

1 GRADSTEIN & MARZANO, P.C.
HENRY GRADSTEIN (State Bar No. 89747)
2 hgradstein@gradstein.com
MARYANN R. MARZANO (State Bar No. 96867)
3 mmarzano@gradstein.com
HARVEY W. GELLER (State Bar No. 123107)
4 hgeller@gradstein.com
DANIEL B. LIFSCHITZ (State Bar No. 285068)
5 dlifschitz@gradstein.com
6310 San Vicente Blvd., Suite 510
6 Los Angeles, California 90048
T: 323-776-3100

7 EVAN S. COHEN (State Bar No. 119601)
8 esc@manifesto.com
1180 South Beverly Drive, Suite 510
9 Los Angeles, California 90035
T: 310-556-9800 F: 310-556-9801

10 Attorneys for Plaintiff
11 FLO & EDDIE, INC.

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 FLO & EDDIE, INC., a California
16 corporation, individually and on behalf
of all others similarly situated,

17 Plaintiff,

18 v.

19 SIRIUS XM RADIO, INC., a Delaware
20 corporation; and DOES 1 through 10,

21 Defendants.
22
23
24
25
26
27
28

Case No. CV13-05693 PSG (RZx)

**DECLARATION OF MICHAEL
WALLACE IN SUPPORT OF FLO
& EDDIE, INC.'S MOTION FOR
CLASS CERTIFICATION**

Date: May 18, 2015

Time: 1:30 p.m.

Place: Courtroom 880

Honorable Philip S. Gutierrez

DECLARATION OF MICHAEL WALLACE

I, MICHAEL WALLACE, declare and state as follows:

1. I am a founding member and officer of TM Financial Forensics, LLC ("TMF") with over 25 years of experience in forensic accounting and the preparation and analysis of claims for economic damages in a wide variety of business disputes. I have personal knowledge of the facts stated herein and, if called upon, could and would testify thereto. I submit this Declaration in support of plaintiff Flo & Eddie, Inc.'s ("Flo & Eddie") Motion for Class Certification.

Background

2. TMF is a specialized business and litigation consulting firm with approximately 55 professionals experienced in accounting, economics, finance, engineering and information technology, with offices in Los Angeles, San Francisco and Chicago. TMF was engaged by counsel for Flo & Eddie on May 23, 2014 to provide economic, financial and damages analyses in connection with Flo & Eddie's putative class actions against Defendant Sirius XM Radio, Inc. ("Sirius XM").

3. Prior to becoming a founding member of TMF in 2010, I was a Managing Director in the Los Angeles office of Navigant Consulting, an international business, management and litigation consulting firm. Prior to joining Navigant Consulting in 2004, I was a Vice President and founding member of Tucker Alan, a business and litigation consulting firm. Prior to joining Tucker Alan in 1994, I was a Vice President in the Los Angeles office of Peterson Consulting, an international consulting firm. At Navigant Consulting, Tucker Alan, and Peterson Consulting, I performed consulting and expert witness work similar to the work I currently perform at TMF.

4. I received a Master of Business Administration degree from the University of California at Berkeley with a specialization in finance and accounting and a Bachelor of Science degree in mechanical engineering from the University of California at Los Angeles. While earning my MBA, I was employed as a Teaching

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

1 Assistant by the University of California in the subjects of statistics and quantitative
2 methods for business decisions. Prior to attending business school, I worked as a
3 design engineer in Chevron's El Segundo, California oil refinery.

4 5. I have extensive experience analyzing accounting and damages issues
5 in connection with the entertainment industry. I have served as an expert witness or
6 consultant on dozens of litigation disputes involving licensing, production and
7 distribution of music, television, motion pictures, and related merchandise, among
8 other entertainment matters. In the course of my entertainment industry work, I
9 have studied the revenues, expenses, and profits associated with the recording and
10 distribution of music in a variety of formats. I have testified in federal court, state
11 court, and arbitration on accounting and damages issues related to the music,
12 television, and motion picture industries.

13 6. I am experienced in the financial, economic, accounting, and damages
14 concepts relevant to my work on this matter. As examples, I have consulted and
15 testified in many commercial litigation and intellectual property matters. I have
16 prepared and analyzed numerous claims involving improper accounting, lost
17 earnings, lost revenues, lost profits, unjust enrichment, increased costs, cost of
18 capital, royalty disputes, disgorgement of revenues or profits, and other measures of
19 economic damages. I am familiar with standards for preparation of forensic
20 accounting analyses and economic damage claims for use in judicial proceedings
21 and the requirement for the use of reliable principles and supporting data.

22 7. My resume and a listing of my testimony in the last four years are
23 attached hereto as **Exs. A and B**, respectively.

24 8. I was asked by counsel for Flo & Eddie to: (1) determine whether
25 damages are capable of measurement on a class-wide basis ("Class Damages"), (2)
26 identify a reasonable method for calculating Class Damages; and (3) calculate the
27 amount of those Class damages. For purposes of this declaration and certification, I
28 will focus on tasks 1 and 2. Task 3, which I understand is relevant for trial, will be

1 addressed in my expert report. I have performed my work to date with the assistance
2 of other TMF professionals working at my direction. A listing of the documents
3 used in the course of performing this work is attached hereto as **Ex. C**.

4 9. I have been asked to assume that the proper measure of compensatory
5 damages as a remedy under California law for Sirius XM's alleged violation of Civil
6 Code §980(a)(2), conversion, and misappropriation of pre-1972 recordings is Sirius
7 XM's gross revenues attributable to the use of those recordings, without deduction
8 of costs. I have additionally been asked to assume that the proper measure of
9 restitution as a remedy under California Bus. & Professions Code §§ 17200 and
10 17203 is also Sirius XM's gross revenues attributable to the use of those recordings
11 by Sirius XM, without deduction of costs.

12 10. One reasonable approach to calculating Sirius XM's gross revenues
13 attributable to the use of the pre-1972 recordings is to mirror Sirius XM's own
14 methodology for calculating and paying royalties to SoundExchange for sound
15 recordings made after February 15, 1972. The reason that Sirius XM's methodology
16 is particularly appropriate is because it includes a specific carve-out for the revenues
17 that Sirius XM has calculated are attributable to pre-1972 recordings. Sirius XM
18 describes this methodology in its filings in the matter entitled *SoundExchange, Inc.*
19 *v. Sirius XM Radio, Inc.*, United States District Court, District of Columbia, Case
20 No. 13-cv-1290. Sirius XM's methodology, coupled with the financial data that
21 Sirius XM included in its interrogatory responses, provides the basis for calculating
22 Class Damages.

23 Sirius XM's Methodology

24 11. Sirius XM has represented that it has developed a methodology and
25 mathematical formula by which it calculates, segregates, and then deducts all of the
26 revenue that it has determined is attributable to its exploitation of pre-1972
27 recordings. These representations have been made by Sirius XM to: (1) the federal
28 court in the matter entitled *SoundExchange, Inc. v. Sirius XM Radio, Inc.*, United

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

1 States District Court, District of Columbia, Case No. 13-cv-1290 (Dkt. 20), a true
2 and correct copy of which is attached hereto as **Ex. D**, and (2) the Copyright Royalty
3 Board ("CRB") in connection with the two proceedings where the rates have been
4 set for Satellite Digital Audio Radio Services ("SDARS").

5 12. In each of the two CRB proceedings, also known as *Satellite I* and
6 *Satellite II*, the adverse party was SoundExchange (a performance rights
7 organization that collects and distributes royalties on behalf of copyright owners). I
8 understand that the result of both proceedings was the setting of royalty rates
9 payable to SoundExchange for a statutory license with respect to post-1972
10 recordings. I understand that *Satellite I* set the royalty rates for the period 2008
11 through 2012 and *Satellite II* for the period 2013 through 2017. In order to
12 determine the actual royalty that is payable, the applicable royalty rate is multiplied
13 against "Gross Revenues," defined at 37 C.F.R. § 382.11 to mean "revenue
14 recognized by the Licensee in accordance with GAAP from the operation of an
15 SDARS," but excluding, as Sirius XM notes, revenue from "non-music sources" and
16 revenue attributable to performances of pre-1972 recordings. *See Ex. D at 7-12.*

17 13. As explained by Sirius XM in *SoundExchange, Inc. v. Sirius XM Radio,*
18 *Inc.*, other than changing the sequence of its mathematical equation, Sirius XM's
19 "royalty payment calculation" remained "substantively identical" and
20 "mathematically equivalent" under both *Satellite I* and *Satellite II*. *See Ex. D at 9-*
21 **11**. That calculation involved the same three components for *Satellite I* and *Satellite*
22 *II*: gross revenues, an adjustment for performances of pre-1972 recordings, and the
23 royalty rate.

