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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

17 FLO & EDDIE, INC., a California  
18 corporation, individually and on behalf of  
19 all others similarly situated,

20 Plaintiff,

21 v.

22 SIRIUS XM RADIO, INC., a Delaware  
23 corporation; and DOES 1 through 10,

24 Defendants.

Case No. 2:13-cv-05693-PSG-GJS

**PLAINTIFF FLO & EDDIE, INC.’S  
NOTICE OF MOTION AND MOTION  
IN LIMINE TO PRECLUDE DR. KEITH  
R. UGONE FROM TESTIFYING  
CONCERNING (1) SIRIUS XM’S COSTS  
(2) ALTERNATIVE DAMAGE MODELS  
(3) ALLOCATION OF PRE-1972  
SUBSCRIPTION REVENUE TO TALK  
CHANNELS AND (4) UNFOUNDED  
MATTERS BEYOND UGONE’S  
EXPERTISE**

**[MIL 11 of 13]**

Trial Date: November 15, 2016  
Complaint Filed: August 1, 2013  
Honorable Philip S. Gutierrez

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that, on November 15, 2016 at 9:00 a.m. or as  
3 soon thereafter as counsel may be heard in Courtroom 880 of the above entitled  
4 Court, located at 255 East Temple Street, Los Angeles, CA 90012, before the  
5 Honorable Philip S. Gutierrez, plaintiff Flo & Eddie, Inc. (“Flo & Eddie”) will and  
6 hereby does move in limine for an Order precluding Dr. Keith R. Ugone (“Dr.  
7 Ugone”) from testifying about (1) Sirius XM’s costs incurred in misappropriating  
8 pre-1972 recordings (2) alternative damage models based on “lost royalties,”  
9 “imputed license fees,” “fair market value,” “benefits received” or “detriment  
10 caused” (3) a 50% reduction of subscription revenue from pre-1972 recordings  
11 supposedly allocable to non-music channels and (4) unfounded matters beyond Dr.  
12 Ugone’s expertise including the relative value of recordings, the conclusory  
13 assertion that subscribers pay half of their subscription fees for a “commercial free  
14 listening experience” but not to hear the music, and the use of a sampling  
15 methodology to establish the percentage of licensed versus unlicensed pre-1972  
16 recordings – which cannot supplant Defendant’s affirmative burden to demonstrate  
17 it has licensed tracks.

18 The motion is made pursuant to Fed. R. Evid. §§ 401-403 702 and 703 and  
19 relevant case law on the grounds that the Court has twice approved Flo & Eddie’s  
20 damages model based on Sirius XM’s gross revenues attributable to pre-1972  
21 recordings without deduction for costs, and twice rejected Sirius XM’s attempt to  
22 “cast[] the appropriate damages measure as ‘lost royalties’ or ‘imputed license  
23 fees’.” Dkt. 225 at 21-22; Dkt. 411 at 6 (“Plaintiffs’ damages model is appropriate  
24 in this case” and “Plaintiff’s damages model has already been approved”). Ugone  
25 cannot testify contrary to the orders of the Court and the law of the case.

26 The motion is further made pursuant to Fed. R. Evid. (“FRE”) §§ 401-403,  
27 702 and 703 on the grounds that Dr. Ugone’s allocation of 50% of subscription  
28 revenue from pre-1972 recordings to non-music channels is contrary to 37 C.F.R. §

1 382.11, Sirius XM’s representations under oath and is based on hearsay. Further, Dr.  
2 Ugone’s testimony regarding the relative value of sound recordings, his contention  
3 that subscribers pay half of their subscription fees for a “commercial free listening  
4 experience” but not to hear music, and his use of a sampling methodology to  
5 establish the percentage of licensed versus unlicensed pre-1972 recordings, are all  
6 without foundation and beyond his expertise in violation of the aforesaid code  
7 sections and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 587, 589 (1993).

8 This motion is made following the conference of counsel pursuant to L.R. 7-3  
9 which took place on September 28, 2016, but counsel were unable to reach an  
10 agreement.

