.

22 30. Plaintiff and each Class Member are, and at relevant times were, the exclusive
23 owner of all right, title and interest in and to their Pre-1972 Recordings and possession thereof in
24 California.

25 31. By their acts and conduct alleged above, Defendants have converted Plaintiff's and
26 the Class Members' property rights in their Pre-1972 Recordings for Defendants' own use and
27 wrongful disposition for financial gain.

28 32. As a direct and proximate result of Defendants' conversion, Plaintiff and the

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1 members of the Class have been damaged, and Defendants have been unjustly enriched, in an
2 amount that is not as yet fully ascertained but which Plaintiff is informed and believes, and alleges
3 thereon, exceeds \$100,000,000 according to proof at trial. Defendants are constructive trustees for
4 the benefit of Plaintiff and Class Members, and the Court should order Defendants to convey to
5 Plaintiff and the Class Members the gross receipts received or to be received from Defendants
6 misappropriation of the Pre-1972 Recordings.

7 33. Plaintiff is informed and believes, and based thereon alleges, that in engaging in the
8 conduct as described above, the Defendants acted with oppression, fraud and/or malice. The
9 conduct of the Defendants has been despicable and undertaken in conscious disregard of
10 Plaintiff's rights. Accordingly, Plaintiff and each member of the Class is entitled to an award of
11 punitive damages against defendants, and each of them, in an amount sufficient to punish and
12 make an example of them according to proof at trial.

13 34. Defendants' conduct is causing, and unless enjoined and restrained by this Court will
14 continue to cause, Plaintiff and the Class Members great and irreparable injury that cannot fully be
15 compensated or measured in money. Plaintiff and each Class Member are entitled to temporary,
16 preliminary and permanent injunctions prohibiting further acts of conversion of their Pre-1972
17 Recordings.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff, on behalf of itself and the other Class Members, prays for
20 Judgment against Defendants, and each of them, as follows:

21 **Regarding the Class Action:**

- 22 1. That this is a proper class action maintainable pursuant to the applicable provisions of the
23 California Code of Civil Procedure; and
24 2. That the named Plaintiff is appropriate to be appointed representative of the respective
25 Class.

26 **On The First Cause of Action For Misappropriation against all Defendants:**

- 27 1. For compensatory damages in excess of \$100,000,000 according to proof at trial;
28 2. Punitive and exemplary damages according to proof trial; and

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1 3. A temporary, preliminary, and permanent injunction enjoining and restraining Defendants,
2 and their respective agents, servants, directors, officers, principals, employees,
3 representatives, subsidiaries and affiliated companies, successors, assigns, and those acting
4 in concert with them or at their direction, from directly or indirectly misappropriating in
5 any manner the Pre-1972 Recordings in California, including without limitation by directly
6 or indirectly copying, reproducing, downloading, distributing, communicating to the
7 public, uploading, linking to, transmitting, publicly performing, or otherwise exploiting in
8 any manner any of the Pre-1972 Recordings.

9 **On The Second Cause of Action For Unfair Competition against all Defendants:**

- 10 1. For compensatory damages in excess of \$ 100,000,000 according to proof at trial;
11 2. Punitive and exemplary damages according to proof at trial;
12 3. Imposition of a constructive trust;
13 4. Restitution of Defendants' unlawful proceeds, including Defendants' gross profits; and
14 5. A temporary, preliminary, and permanent injunction enjoining and restraining Defendants,
15 and their respective agents, servants, directors, officers, principals, employees,
16 representatives, subsidiaries and affiliated companies, successors, assigns, and those acting
17 in concert with them or at their direction, from directly or indirectly misappropriating in
18 any manner the Pre-1972 Recordings, including without limitation by directly or indirectly
19 copying, reproducing, downloading, distributing, communicating to the public, uploading,
20 linking to, transmitting, publicly performing, or otherwise exploiting in any manner any of
21 the Pre-1972 Recordings.

22 **On The Third Cause of Action For Conversion against all Defendants:**

- 23 1. For compensatory damages in excess of \$100,000,000 according to proof at trial;
24 2. Punitive and exemplary damages according to proof at trial;
25 3. Imposition of a constructive trust;
26 4. Restitution of Defendants' unlawful proceeds, including Defendants' gross profits; and
27 5. A temporary, preliminary, and permanent injunction enjoining and restraining Defendants,
28 and their respective agents, servants, directors, officers, principals, employees,

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1 representatives, subsidiaries and affiliated companies, successors, assigns, and those acting
2 in concert with them or at their direction, from directly or indirectly infringing in any
3 manner any right in any and all of the Pre-1972 Recordings, including without limitation
4 by directly or indirectly copying, reproducing, downloading, distributing, communicating
5 to the public, uploading, linking to, transmitting, publicly performing, or otherwise
6 exploiting in any manner any of the Pre-1972 Recordings.

7 **On All Causes of Action:**

- 8 1. For reasonable attorneys' fees and costs as permitted by law;
9 2. For prejudgement interest at the legal rate; and
10 3. For such other and further relief as the Court deems just and proper.

11 DATED: July 31, 2013

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MARYANN R. MARZANO
ROBERT E. ALLEN
-and-
EVAN S. COHEN

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16 By: 

Henry Gradstein
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FLO & EDDIE, INC.

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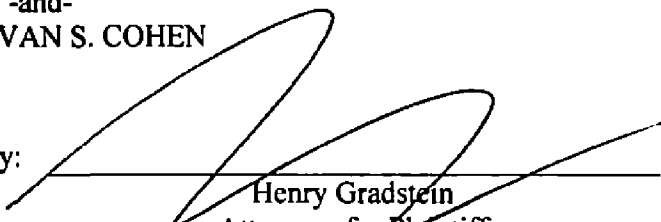
1 **DEMAND FOR JURY TRIAL**

2 Plaintiff, individually and on behalf of the Class Members, demands a trial by jury of the
3 causes of action alleged in this Complaint.

4
5 DATED: July 31, 2013

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7 HENRY GRADSTEIN
8 MARYANN R. MARZANO
9 ROBERT E. ALLEN
10 -and-
11 EVAN S. COHEN

12 By: _____

13 
14 Henry Gradstein
15 Attorneys for Plaintiff
16 FLO & EDDIE, INC.

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