24 14. For *Satellite I*, "[t]o calculate its royalty fee obligation, Sirius XM
25 reduced its Gross Revenues by the percentage of pre-1972 sound recordings and then
26 multiplied that adjusted Gross Revenues figure by the applicable royalty rate," as
27 follows:
28

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

- **(A) Gross Revenues**, defined as “revenue recognized by the Licensee in accordance with GAAP.” 37 C.F.R. 382.11 (2008).
- **(B) An Adjustment for Performances of Pre-1972 Recordings**, determined by calculating the percentage of performances of pre-1972 recordings on Sirius XM (out of the total number of performances) and reducing Gross Revenues by that same percentage.
- **(C) Royalty Rate**, the *Satellite I* determination called for the license fee to equal between 6% and 8% of monthly Gross Revenues. *See Ex. D at 9-10.*

$$\text{Royalty Payment} = \frac{[\text{A}]}{\text{Gross Revenues}} \times \frac{[\text{B}]}{(1 - \frac{\text{Pre-1972 Performances}}{\text{Total Performances}})} \times [\text{C}] \text{ Royalty Rate}$$

15. For *Satellite II*, “Sirius XM’s gross revenues are multiplied by the royalty rate and then reduced by applying the Pre-1972 Recording Share,” as follows:

- **(A) Gross Revenues** as defined at 37 C.F.R. § 382.11.
- **(B) An Adjustment for Performances [of] Pre-1972 Recordings**, determined... by dividing the number of performances of pre-1972 recordings by the total number of performances (the **Pre-1972 Recording Share**) and reducing the royalty obligation by that percentage.
- **(C) Royalty Rate**, the *Satellite II* determination called for the license fee rising each year from 9% to 11% of Gross Revenues, “except that the royalty fee so determined may be reduced by . . .

the Pre-1972 Recording Share.” 37 C.F.R. 382.12. *See Ex. D at 10-11.*

$$\text{Royalty Payment} = \frac{[\text{A}]}{\text{Gross Revenues}} \times \frac{[\text{C}]}{\text{Royalty Rate}} \times \frac{[\text{B}]}{(1 - \frac{\text{Pre-1972 Performances}}{\text{Total Performances}})}$$

16. Sirius XM’s methodology for determining “the Pre-1972 Recording Share” under both *Satellite I* and *Satellite II* is well suited for the calculation of the Class Damages. The mathematical equation used by Sirius XM attributes the same amount of revenue to each performance of each recording regardless of its popularity and regardless of whether it is a pre-1972 or post-1972 recording. Popular recordings may be performed more often, but the revenue per performance remains constant. The revenues that Sirius XM deducts for “the Pre-1972 Recording Share” are the revenues that it considers to be attributable to its performances of those recordings.

Sirius XM’s Data

17. All of the information necessary to calculate the gross revenue which Sirius XM attributes to the performances of pre-1972 recordings in California is contained in Sirius XM’s Supplemental Responses to Flo & Eddie’s Second Set of Interrogatories attached hereto as **Ex. E**. Sirius XM lists its percentage of performances of pre-1972 recordings out of the total number of performances on a monthly basis and “identifies the deduction Sirius XM made for PRE-72 recordings before making payments to SoundExchange for July 2009 through September 2014.” (**Ex. E at 17 and Attachment F**) Sirius XM further provides “the revenue base(s) against which Sirius XM applied the deduction for pre-1972 recordings.” (**Ex. E at 17 and Attachment G**) Combining these two sets of data provided by

GRADSTEIN & MARZANO, P.C.
6310 SAN VICENTE BLVD, SUITE 510
LOS ANGELES, CALIFORNIA 90048
TELEPHONE: 323-776-3100

1 Sirius XM allows one to calculate the gross revenues which Sirius XM attributes to
2 the performances of pre-1972 recordings on its satellite service.¹

3 18. The final step in the calculation of Class Damages for this action is to
4 determine the percentage of gross revenue that Sirius XM has received from its
5 exploitation of pre-1972 recordings in California. Sirius XM's tax department has
6 "confirmed" that it does not separately track total revenues received from California
7 subscribers: "Because Sirius XM does not have to pay sales tax on the services it
8 provides subscribers in California, the company does not track subscriber-specific
9 revenue for California." Letter from O'Melveny & Myers LLP, dated December 16,
10 2014, attached hereto as **Ex. F**. However, Sirius XM also confirmed that it "can
11 approximate California revenue by multiplying its national revenue by a fraction: the
12 numerator is the total number of subscribers in California annually, and the
13 denominator is the total number of subscribers annually nationwide." (**Ex. E at 4**)
14 Accordingly, a reasonable method for determining the gross revenues that Sirius XM
15 has received during the damage period from its exploitation of pre-1972 recordings
16 in California is to multiply the national revenue which Sirius XM attributes to its
17 performances of pre-1972 recordings by a fraction, the numerator of which is the
18 total number of subscribers in California, and the denominator of which is the total
19 number of subscribers nationwide, on a monthly basis.² Presented in the format of a
20 typical mathematical equation, the preceding calculation looks as follows:

$$\begin{array}{rcccl} & & \text{Total number of subscribers monthly} & & \\ & & \text{in California} & & \\ & & \hline \text{California revenue} & = & \text{National revenue} & \times & \frac{\quad}{\text{Total number of subscribers monthly}} \\ & & & & \text{nationwide} \end{array}$$

26 ¹ Sirius XM earns a relatively small amount of additional revenue from its internet radio service. A similar
27 methodology would be applicable to internet radio service revenue based on the percentage of performances of pre-
1972 recordings on its internet radio service. (**Ex. E at 5-12 and Attachments A, C and F**)

28 ² Performing a monthly calculation to determine the fraction of Sirius XM's national revenue received from California
subscribers provides an equivalent or better approximation than the annual approach identified in Sirius XM's
interrogatory responses at **Ex. E**.

EXHIBIT A



Michael J. Wallace

Michael J. Wallace
Chief Operating Officer, Member

TM Financial Forensics, LLC
333 South Grand Avenue
40th Floor
Los Angeles, California 90071

Tel: 213.784.5010
mwallace@tmfin.com

Professional History

- Navigant Consulting, Managing Director
- Tucker Alan Inc., Vice President
- Peterson Consulting, Vice President
- Chevron USA El Segundo Refinery, Design Engineer

Education and Certifications

- MBA in finance and accounting
 - UC Berkeley
- BS in mechanical engineering
 - UCLA

Professional Associations

- Western Justice Center Foundation – Board Member, Audit Committee Chair
- USC Intellectual Property Institute – Planning Committee Member
- Institute for Corporate Counsel – Advisory Board Member
- National Contract Management Association
- American Bar Association – Litigation Section, Public Contract Section
- State Bar of California – Intellectual Property Section

Michael Wallace is the Chief Operating Officer and a founding Member of TM Financial Forensics, LLC. He has over 28 years of experience in the field of business and litigation consulting. He specializes in providing consulting and testimony services to clients regarding financial, economic, accounting and damages issues. Mr. Wallace has testified as an expert witness in federal and state court, in arbitration and in depositions in a number of jurisdictions.

Mr. Wallace has prepared and analyzed numerous damages claims, including claims for lost profits, increased costs, unjust enrichment, reasonable royalties and other measures of economic damages. He has extensive experience in the interpretation and application of financial and accounting principles and standards in regulatory and contractual settings. His professional work has included analyzing the financial condition and financial performance of businesses through review of financial statements, public disclosures, accounting information, operational reports, and other business records.

Mr. Wallace's experience has included significant work in the following practice areas, among others:

- » Commercial Litigation
- » Construction
- » Entertainment And Sports
- » Financial Institutions
- » Government Contracts
- » Health Care
- » Investment Management
- » Intellectual Property
- » Regulated Industries

Exhibit A**Michael J. Wallace****CLIENT AND INDUSTRY EXPERIENCE**

Clients have included corporations, partnerships and individuals; in-house and outside counsel; plaintiffs, defendants and judicial bodies; on litigation, non-litigation, arbitration and mediation matters. Client matters have involved issues in a wide variety of industries including the following:

Advertising	Electronics	Oil and Gas
Aerospace	Environmental	Pharmaceutical
Airline	Health Care	Professional Sports
Asset Management	Industrial Supplies	Promotion
Automotive	Insurance	Real Estate
Banking	Licensing	Restaurants
Biotechnology	Manufacturing	Retail
Commercial Fishing	Marketing	Sporting Goods
Construction	Medical Practice	Structured Investments
Data Processing	Merchandising	Telecommunications
Defense	Motion Pictures	Television
Distribution	Music Recording	Transportation
Electric Power	Newspaper	Video

SELECTED EXPERIENCE

Economic, Operational, Damage and Accounting Analyses

Consulted on projects involving calculation of lost profits, business valuation, reasonable royalty analysis, determination and allocation of costs, investigation and analysis of fraud allegations, tracing of funds, and other economic damages issues.