11 This motion is based upon this Notice, the accompanying Memorandum of  
12 Points and Authorities, all of the pleadings, files, and records in this proceeding, the  
13 court file, any matters of which this Court may properly take judicial notice or may  
14 otherwise consider, any reply Flo & Eddie may make, and any further evidence and  
15 argument that may be presented to the Court prior to or at the hearing on this  
16 Motion.

17  
18 Dated: September 30, 2016

GRADSTEIN & MARZANO, P.C.  
SUSMAN GODFREY L.L.P.

19  
20  
21 By: /s/ Rachel S. Black

22 Rachel S. Black

23 Attorneys for Plaintiff and the Class  
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1 **I. INTRODUCTION**

2 Dr. Keith R. Ugone’s (“Dr. Ugone”) Rebuttal Expert Report (“Ugone  
3 Rebuttal Report”) (Gradstein Dec. Exhibit 2) and Supplemental Rebuttal Expert  
4 Reports (“Ugone Supplemental Report”) (Gradstein Dec. Exhibit 3) proceed under  
5 the assumption that the damages model of Plaintiff Flo & Eddie, Inc. (“Flo &  
6 Eddie”) and the certified class (collectively, “Plaintiffs”) has not been approved by  
7 the Court, that royalty- and license-based models have not already been dismissed,  
8 that representations made by Sirius XM in sworn declarations both to the Court and  
9 in testimony before the Copyright Royalty Board (“CRB”) may be disregarded, and  
10 that Dr. Ugone may opine as to matters for which he has no foundation or expertise  
11 whatsoever. None of this testimony is admissible, and Dr. Ugone’s insistence on  
12 presenting theories this Court has explicitly rejected is a naked and wholly improper  
13 attempt to make an end-run around those orders.

14 As set forth in Plaintiffs’ Motions in Limine Nos. 12 and 13, this Court has  
15 twice approved Flo & Eddie’s damages model based on Sirius XM’s gross revenues  
16 attributable to pre-1972 recordings and held that the law does not permit deduction  
17 of costs. The Court also has also twice rejected Sirius XM’s attempt to put forward  
18 other damage models including those which “cast[] the appropriate damages  
19 measure as ‘lost royalties’ or ‘imputed license fees’” as having no foothold in the  
20 law. Dkt. 225 at 21-22; Dkt. 411 at 6 (“Plaintiffs’ damages model is appropriate in  
21 this case” and “Plaintiff’s damages model has already been approved”). Dr. Ugone  
22 cannot testify contrary to the orders of the Court and offer opinions regarding costs  
23 and alternative measures of damages which have been rejected.

24 Moreover, contrary to the Plaintiffs’ Court approved damage model based on  
25 37 C.F.R. § 382.11 which permits Sirius XM to exclude revenue which it  
26 “recognizes” (in accordance with GAAP) for the provision of pre-1972 recordings,  
27 and contrary to Sirius XM’s sworn statements to the Court and to the CRB that  
28

1 Sirius XM follows this methodology, Dr. Ugone opines that 50% of the pre-1972  
2 revenue recognised and excluded by Sirius XM is allocable to non-music channels  
3 and that therefore Plaintiffs’ damages should be cut in half. Worse, he bases this  
4 reduction on nothing more than hearsay from an offhand remark by a Sirius XM  
5 executive and a misreading of a CRB proceeding known as Satellite II. The only  
6 expertise he actually brings to the case in this regard is the ability to divide by two.

7 Finally, Dr. Ugone peppers his Reports with unfounded statements and  
8 conclusions regarding the relative value of recordings, his contention that  
9 subscribers pay half of their subscription fees for a so-called “commercial free  
10 listening” experience but not actually to hear music, and a “sampling methodology”  
11 implemented to more easily argue that Sirius XM has licensed additional pre-1972  
12 recordings, all beyond his expertise in violation of Fed. R. Evid. §§ 401-403, 702,  
13 703 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 587, 589 (1993).