Prepared and analyzed claims resulting from breach of contract, business interruption, patent infringement and other intellectual property claims, antitrust, fraud and other allegations.

Evaluated issues such as lost or diminished product sales and other lost revenues, loss of market share, loss of business value, losses of specific customer accounts or contracts, diminution of future revenue prospects, increased costs, avoided costs, fixed and variable costs, costs of capital and mitigation.

Utilized a variety of statistical analysis techniques in a number of circumstances. Have applied or analyzed statistical methods including random sampling, estimation, extrapolation, stratification, simple and multiple regression, and analysis of variance.

Exhibit A**Michael J. Wallace****ENTERTAINMENT AND SPORTS**

Performed consulting services and provided expert witness testimony on a variety of entertainment and sports matters.

Entertainment and sports matters have involved the production, recording, licensing, promotion, distribution and sale of a variety of entertainment media including motion pictures, television, recorded music, online games, concert and sports merchandise and DVD/video.

Addressed a wide range of issues on entertainment and sports matters including the following:

Accounting practices	Management fees
Antitrust issues	Personal vs. business expense
Breach of contract	Pricing policies
Budgets and forecasts	Production costs and funding
Cooperative advertising	Professional malpractice
Contract terms	Promotional tie-ins
Copyrights	Revenue recognition
Distribution costs and fees	Sales projections
Diversification of collateral	Trademarks
Financing vehicles	Trade Secrets
Fraud and embezzlement	Tax Incentives
Lost profits	Valuation

Assisted counsel for seven major motion picture studios in responding to price-fixing and other antitrust allegations in class action matter. Evaluated and presented the variety of financial and other contractual terms for thousands of motion picture talent contracts, including front-end and back-end fixed and contingent payments and profit participations.

Analyzed lost profits and disgorgement of profit issues related to numerous breach of contract, copyright and trademark matters in the music industry.

Prepared and reviewed breach of contract lost profits claims related to videocassette licensing and promotion, as well as licensed concert and sports merchandise.

Analyzed direct and indirect revenues and costs associated with online games, online direct marketing, online distribution and other internet based business models.

Performed an accounting of motion picture production funds and distribution proceeds for over 40 films. Evaluated producer's fees, distribution fees and the accounting procedures and practices of the production company to evaluate allegations of management fraud.

Evaluated unjust enrichment damages related to the misappropriation of trade secrets used for manufacturing competition-quality sporting goods.



Michael J. Wallace

INTELLECTUAL PROPERTY

Analyzed and prepared claims for damages in a broad range of intellectual property matters, including patent, copyright, trade secret, trademark and trade dress. Evaluated lost profits, price erosion and reasonable royalty issues on patent infringement matters. Patent cases have included analysis of market share issues, non-infringing alternatives and design around issues.

In connection with copyright, trademark and trade secret matters, analysis has been performed of the lost profits or other damages to the rights holder, and the profits or cost savings of the alleged infringer. Have also studied apportionment of profits between the infringed property and other factors unrelated to infringement.

Addressed intellectual property issues with respect to the following industries or technologies:

Advertising	Petroleum Products
Aerospace	Pharmaceutical
Automotive	Publishing
Communications	Religion
Diagnostics	Restaurants
Electronics	Satellites
Electric Power	Software
Fitness	Sports
Internet	Television
Manufacturing	Test Equipment
Music	Toys
Paper Products	Water Treatment

Analysis of lost profits has included evaluating achievability of sales; capacity for manufacturing, sales and distribution; and impacts of competition on pricing. Cost analysis has included determining fixed and variable costs, costs of expansion, research and development costs and costs of capital.

LABOR AND EMPLOYMENT MATTERS

Analyzed and prepared claims for damages in connection with labor termination and discrimination matters. These engagements have included economic analysis of compensation, fringe benefits, retirement and pension plans, stock options, appropriate period of loss, and wage escalation and discount rates.

Analyzed replacement compensation, including independent consulting ventures and operation of small businesses. Performed numerous analyses of labor and related costs on commercial damage matters, including analysis of labor burdens, benefit costs, salary and compensation plans.



Michael J. Wallace

GOVERNMENT CONTRACT MATTERS

Provided consulting services and testified on a variety of government contracts matters involving issues such as cost accounting, cost estimating, defective pricing, false claims, pension accounting, purchase price adjustments, regulatory compliance and contract claims.

Have assisted counsel on liability, damages and penalty issues on numerous cases filed under the Federal False Claims Act. Provided expert testimony on qui tam matters, in addition to providing formal and informal presentations to Department of Justice, Defense Contract Audit Agency and Defense Criminal Investigative Service regarding defective pricing and false claims issues. Consulted and testified on False Claims Act matters involving defective pricing, improper accounting, mischarging, overbilling, design defects, violations of the Cost Accounting Standards and the Federal Acquisition Regulation, non-compliance with contract terms, and false certification, among other claims.

Government contract matters have included substantial work in analyzing and applying provisions of the Federal Acquisition Regulations, Cost Accounting Standards and other regulatory guidance. Application of this regulatory guidance has involved evaluation of cost estimating procedures and proposal preparation; determination of the cost of service and allocation of costs among multiple cost objectives; and in the pricing of contracts, contract claims and contract price adjustments. Analyzed proper accounting for pension costs, pension assets and pension liabilities under the Cost Accounting Standards (CAS) and the Employee Retirement Income Security Act (ERISA). Studied Prepayment Credits and Segment Closing Claim procedures under CAS rules. Assisted buyers and sellers in resolving acquisition disputes regarding the transfer of pension assets and liabilities upon the sale of subsidiaries and divisions.

Prepared and reviewed claims and counterclaims for cost and schedule impacts on a variety of government contract projects. Analyzed claims based on defective specifications, change orders, regulatory changes, increased project scope, acceleration, constructive changes, defective work, excessive inspections, and delay and disruption, among other causes.

HEALTH CARE

Assisted clients with health care related matters and researched emerging industry issues, including fraud, waste and abuse. Client matters have included private hospital urgent care affiliates, municipalities providing emergency medical care to the public and the incarcerated, a biomedical research material supplier, a manufacturer of hematology equipment and reagents, and a medical transportation company, among others.

Issues analyzed have included false claims allegations, lost profits, business valuation, lost wages, insurance claims coverage, construction costs and professional liability.



Michael J. Wallace

CONSTRUCTION CLAIMS AND RELATED MATTERS

Provided consulting services on a variety of construction related matters. Prepared and analyzed claims related to construction projects including assessment of formal and constructive change orders, delay and disruption, defective specifications, differing site conditions, acceleration, defective workmanship and cost of rework, and false claims allegations.

Analyzed issues including assessment of the reasonableness of original bids, causes for cost growth and budget overruns, determining the impact of individual events or changes on cost and schedule. Have also prepared and analyzed claims for economic impacts of delayed, diminished or lost use of facilities including lost profits, cost of substitute facilities, costs of capital and other measures of economic damages.

Construction project analyzed have included the following types of facilities:

Apartment Buildings	Oil Refineries and Pipelines
Environmental Remediation	Petroleum Tank Farms
Hospitals	Prisons
Municipal Sewers	Residential Housing
Nuclear Power Plants	Retail Complex
Office Buildings	University Facilities

Experienced in working with counsel and other experts to combine entitlement analysis with cost, schedule and other technical analyses to develop a coherent presentation of the chronology of a construction project and the resultant economic impacts of unplanned and unforeseen events and conditions.

REAL ESTATE DEVELOPMENT

Consulted on a variety of real estate development matters. Real estate projects have included office buildings, hotels, apartments, townhouses, university housing, theatres, retail complexes and condominiums. Issues have included market value, lease costs, occupancy rates, construction defects, loss of use, lost profits and breach of contract.

Evaluated damages claimed by the limited partners due to the reorganization of a real estate limited partnership. Damage issues included the real estate valuations and transaction costs for a number of distressed properties. Risks associated with various scenarios were analyzed, along with the appropriate discount rates applicable to the financial analysis.