## 14 **II. LEGAL STANDARD**

### 15 **A. Motions in Limine**

16 A motion in limine is “a procedural device to obtain an early and preliminary  
17 ruling on the admissibility of evidence.” *Farris v. Int’l Paper, Inc.*, 2014 U.S. Dist.  
18 LEXIS 162335, at \*2 (C.D. Cal. Nov. 17, 2014) (quoting *Goodman v. Las Vegas*  
19 *Metro. Police Dep’t*, 963 F. Supp. 2d 1036, 1046 (D. Nev. 2013)). “Although the  
20 Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice  
21 has developed pursuant to the district court's inherent authority to manage the course  
22 of trials.” *Luce v. U.S.*, 469 U.S. 38, 41 n.4 (1984). Under the Federal Rules of  
23 Evidence (“FRE”), “[e]vidence is relevant if [¶] (a) it has any tendency to make a  
24 fact more or less probable than it would be without the evidence; and [¶] (b) the fact  
25 is of consequence in determining the action.” FRE 401. If evidence is not relevant, it  
26 is not admissible. FRE 402. Under FRE 403, “[t]he court may exclude relevant  
27 evidence if its probative value is substantially outweighed by a danger of one or  
28 more of the following: unfair prejudice, confusing the issues, misleading the jury,

1 undue delay, wasting time or needlessly presenting cumulative evidence.” That  
2 includes unfounded expert testimony. *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d  
3 993, 1006 (9th Cir. 2001).

#### 4 **B. Expert Testimony**

5 An expert witness’ opinion may be introduced when the testimony is relevant  
6 and reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999);  
7 *Daubert*, 509 U.S. at 589 (1993). An opinion is relevant “if scientific, technical, or  
8 other specialized knowledge will assist the trier of fact to understand the evidence or  
9 to determine a fact in issue.” *Daubert*, 509 U.S. at 589 (citing FRE 702). An opinion  
10 is reliable “if the knowledge underlying it has a reliable basis in the knowledge and  
11 experience of the relevant discipline” and if the opinion has been reliably applied to  
12 the facts of the case. *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (citing  
13 *U.S. v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)). The opinion may  
14 also be considered reliable if the expert’s techniques are “generally accepted” as  
15 reliable in the relevant community, or the opinion is not based on a methodology  
16 that “diverges significantly from the procedures accepted by the recognized  
17 authorities in the field[.]” *Daubert*, 509 U.S. at 584 (citation omitted); FRE 702.

18 Because trial courts are “charged...with the responsibility of acting as  
19 gatekeepers” to exclude unreliable expert testimony, they must engage in an inquiry  
20 that examines the expert’s proposed testimony for both reliability and relevance.  
21 *Daubert*, 509 U.S. at 589; *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 841 (9th  
22 Cir. 2001). The *Daubert* “gatekeeping” function provides safeguards that are  
23 necessary to “make certain that an expert, whether basing testimony upon  
24 professional studies or personal experience, employs in the courtroom the same  
25 level of intellectual rigor that characterizes the practice of an expert in the relevant  
26 field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). As further  
27 clarified by FRE 702, expert testimony is only admissible if it is: (1) based on  
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1 sufficient facts and data; (2) the product of reliable principles and methods; and (3)  
2 the witness has reliably applied the principles and methods to the case.

3 In the Ninth Circuit, trial courts also consider “whether the experts are  
4 proposing to testify about matters growing naturally and directly out of the research  
5 they have conducted independent of the litigation, or whether they have developed  
6 their opinions expressly for purposes of testifying.” *Daubert v. Merrell Dow*  
7 *Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (“*Daubert II*”). This additional  
8 factor is important because research conducted independent of litigation “provides  
9 important objective proof that the research comports with the dictates of good  
10 science.” *Smelzer v. Norfolk Southern Railway Co.*, 105 F.3d 299, 303 (6th Cir.  
11 1997). Conversely, expert testimony that has been prepared solely for purposes of  
12 litigation “should be viewed with some caution.” *Johnson v. Manitowoc Boom*  
13 *Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007) (noting that “the best explication of  
14 the prepared-solely-for-litigation factor” comes from *Daubert II*). The exhibition of  
15 such caution is essential “because expert witnesses are not necessarily always  
16 unbiased scientists. They are paid by one side for their testimony.” *Turpin v.*  
17 *Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1352 (6th Cir. 1992).

18 “Absent research conducted independent of litigation, an expert must provide  
19 ‘other objective, verifiable evidence that the testimony is based on scientifically  
20 valid principles’” in order to ensure that said expert testimony is, in fact, the product  
21 of reliable principles and methods. *Metabolife International, Inc.* 264 F.3d at 841.

22 With regard to such, *Daubert* provides a

23 non-exhaustive list of factors for determining whether  
24 scientific testimony is sufficiently reliable to be admitted  
25 into evidence including (1) whether the scientific theory  
26 or technique can be (and has been) tested; (2) whether the  
27 theory or technique has been subjected to peer review and  
28 publication; (3) whether there is a known or potential error  
rate; and (4) whether the theory or technique is generally  
accepted in the relevant scientific community. *Domingo v.*  
*T.K.*, 289 F.3d 600, 605 (9th Cir. 2002).

1 Subject to this non-exhaustive list, “a trial court may consider one or more of  
2 the more specific factors that *Daubert* mentioned when doing so will help determine  
3 that testimony’s reliability.” *Kumho Tire Co.*, 526 U.S. at 141-142. In assessing  
4 reliability, “the trial judge’s general ‘gatekeeping’ obligation—applies not only to  
5 testimony based on ‘scientific’ knowledge, but also to testimony based on  
6 ‘technical’ and ‘other specialized’ knowledge.” *Id.* at 141. In fact, “Rule 702 does  
7 not distinguish between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’  
8 knowledge, but makes clear that any such knowledge might become the subject of  
9 expert testimony.” *Id.* The specific reference to “scientific” knowledge in *Daubert* is  
10 because “that was the nature of the expertise there at issue.” *Id.* The factors of =  
11 *Daubert*, therefore, are to be applied as to non-scientific expert testimony “where  
12 they are reasonable measures of reliability.” *Id.* at 141. Ideally, “[e]stablishing that  
13 an expert’s preferred testimony grows out of pre-litigation research or that the  
14 expert’s research has been subjected to peer review are the two principal ways the  
15 proponent of expert testimony can show that the evidence satisfies the [reliability]  
16 prong of Rule 702.” *Daubert II*, 43 F.3d at 1318. However, where

17 the testimony is not based on “pre-litigation research or if  
18 the expert’s research has not been subjected to peer  
19 review, then the expert must explain precisely how he  
20 went about reaching his conclusions and point to some  
21 objective source—a learned treatise, the policy statement  
22 of a professional association, a published article in a  
23 reputable scientific journal or the like—to show that he  
24 has followed the scientific method, as it is practiced by (at  
least) a recognized minority of scientists in his field.”  
*Carnegie Mellon Univ. v. Hoffman-LaRoche, Inc.*, 55 F.  
Supp. 2d 1024, 1030 (N.D. Cal. 1999).

25 But merely repeating hearsay is not enough. An expert may rely on hearsay,  
26 but cannot express it. “Rule 703 merely permits such hearsay, or other inadmissible  
27 evidence, upon which an expert properly relies, to be admitted to explain the basis  
28

1 of the expert’s opinion.” *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262  
2 (9th Cir. 1984); *see Fox v. Taylor Diving & Salvage Co.*, 694 F. 2d 1349, 1356 (5th  
3 Cir. 1983) (“An expert is permitted to disclose hearsay for the limited purpose of  
4 explaining the basis for his expert opinion...but not as general proof of the truth of  
5 the underlying matter.”). The expert is not, however, allowed to simply repeat  
6 inadmissible hearsay to the jury:

7           Although an expert may rely upon inadmissible hearsay,  
8           the expert must “form his own opinions by applying his  
9           extensive experience and a reliable methodology to the  
10           inadmissible materials. Otherwise, the expert is simply  
11           repeating hearsay evidence without applying any expertise  
12           whatsoever, a practice that allows the [party] to  
13           circumvent the rules prohibiting hearsay.” *Strauss v.*  
14           *Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 438 (E.D.N.Y.  
15           2013) (quoting *United States v. Mejia*, 545 F. 3d 179, 197  
16           (2d Cir. 2008)).

17           In short, expert opinions that are without factual basis and are based on  
18           speculation, hearsay or conjecture are inadmissible at trial. *California ex rel. Brown*  
19           *v. Safeway, Inc.*, 615 F.3d 1171, 1181 n.4 (9th Cir. 2010) (quoting *Major League*  
20           *Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008)).