Michael J. Wallace

FINANCIAL INSTITUTIONS AND ASSET MANAGEMENT

Provided consulting services on a variety of financial institutions and asset management matters. Prepared and analyzed claims related to mortgage origination and servicing, real estate development, structured investments, film financing, custodial and trustee services, private equity and hedge funds, Ponzi schemes and embezzlement.

Analyses have included funds tracing, collateral analysis, portfolio analysis, calculations of carried interest, alternative investment returns and analysis of lost profits, among other areas.

Projects have included the following types of entities:

Asset Management Companies	Insurance Companies
Commercial Banks	Mortgage Originators & Servicers
Commodities Brokers	Real Estate Investment Trusts
Film Financing Vehicles	Structured Investments

Evaluated claims for lost profits and loss of business value damages in connection with the departure of key executives from a major asset management company. Also assessed counterclaims for lost income of key executives due to termination of employment.

Studied causation and damages issues in a professional malpractice claim, including determination of the losses suffered by an asset management company and its investors caused by the failure of independent accountants, outside counsel and investment bankers to uncover and disclose fraudulent practices of the asset manager's prime broker.

Analyzed investor losses in connection with a Ponzi-type scheme. Determined potential losses attributable to the failure by the financial institution that served as custodian of investor funds to uncover the scheme. Evaluated involvement and fees earned by plaintiff banks in connection with the distribution and sale of the investments in the fraudulent funds.

Evaluated claims for lost investment income asserted by investor against an asset management company. Studied potential alternative investment results under a number of different asset allocation scenarios.

Analyzed a claim for damages related to lost commercial real estate opportunities in an REIT investment.

Studied the causes of losses incurred by a financial institution in connection with the development of a condominium complex.

Evaluated claims for losses by financial institutions related to fraud perpetrated by a mortgage originator. Determined potential losses attributable to the failure by the financial institution that served as custodian of investor funds to uncover the scheme.



Michael J. Wallace

TESTIMONY AND ALTERNATIVE DISPUTE RESOLUTION EXPERIENCE

Testified on Federal Court, State Court and arbitration matters regarding lost profits, business valuation, forensic accounting, asset management, false claims, breach of contract, intellectual property, employment termination, cost allocation, product defects, construction claims and statistical analyses, among other issues.

Provided written testimony and expert witness reports on Federal and State Court matters regarding data processing billing algorithms, interest accruals on deferred compensation, and internet-based business damages in addition to the testimony subjects listed above.

Prepared analyses and reports which were the bases of findings by a court-appointed Special Master in a case involving allegations of management fraud in an independent motion picture production and distribution company.

LECTURES AND SEMINARS

"Program and Contract Changes" - Albuquerque, NM

- Managing, tracking and pricing contract changes and contract claims
- National Contract Management Association (NCMA) seminar

"What You Need To Know About Trademarks" - Beverly Hills, CA

- Valuation, licensing and economic damages related to trademarks
- Minimum Continuing Legal Education seminar approved by California Bar

EXHIBIT B

Exhibit B

MICHAEL J. WALLACE TESTIMONY

<u>Case Name</u>	<u>Venue</u>	<u>Approximate Date</u>
San Diego Gas & Electric Company, City of Riverside, City of Anaheim v. Southern California Edison Company	Judicial Arbitration and Mediation Services, Inc. (Deposition)	2014
Medley Capital LLC, a limited liability company, and Fourth Third, LLC, a limited liability company v. Milbank, Tweed, Hadley & McCloy LLP	Superior Court of California, City and County of San Francisco (Deposition)	2013
In re Medical Capital Securities Litigation; Kenneth and Gwen Bain, et al. v. Wells Fargo Bank, National Association, et al.; James L. Abbate, et al. v. Wells Fargo Bank, National Association, et al.	United States District Court for the Central District of California (Deposition)	2013
Core Industries, Inc. v. Shinn Fu Corporation	United States District Court for the Central District of California (Deposition)	2012
Bagdasarian Productions, LLC v. Capitol Records, Inc. et al.	Superior Court of California, County of Los Angeles (Deposition)	2012
Trust Company of the West v. DoubleLine Capital LP, Jeffrey Gundlach et al.	Superior Court of California, County of Los Angeles (Bench Trial – Nov.)	2011
Trust Company of the West v. DoubleLine Capital LP, Jeffrey Gundlach et al.	Superior Court of California, County of Los Angeles (Jury Trial – Sep.)	2011
Trust Company of the West v. DoubleLine Capital LP, Jeffrey Gundlach et al.	Superior Court of California, County of Los Angeles (Depositions – May, June, July, August, October and November)	2011

Exhibit B

**MICHAEL J. WALLACE
TESTIMONY**

<u>Case Name</u>	<u>Venue</u>	<u>Approximate Date</u>
RHC Communities, LLC v. Southern California Edison Company	Judicial Arbitration and Mediation Services, Inc. (Arbitration Hearing)	2011

EXHIBIT C

Exhibit C

Documents

Pleadings

1. Class Action Complaint, Flo & Eddie, Inc., v. Sirius XM Radio, Inc. and Does 1 through 100, for the County of Los Angeles, Central District, July 31, 2013
2. Defendant's: (1) Answers and Affirmative Defenses; and (2) Demand for Jury Trial, November 18, 2013
3. Order Granting Plaintiff's Motion for Summary Judgment, September 22, 2014
4. Sirius XM Radio Inc.'s Supplemental Responses and Objections to Flo & Eddie, Inc.'s Second Set of Interrogatories, December 23, 2014
5. Complaint, SoundExchange, Inc. v. Sirius XM Radio Inc., August 26, 2013
6. Defendant Sirius XM Radio Inc.'s Memorandum of Law in Support of Its Motion to Dismiss, SoundExchange, Inc. v. Sirius XM Radio Inc., October 16, 2013
7. Plaintiff SoundExchange's Memorandum of Points and Authorities in Opposition to Defendant Sirius XM's Motion to Dismiss, December 2, 2013
8. Defendant Sirius XM Radio Inc.'s Reply Memorandum of Law in Further Support of Its Motion to Dismiss, SoundExchange Inc., v. Sirius XM Radio Inc., December 20, 2013

Other Documents and Information

9. O'Melveny & Myers LLP Letter, Re: Flo & Eddie Inc. v. Sirius XM Radio Inc., December 16, 2014
10. Deposition of David Frear and Associated Exhibits, February 18, 2015
11. A & M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, November 30, 1977
12. Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718, July 26, 2984
13. 37 CFR Ch. III (7-1-14 Edition)
14. Sirius XM Holdings Inc. Form 10-K (2009 - 2013)
15. Sirius XM Holdings Inc. Form 10-Q (2009 - 1Q2014)
16. Siriusxm.com

EXHIBIT D

Case No. 1:13 cv 1290 (RJL)

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT.....	3
I. This Case is a Prime Candidate for Referral under the Primary Jurisdiction Doctrine	3
A. SoundExchange Misconstrues the CRB's Decisions in <i>Satellite I</i> and <i>Satellite II</i>	3
1. The <i>Satellite I</i> Determination Refutes SoundExchange's Contentions	3
2. <i>Satellite II</i> Neither Construed <i>Satellite I</i> nor Reviewed Sirius XM's Royalty Calculations for the 2007-2012 License Period.....	4
3. <i>Satellite II</i> 's Mechanism for Calculating Exclusions Attributable to Pre-1972 Sound Recordings, If Anything, Confirms the Lack of Merit in SoundExchange's Allegations of Underpayment.....	5
4. <i>Satellite II</i> Did Not Purport To Construe the <i>Satellite I</i> Exemption for Non-Music Programming	8
B. This Case is an Ideal Candidate for Invoking the Primary Jurisdiction Doctrine	9
II. The CRB has "Continuing Jurisdiction" to Address the Questions Presented in this Case	12
CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.</i> , 965 F.2d 1118 (D.C. Cir. 1992)	10, 11
<i>Comcast Corp. v. FCC</i> , 600 F.3d 642 (D.C. Cir. 2010)	13
<i>Ctr. for Individual Freedom v. Van Hollen</i> , 694 F.3d 108 (D.C. Cir. 2012)	12
<i>Davel Commc'ns, Inc. v. Qwest Corp.</i> , 460 F.3d 1075 (9th Cir. 2006)	11
<i>Ricci v. Chi. Mercantile Exch.</i> , 409 U.S. 289 (1973)	13
<i>Ryan v. Chemlawn Corp.</i> , 935 F.2d 129 (7th Cir. 1991)	14
<i>SoundExchange v. Librarian of Congress</i> , 571 F.3d 1220 (D.C. Cir. 2009)	3
<i>In re StarNet, Inc.</i> , 355 F.3d 634 (7th Cir. 2004)	12
<i>United States v. Philip Morris USA, Inc.</i> , 686 F.3d 832 (D.C. Cir. 2012)	10
<i>United States v. Western Pac. R.R. Co.</i> , 352 U.S. 59 (1956)	10, 11, 12
 Statutes	
17 U.S.C. § 801(b)(1)	2, 10
17 U.S.C. § 803(c)(4)	13
 Other Authorities	
37 C.F.R. 382.11	<i>passim</i>
37 C.F.R. 382.12	5, 7
Copyright Office, Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537 (Jan. 26, 2009)	13

Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054 (Apr. 17, 2013) (<i>Satellite II</i>)	<i>passim</i>
Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080 (Jan. 24, 2008) (<i>Satellite I</i>)	<i>passim</i>

PRELIMINARY STATEMENT

The central premise of SoundExchange's opposition is that the primary jurisdiction doctrine is inappropriate here because the Copyright Royalty Board—twice, in its count—has already “unambiguously” determined that Sirius XM was not entitled to certain royalty fee exclusions it took between 2007 and 2012. *See* SoundExchange Mem. at 1. That argument conveniently assumes away the parties' dispute, which arises because Sirius XM interpreted the same CRB rate determination¹ and the regulations enacted under it as unambiguously *supporting* the challenged exclusions. The point of remitting this controversy to the CRB is to enable the agency that crafted the regulations at issue to opine as to what it actually intended and whether Sirius XM's practices comport with that intention.

SoundExchange is also wrong on the merits. The disputed revenue definition states clearly that Sirius XM should not pay royalties to SoundExchange for programming “exempt from any license requirement” and programming with “only incidental performances of sound recordings.” 37 C.F.R. 382.11(3)(vi) (2008). The reason for such exclusions is obvious: revenue earned by Sirius XM for activities “not licensed under the statutory royalty regime”—*e.g.*, performances of pre-1972 recordings or non-music programming—“should not factor into determining the statutory royalty obligation.” Copyright Royalty Board, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23073 (Apr. 17, 2013) (“*Satellite I*”).

SoundExchange brazenly contends that Sirius XM should have disregarded that fundamental premise and paid SoundExchange tens of millions of dollars in royalties for such

¹ *See* Copyright Royalty Board, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080 (Jan. 24, 2008) (“*Satellite I*”).

programming anyway. It bases this conclusion on a meritless accounting quibble (relating to when revenue is “recognized” under GAAP) and the misconception that the Copyright Royalty CRJs, in *Satellite II*, determined how to interpret *Satellite I* and evaluated Sirius XM’s practices under that decision. They did not. As we demonstrate herein, the CRJs in *Satellite II* forcefully reiterated their holding that Sirius XM should *not* pay SoundExchange for programming unrelated to the statutory license and expressly rejected SoundExchange’s attempt to eliminate the exemptions for such programming. What is more, the CRJs prescribed a method for calculating such exemptions for the 2013-2017 license period that is nearly identical, both in approach and economic consequence, to the methodology utilized by Sirius XM for the period in dispute. These conclusions *support*, not contradict, Sirius XM’s payment calculations during the 2007-2012 period. A referral to the CRB should quickly and efficiently confirm the propriety of Sirius XM’s approach.

SoundExchange’s further suggestion that this case concerns a garden variety interpretation of mundane agency regulations, something courts do “every day,” SoundExchange Mem. at 1, is also erroneous. The CRB is uniquely positioned to opine on the intended economic outcome of its *Satellite I* determination in light of both the extensive hearing record before it and the statutory policy factors that guide its determinations. *See* 17 U.S.C. § 801(b)(1). It is also uniquely positioned to opine on SoundExchange’s attempt to fundamentally alter the economics that determination and the CRJs’ careful balancing of the statutory factors. Courts routinely refer technical questions of the sort raised by the Complaint to administrative agencies in recognition of their peculiar expertise and familiarity with the entire panoply of relevant considerations.

ARGUMENT

I. This Case is a Prime Candidate for Referral under the Primary Jurisdiction Doctrine

A. SoundExchange Misconstrues the CRB's Decisions in *Satellite I* and *Satellite II*

1. The *Satellite I* Determination Refutes SoundExchange's Contentions

The CRB has repeatedly stressed, as should be self-evident, that users of the statutory license like Sirius XM do not have to pay royalties for programming not covered by that license. In *Satellite I*, the CRJs explained that the revenue definition should “unambiguously relate[] the fee to the value of the sound recording performance rights at issue.” 73 Fed. Reg. at 4087–88. Similarly, in *Satellite II*, the CRJs stated that “pre-1972 recordings are not licensed under the statutory royalty regime and should not factor into determining the statutory royalty obligation.” 78 Fed. Reg. at 23073. Likewise, the D.C. Circuit, in the course of affirming *Satellite I*, observed that “SoundExchange never contended and the CRJ[s] never opined that revenue from such non-music sources should be included in calculating the royalty payments.” *SoundExchange v. Librarian of Congress*, 571 F.3d 1220, 1225 (D.C. Cir. 2009).

In accordance with these principles, the CRJs' decision in *Satellite I* provided for the following exclusions from Gross Revenues—the base on which the royalty payment is calculated—to ensure the omission of revenue attributable to programming exempt from the license:

- “revenues recognized by [the] Licensee for the provision of . . . channels, programming, products and/or other services offered for a separate charge where such channels use only incidental performances of sound recordings,” 37 C.F.R. 382.11(3)(vi)(B) (2008); and

- “channels, programming, products and/or other services for which the performance of sound recordings . . . is exempt from any license requirement,” 37 C.F.R. 382.11(3)(vi)(D) (2008).

While *Satellite I* did not spell out the precise mechanics for implementing the exclusions, the CRJs plainly intended to “relate[] the fee to the value of the sound recording performance rights at issue.” SoundExchange’s purportedly “unambiguous” construction of the CRB’s regulations would nullify the above-stated exclusions, impose an unauthorized surcharge on statutory licensees like Sirius XM, and confer a concomitant windfall on SoundExchange. SoundExchange’s position is so obviously contrary to what the CRB has held, as well to common sense, that it is doing everything possible to avoid making its case to the body best positioned to opine on it, the CRB.

2. *Satellite II Neither Construed Satellite I nor Reviewed Sirius XM’s Royalty Calculations for the 2007-2012 License Period*

The *Satellite II* proceeding set the statutory royalty rates and terms for the 2013-2017 period. In that proceeding, SoundExchange sought essentially identical relief to that which it seeks here: a nullification of the statutory exclusion from payments of royalties for performances of sound recordings exempt from the statutory license.² The CRJs roundly rejected SoundExchange’s proposal and reiterated the core principle that “pre-1972 recordings are not licensed under the statutory royalty regime and should not factor into determining the statutory royalty obligation.” *Satellite II*, 78 Fed. Reg. at 23073.

² As the CRJs summarized the argument, “SoundExchange also proposes to eliminate from the current *Gross Revenues* definition a provision that authorizes an exclusion from revenues received from channels and programming that are licensed outside of the Sections 112 and 114 licenses, *which includes pre-1972 recordings*.” *Satellite II*, 78 Fed. Reg. at 23071 (emphasis added). Clearly, the CRJs understood the exclusion from Gross Revenues to encompass pre-1972 recordings.

The CRJs then spelled out a specific mechanism to be utilized in calculating the appropriate deduction during the 2013-2017 license period.³ They had no occasion to decide how the fee deductions established in the *Satellite I* proceeding should have been calculated, let alone opine as to SoundExchange's conception of those deductions or the economic consequences they would have had on the determination reached there. Simply stated, the construction and application of the *Satellite I* rates and terms were not before the CRB during the *Satellite II* proceedings.

This recognition puts to rest the assertion that the CRJs resolved the issue presented here (much less in SoundExchange's favor) by way of their passing remark that "there is no revenue recognition for the performance of pre-1972 works." *Satellite II*, 78 Fed. Reg. at 23073. Not only, as noted, did the *Satellite II* proceeding *not* concern royalty calculations pertaining to the *Satellite I* license period; neither did it contain any reliable record as to Sirius XM's accounting practices during the prior license period or any expert testimony as to what revenue is or is not "recognized" under GAAP.

3. *Satellite II's Mechanism for Calculating Exclusions Attributable to Pre-1972 Sound Recordings, If Anything, Confirms the Lack of Merit in SoundExchange's Allegations of Underpayment*

A comparison of the mechanism adopted by the CRJs in *Satellite II* for implementing the exclusion for pre-1972 sound recordings for the 2013-2017 period with the process Sirius XM utilized in calculating the same exclusion during the period covered by the *Satellite I* determination exposes SoundExchange's complaint as one of form over substance. In short, the

³ As discussed below, that mechanism provides that the royalty fee should be reduced by a "Pre-1972 Recording Share," a percentage reflecting the Sirius XM's number of pre-1972 performances divided by the total number of Sirius XM's performances. The regulations define the Pre-1972 Recording Share as "the result of dividing the Internet Performances of Pre-1972 Sound Recordings on the Reference Channels by the total number of Internet Performances of all sound recordings on the Reference Channels." 37 C.F.R. 382.12(e).

two approaches are equivalent in all material respects, yielding substantially the same economic results.

Satellite I Royalty Fee Calculation. There were three basic components to Sirius XM's royalty fee calculation under the prior determination:

- **(A) Gross Revenues**, defined as "revenue recognized by the Licensee in accordance with GAAP." 37 C.F.R. 382.11 (2008).
- **(B) An Adjustment for Performances of Pre-1972 Recordings**, determined by calculating the percentage of performances of pre-1972 recordings on Sirius XM (out of the total number of performances) and reducing Gross Revenues by that same percentage.
- **(C) Royalty Rate**, the *Satellite I* determination called for the license fee to equal between 6% and 8% of monthly Gross Revenues.

To calculate its royalty fee obligation, Sirius XM reduced its Gross Revenues by the percentage of pre-1972 sound recordings and then multiplied that adjusted Gross Revenues figure by the applicable royalty rate, as follows:⁴

$$\text{Royalty Payment} = \text{Gross Revenues} \times \left(1 - \frac{\text{Pre-1972 Performances}}{\text{Total Performances}}\right) \times \text{Royalty Rate}$$

Satellite II Royalty Fee Calculation. The royalty payment calculation as prescribed the *Satellite II* determination for 2013-2017 is substantively identical. Sirius XM's gross revenues are multiplied by the royalty rate and then reduced by applying the Pre-1972 Recording Share. In other words, the calculation consists of the *same three elements* as the *Satellite I* determination, but in a different order:

⁴ For example, if Gross Revenues were \$1,000,000, 10% of total performances were pre-1972 performances, and the royalty rate was 8%, the total royalty payment would be \$72,000: \$1,000,000 x (1-.10) x .08 = \$72,000.

- (A) **Gross Revenues** as defined at 37 C.F.R. § 382.11.
- (B) **An Adjustment for Performances Pre-1972 Recordings**, determined, just as Sirius XM did under the *Satellite I* determination, by dividing the number of performances of pre-1972 recordings by the total number of performances (the **Pre-1972 Recording Share**) and reducing the royalty obligation by that percentage.
- (C) **Royalty Rate**, the *Satellite II* determination called for the license fee rising each year from 9% to 11% of Gross Revenues, “except that the royalty fee so determined may be reduced by . . . the Pre-1972 Recording Share.” 37 C.F.R. 382.12.

Sirius XM’s royalty payment is determined by multiplying these three factors in the same way as during 2007-2012. To summarize:

$$\text{Royalty Payment} = \text{[A]} \times \text{[C]} \times \text{[B]} \times \left(1 - \frac{\text{Pre-1972 Performances}}{\text{Total Performances}}\right)^5$$

In short, Sirius XM’s approach under the *Satellite I* determination was mathematically equivalent to what the CRJs made explicit under *Satellite II*, except that rather than multiplying $A \times B \times C$, the *Satellite II* determination calls for multiplying $A \times C \times B$. See *supra* nn. 4 & 5. While the CRJs suggested the formula should be conceptualized as a reduction of the royalty payment to be made, rather than as a reduction of revenue against which the royalty rate applied, the economic results are substantively identical.⁶ *Satellite II* is thus completely consistent with Sirius XM’s treatment of pre-1972 recordings for the 2007-2012 period.

⁵ As in the example in n.4, *supra*, if Gross Revenues were \$1,000,000, the royalty rate was 8% and 10% of performances were pre-1972 performances, the royalty payment would be \$72,000: $\$1,000,000 \times .08 \times (1-.10) = \$72,000$.

⁶ There are two minor differences that are not germane to the argument. During 2007-2012, Sirius XM calculated the amount of its Pre-72 exclusion based on its subscription revenues, an amount slightly less than total Gross Revenues. Also, for part of that period, it used plays on its satellite service, as opposed to performances on its webcasting service (where the channels are largely identical) to determine the specific pre-1972 share for a given reporting period. While

Once understood in context, SoundExchange's reliance on the CRJs' statement in *Satellite II* that "revenue exclusion is not the proper means for addressing pre-1972 recordings" as purported evidence that Sirius XM had underpaid royalties for the prior period is evidently misplaced. *Satellite II*, 78 Fed. Reg. at 23073. The quoted language at most suggests that the guidance in *Satellite I* as to precisely how the exemption for pre-1972 recordings should be computed was not specific enough. Its import was conceptual and forward-looking: *i.e.*, the royalty adjustment for pre-1972 recordings should be understood and applied as an exclusion from the total fees owed, rather than applied against the revenue base. Insofar as the *result* of the prescribed *Satellite II* approach leads, as a practical matter, to essentially the same economic results as the methodology Sirius XM employed in the previous licensing period, the inference SoundExchange asks be drawn from the CRJs' statement—that Sirius XM instead should have paid royalties for performances of recordings that are wholly exempt from the license requirement—is completely improper.

4. *Satellite II* Did Not Purport To Construe the *Satellite I* Exemption for Non-Music Programming

SoundExchange suggests that in *Satellite II* the CRJs held that Sirius XM's exclusion for non-music programming offered through its premier packages failed to comport with the *Satellite I* exemption for programming "us[ing] only incidental performances of sound recordings" that is "offered for a separate charge." *Satellite I*, 73 Fed. Reg. at 4102; 37 C.F.R. 382.11(3)(vi)(B). This is plainly untrue.

these minor differences may have marginally altered Sirius XM's royalty obligations, they do not alter the point that Sirius XM's approach to calculating the fee obligation during 2007-2012 was substantively identical to the one later prescribed by the CRJs in *Satellite II* for 2013-2017.

As Sirius XM explained in its moving papers, the additional all-talk and non-music programming available through its premier packages is “offered for a separate charge” within the meaning of the *Satellite I* determination because the only additional services provided in such packages—and thus the value the consumer receives for the incremental charge for a premier package—is programming that makes only incidental use of sound recordings and exempt from the statutory license. See Sirius XM Mem. at 8, 13. SoundExchange contends here that Sirius XM should pay for exempt programming because a clear upcharge for only non-music programming somehow does not count as a “separate charge.” SoundExchange Mem. at 5–6. The language in *Satellite II* upon which SoundExchange relies did not pass upon that contention,⁷ and indeed did no more than repeat the regulatory text from *Satellite I*: “the exclusion is available only to the extent that the channels, programming, products and/or other services are offered for a separate charge.” *Satellite II*, 78 Fed. Reg. at 23072 n.45. If anything, the CRJs once again confirmed that revenues that are attributable to activities not covered by the statutory license should be exempt from the statutory license calculation: “the Judges are driven by the admonition in [*Satellite I*] to include only those revenues related to the value of the sound recording performance rights at issue in this proceeding.” *Satellite II*, 78 Fed. Reg. at 23072.

It is clear that the CRJs are in the best position to interpret their own opinions, and should have the opportunity to provide any necessary clarification on this issue in the first instance.

B. This Case is an Ideal Candidate for Invoking the Primary Jurisdiction Doctrine

Resolution of this case calls for the interpretation and application of the CRJs’ own rate determination, a determination they reached after an extensive, multi-week trial and the product

⁷ SoundExchange has yet to offer any coherent policy reason (accounting gimmicks aside) that would support a construction of the CRJs’ regulations requiring Sirius XM to pay license fees for material exempt from the statutory license.

of the careful balancing of the Section 801(b) policy factors. Congress created the CRB specifically for the expert determination of royalty rates. Questions concerning the proper implementation of the CRB's own rate determinations should properly be decided by the CRB. *See, e.g., United States v. Philip Morris USA, Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012) (“[W]e have found the primary jurisdiction doctrine applicable when the precise question before the district court was one within the particular competence of an agency.”); *Allnet Commc’n Serv., Inc. v. Nat’l Exch. Carrier Ass’n, Inc.*, 965 F.2d 1118, 1122–23 (D.C. Cir. 1992) (finding primary jurisdiction where the issue involved the agency’s “interpretation of its own regulations, on which it is owed great deference”).

SoundExchange argues that the primary jurisdiction doctrine is not implicated here because the questions concern the straightforward interpretation of unambiguous agency regulations, a function federal courts routinely perform. According to SoundExchange, this case concerns not policy determinations but simple construction of agency regulations. SoundExchange Mem. at 12–14. This argument is misplaced for several reasons.

First, policy implications, including the intended economic outcome of the *Satellite I* determination, sit at the heart of the questions presented here. The core function of the CRB is to set “reasonable” rates and terms for the statutory license, taking into account the extensive factual record before it and balancing the statutory Section 801(b) policy factors enumerated by Congress. In challenging Sirius XM’s interpretation and implementation of the regulations, SoundExchange, not only calls into question, but seeks to fundamentally alter, the economics of the CRB’s rate determination and its policy choices. The CRB is uniquely positioned to opine on the intended economic effect of its own rate determination, a task specifically delegated to it by Congress. *See United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956) (“primary

jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties”). In short, the distinction SoundExchange attempts to draw between regulation interpretation and policymaking is a false distinction, particularly with respect to the question now before this Court.⁸

Second, SoundExchange’s suggestion that the primary jurisdiction doctrine is inapplicable when the question is a matter of the interpretation of agency regulations finds no support in the case law. Courts routinely invoke the primary jurisdiction doctrine when the question presented concerns the proper interpretation of agency regulations, particularly rate determinations that were the product of a highly detailed and technical regulatory process. *See Allnet*, 965 F.2d at 1120 (“[I]t is hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations.”); *see also Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1089 (9th Cir. 2006) (“the interpretation of an agency order issued pursuant to the agency’s congressionally granted regulatory authority falls within the agency’s primary jurisdiction *where the order reflects policy concerns* or issues requiring uniform resolution.”) (emphasis added).

For example, in *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956), the seminal case invoking the primary jurisdiction doctrine, the Supreme Court referred a question of tariff interpretation to the Interstate Commerce Commission for resolution. The dispute in *Western Pacific*, as the one here, concerned the proper interpretation of a definition supplied by an agency in the context of its Congressionally-delegated policymaking and rate-setting. The

⁸ *See Western Pacific*, 352 U.S. at 68–69 (“[T]he mere fact that the issue is phrased in one instance as a matter of tariff construction and in the other as a matter of reasonableness should not be determinative on the jurisdictional issue. To hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation at the whim of the pleader.”).

Court held that the ICC should decide the definitional question in the first instance; as the Court explained, “to decide the question of the scope of this tariff without consideration of the factors and purposes underlying the terminology employed would make the process of adjudication little more than an exercise in semantics.” *Id.* at 67. Thus, the Court held, the definitional controversy should be resolved “not by the courts but by the agency which had the exclusive power to pass on the rate in the first instance.” *Id.* The same logic applies to questions concerning the proper interpretation and application of the CRJs’ rate determination.

Similarly, in *In re StarNet, Inc.*, 355 F.3d 634 (7th Cir. 2004), the court referred a question concerning the definition of the word “location” in FCC regulations to the agency: “Instead of trying to divine how the FCC would resolve the ambiguity created by the word ‘location,’ we think it best to send this matter to the Commission under the doctrine of primary jurisdiction.” 355 F.3d at 639. Primary jurisdiction is also often invoked where the court requires further clarification of the existing regulations. *See, e.g., Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 111 (D.C. Cir. 2012) (“Pursuant to this [primary jurisdiction] doctrine, we will leave it to the FEC in the first instance to explain the meaning and scope of 11 C.F.R. § 104.20(c)(9), or, if the agency deems it appropriate, to engage in further rulemaking to better clarify the regulatory regime.”). The fact that this case involves a controversy concerning the proper scope and interpretation of the CRB’s own regulations is a reason to invoke the primary jurisdiction doctrine, not to avoid it.

II. The CRB has “Continuing Jurisdiction” to Address the Questions Presented in this Case

Finally, SoundExchange argues that referral under primary jurisdiction would be inappropriate because it is “far from clear” that the CRB has jurisdiction to address the questions presented. SoundExchange’s arguments are not persuasive.

As the D.C. Circuit has held, “for an issue to fall within an agency’s primary jurisdiction, the agency need not possess definite authority to resolve it; rather, there need only be ‘sufficient statutory support for administrative authority that the agency should at least be requested to proceed’ in the first instance.” *Comcast Corp. v. FCC*, 600 F.3d 642, 648 (D.C. Cir. 2010) (citing *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289, 304 (1973)) (alterations omitted); *see also Ricci*, 409 U.S. at 304 (finding primary jurisdiction where “there is sufficient statutory support for administrative authority in this area”).

The CRB’s “continuing jurisdiction” provides more than sufficient statutory support for its exercise of jurisdiction over the question presented here. As SoundExchange itself acknowledges, the continuing jurisdiction authority granted to the CRB permits it to correct “technical or clerical” errors and to modify the terms of the rate determination “in response to unforeseen circumstances that would frustrate the proper implementation of such determination.” 17 U.S.C. § 803(c)(4). Referring this action to the CRB so that it can decide whether Sirius XM’s exclusions were proper under the rate determination—or if some other mechanism should have been used to account for its performances of exempt sound recordings—fits easily within either of those two grants of continuing jurisdiction authority. For example, the CRJs used their continuing jurisdiction authority to modify the definition of “interactive stream” in a prior rate determination proceeding, as either a technical correction or a response to “unforeseen circumstances.” *See, e.g.*, Copyright Office, Review of Copyright Royalty Judges Determination, 74 Fed. Reg. 4537, 4543 (Jan. 26, 2009).⁹ A similar result would obtain here if the CRJs concluded that a technical correction were required to clarify that the Gross Revenues

⁹ SoundExchange does not respond to Sirius XM’s showing in its moving papers that the CRB has understood its continuing jurisdiction authority very broadly, including using the authority to modify definitions contained in prior rate determinations. *See* Sirius XM Mem. at 7 n.2.

exclusions permitted Sirius XM's exclusions for its exempt performances. Or, alternatively, if the CRJs determined that the revenue exclusion were not the correct way to account for pre-1972 recordings and non-music programming, the CRJs could modify the rate determination to enact a different mechanism to avoid the "unforeseen circumstances" of Sirius XM paying royalties for performances not covered by the statutory license. As discussed *supra*, that was the clear intent of the CRB's rate determination.

Finally, SoundExchange suggests that referral is inappropriate because the CRB does not have the authority to award the damages it seeks. According to SoundExchange, "to obtain a damages award, SoundExchange would have to return to this Court." SoundExchange Mem. at 16. The fact that the CRB cannot award damages has no bearing on whether the issue should be referred to the agency for its expert resolution and determination. The purpose of the referral is not for the agency to resolve every aspect of the claims pending before the district court, but to obtain the agency's authoritative views on the substantive issues. For that reason, cases are not *transferred* to the agency for resolution under primary jurisdiction; rather, they are "referred," with the court retaining jurisdiction over the case to resolve the matter once the agency has weighed in. It is neither unusual nor problematic that SoundExchange would have to return to this court to obtain any damages award.¹⁰

Moreover, the central case on which SoundExchange relies, *Ryan v. Chemlawn Corp.*, 935 F.2d 129 (7th Cir. 1991), is inapposite. The court declined to refer a question to the EPA under primary jurisdiction, not only because the plaintiff sought only damages, but because she asserted only state common-law claims that were "not dependent on any EPA provisions." *Id.* at

¹⁰ Of course, if the CRB determined that Sirius XM's exclusions were permissible under the *Satellite I* determination, or modified the determination to provide some other mechanism to account for exempt performances, SoundExchange will have no damages.

132. In other words, because there were no federal questions presented whatsoever, let alone questions that turned on the proper construction of the EPA's rules or regulations, the court "fail[ed] to understand what role the EPA can play in this suit." *Id.* at 131. To the contrary here, the CRB's role in interpreting its own rate determinations is clear, even if it lacks the power to award the specific damages SoundExchange seeks.

CONCLUSION

For the foregoing reasons and those stated in Sirius XM's moving brief, this Court should dismiss or stay the instant proceedings pending referral to the CRB.

Dated: December 20, 2013

Respectfully submitted,

/s/ Peter D. Isakoff

Peter D. Isakoff (D.C. Bar No. 358419)
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW Suite 900
Washington, D.C., 20005
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
peter.isakoff@weil.com

R. Bruce Rich (*pro hac vice*)
Todd Larson (*pro hac vice*)
Adam Banks (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
bruce.rich@weil.com
todd.larson@weil.com
adam.banks@weil.com

Counsel for Sirius XM Radio Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, I caused a true and correct copy of the foregoing Reply Memorandum in Further Support of Sirius XM's Motion to Dismiss to be filed and served using the CM/ECF system, which shall send notice to all counsel of record.

/s/ Peter Isakoff

Peter Isakoff

EXHIBIT E

(LODGED UNDER SEAL)

EXHIBIT F

Exhibit F



O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
HONG KONG
LONDON
LOS ANGELES
NEWPORT BEACH
NEW YORK

1999 Avenue of the Stars
Los Angeles, California 90067-6035
TELEPHONE (310) 553-6700
FACSIMILE (310) 246-6779
www.omm.com

SAN FRANCISCO
SEOUL
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

December 16, 2014

OUR FILE NUMBER
797,497-1

VIA E-MAIL

Henry Gradstein, Esq.
Gradstein & Marzano, P.C.
6310 San Vicente Boulevard, Suite 510
Los Angeles, California 90048

WRITER'S DIRECT DIAL
(310) 246-8588

WRITER'S E-MAIL ADDRESS
mpocha@omm.com

Re: **Flo & Eddie Inc. v. Sirius XM Radio Inc.**

Dear Henry:

We write in response to your December 11, 2014 letter regarding Sirius XM's responses to plaintiff's RFPs, Set 5 and Interrogatories, Set 2. Due to the holiday travel plans and other work commitments of Sirius XM's employees, by December 30 we will serve supplemental responses and complete our inquiry into the issues discussed below.

Music Royalty Fee

Sirius XM is willing to provide discovery related to the music royalty fee provided that the requests can be narrowed to minimize the burden and expense of the discovery.

Interrogatory Nos. 20-21

These interrogatories request the mathematical equation for the music royalty fee and to describe existing and anticipated royalties. Sirius XM objected on relevance grounds because the fee does not have a pre-72 sound recording component. Although we disagree with your statement that Sirius XM's explanation is "wrong as a factual matter," we will provide responses to these interrogatories.

RFP No. 87

This request seeks all documents describing and detailing the calculation of the music royalty fee. In addition to its relevance objection, Sirius XM objected on burden grounds because the request seeks all documents, including emails, from 2009 to the present. As we discussed during the meet and confer, responding to this request will be expensive and time consuming because it will require collecting and reviewing documents, including emails, from

Exhibit F

O'MELVENY & MYERS LLP

Henry Gradstein, Esq. – December 16, 2014 – Page 2

multiple custodians across a span of more than five years. To reduce the burden of this discovery and to provide materials to you more quickly, Sirius XM will provide a sample of documents that show how the music royalty fee was calculated and tracked internally and that provide background information on the fee. We will make this production by this Friday, December 19. After the production, if additional documents are necessary, we are open to discussing ways to narrow the request.

RFP Nos. 88-91

These requests seek all documents concerning or relating to the collection of the music royalty fee. In addition to its relevance objection, Sirius XM objected on burden grounds because the requests broadly seek the production of every document, including emails, related to the collection of the fee. Like Request 87, this will require collecting and reviewing documents for a time period of more than five years.

Thank you for offering to narrow the requests. During the meet and confer, you indicated that a representation by Sirius XM that it does in fact collect the music royalty fee from its subscribers might be sufficient in lieu of producing documents. Let us know if that will work.

InterrogatoriesInterrogatory Nos. 4 & 5

These interrogatories seek California and national revenue totals. We disagree that there are any deficiencies in the responses. During the meet and confer, you requested that we confirm whether more revenue information can be provided for California. We have confirmed with Sirius XM's tax department that there is no additional revenue information available other than what has already been provided to you.

Your belief that this is "inconceivable" is mistaken. Because Sirius XM does not have to pay sales tax on the services it provides subscribers in California, the company does not track subscriber-specific revenue for California. Such information is therefore not kept in the ordinary course of business and we do not have a way to generate that information for use in this litigation.

You also requested updated revenue totals and a legend to help describe the categories listed in Attachment A. Updated revenue through October 2014 was enclosed with the letter accompanying Sirius XM's December 3, 2014 production. We will also include the updated revenue totals as part of our supplemental responses and we will describe the categories listed in Attachment A.

Interrogatory Nos. 6-9

These interrogatories seek California and national subscriber counts. To respond to your questions regarding the breakdown of subscribers in Attachment B, we will supplement the

Exhibit F

O'MELVENY & MYERS LLP

Henry Gradstein, Esq. – December 16, 2014 – Page 3

responses to describe the categories. We will also provide a more detailed version of Attachment B that provides the most current subscriber counts, including for standalone internet subscribers.

Interrogatory Nos. 10-11

These interrogatories seek the total number of performances and/or streams for pre-72 recordings and all recordings. During the meet and confer, you requested that we confirm with Sirius XM whether Attachments C and D to the responses, which provide detailed performance and streaming information, are complete. We have since confirmed that there is no additional information available other than consumption totals for March through October 2014 (to bring current the information on pages 4 and 5 of attachment C). We will supplement the response with the updated information and with additional descriptions, where necessary, to explain the categories listed in the attachments.

Based on my notes, we did not discuss the “additional gaps” identified in your letter: Attachment “C” p. 3 “SXM SDARS” 1/13 - 9/13 and “Sirius & XM Web” 1/13 - 11/13; Attachment “C” p. 4 “On Demand Consumption Total” 10/11 - 7/12; Attachment “D” “SXM SDARS” and “XM SDARS” 2/14 - 9/14. We are looking into these issues and we will get back to you soon.

Regarding the lists of sound recordings from the Dalet and Prophet databases, during the meet and confer we discussed whether the databases are comprehensive and you also inquired about the meaning of the “add date” field. We are looking into these issues and we will provide additional description where necessary to explain the lists.

Regarding monthly playlists, based on my notes, you indicated that the “date” field was missing from the playlists from Jan. 2013 onward. We confirmed that the date field has been provided. As for the “year” field, we are looking into whether that information was previously produced and if not, whether it is available for the playlists in question.

Interrogatory No. 12

This interrogatory seeks the total percentage of performances and/or streams that are pre-72 recordings. In response, Sirius XM provided the information it used in connection with payments to SoundExchange, because that is the information Sirius XM calculates and maintains in the ordinary course of business to track the percentage of performances that are of pre-72 recordings. You asked for confirmation that the percentages are “correct.” Although we disagree with your claim that the response is not already complete, we will amend to clarify that this information is correct.

Interrogatory Nos. 13, 15 and 17

These interrogatories seek information that Sirius XM reported to any government agency or tribunal regarding performances of and revenues from pre-72 recordings. Sirius XM’s responses reference the revised and original rebuttal testimony by David Frear in the CRB

Exhibit F

O'MELVENY & MYERS LLP

Henry Gradstein, Esq. – December 16, 2014 – Page 4

PSS/Satellite II proceedings. We agreed to produce the testimony to the extent it was not publicly available. We have confirmed that the revised rebuttal testimony was produced without redactions at Bates SXM-F&E_00004554. We will produce an unredacted version of the original rebuttal testimony by December 19.

Interrogatory Nos. 22-23

These interrogatories request that Sirius XM state whether it contends that there are less than either 40 or 100 owners of pre-72 sound recordings performed by Sirius XM in California. Sirius XM responded by explaining that it does not have sufficient knowledge regarding the legal ownership of the pre-72 recordings that it played to answer the interrogatories. We disagree with your claim that these responses were deficient and that Sirius XM was required to do more. But to address your concerns, we are willing to supplement the responses.

Protective Order

Thank you for agreeing to our request to submit a revised stipulation and protective order to the court and for confirming that you will treat the discovery materials provided to you consistent with their confidentiality designations pending submission and entry of a revised protective order. We received your December 12 comments on the draft and we will provide a response shortly.

The information above is based on our investigation to date. As with our prior correspondence, we reserve all rights, including the right to amend the information provided here or in the discovery responses.

Very truly yours,

/s/ Madhu Pocha

Madhu Pocha
for O'MELVENY & MYERS LLP