### 21 **III. ARGUMENT**

#### 22 **A. The Court Has Twice Approved Plaintiff’s Damages Model and** 23 **Rejected Alternatives Such as “Lost Royalties” or “Imputed** 24 **License Fees;” Dr. Ugone May Not Testify to the Contrary**

25           As more particularly set forth in Plaintiffs’ Motions in Limine Nos. 12 and  
26           13,<sup>1</sup> this Court has twice approved Flo & Eddie’s damages model based on Sirius

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27 <sup>1</sup> These Motions in Limine have been filed as standalone Motions because in  
28 addition to the testimony of Dr. Ugone, Sirius XM Chief Financial Officer David  
Frear has also testified to Sirius XM’s costs and payment of royalties. *See e.g.* Dkt  
89, Decl. of David J. Frear in Opposition to Plaintiff’s Motion for Summary

1 XM’s gross revenues attributable to pre-1972 recordings without deduction for  
2 costs, and twice rejected Sirius XM’s attempt to put forward other damage models  
3 including those which “cast[] the appropriate damages measure as ‘lost royalties’ or  
4 ‘imputed license fees’” as having no apparent basis in any relevant law. Dkt. 225 at  
5 21-22; Dkt. 411 at 6 (“Plaintiffs’ damages model is appropriate in this case” and  
6 “Plaintiff’s damages model has already been approved”).

7 Specifically, in its order granting class certification, the Court approved  
8 Plaintiff’s damages model consisting of “Sirius XM’s Gross Revenues as defined at  
9 37 C.F.R. § 382.11” multiplied by “[t]he percentage of performances of pre-1972  
10 recordings on Sirius XM’s service” multiplied by “[t]he percentage of Sirius XM’s  
11 subscribers located in California.” Dkt. 225 at 20-21. The Court further held that this  
12 measure, which accounted for “100% of Sirius XM’s revenues attributable to pre-  
13 1972 recordings, without deduction for costs,” was supported by both California and  
14 Ninth Circuit authority. *Id.* at 21 (citing *A&M Records, Inc. v. Heilman*, 75 Cal.  
15 App. 3d 554, 570 (1977)(“*Heilman*”) and *Lone Ranger Television, Inc. v. Program*  
16 *Radio Corp.*, 740 F.2d 718, 725 (9th Cir. 1984)(“*Lone Ranger*”). Thus, the Court  
17 approved a class-wide measure of damages equal to Sirius XM’s gross receipts  
18 attributable to pre-1972 recordings, and further held that costs should not be  
19 deducted therefrom under prevailing law. *Id.* The Court flatly rejected Sirius XM’s  
20 attempt to “cast[] the appropriate measures of damages as ‘lost royalties’ or  
21 ‘imputed license fees’” and noted that “Sirius XM does not demonstrate that its  
22 alternative measures of damages are either available under the law or that they  
23 would enable greater class and class member recovery.” *Id.* at 21-22.

24 To use this Court’s parlance, it was *deja vu* all over again when Sirius XM  
25 filed its motion for partial summary judgment once more arguing that Plaintiffs’

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26  
27 Judgment.



1 “gross revenues attributable to [Sirius XM’s] use of [their pre-1972] recordings  
2 without deduction of costs” was an improper measure of damages, that “proving  
3 actual damages at law on a class-wide basis would require complicated  
4 individualized inquiries into lost royalties or foregone licensing opportunities,” and  
5 that *Heilman* and *Lone Ranger* did not preclude deductions for costs. Dkt. 335 at 4,  
6 21-22. Once again, relying on *Heilman* and *Lone Ranger*, the Court flatly rejected  
7 these arguments, holding that “Plaintiff’s damages model is appropriate in this case”  
8 and that “Plaintiff’s damages model has already been approved.” Dkt. 411 at 6.

9 Notwithstanding the foregoing, Dr. Ugone ignores this Court’s rulings and  
10 opines that “it is appropriate to deduct costs from a calculation of Sirius XM’s  
11 alleged gained revenues from its use of Pre-1972 Recordings.” (Ugone Rebuttal  
12 Report pp. 5, 14, 27-38, Exs. 7-14; Ugone Supplemental Rebuttal Report pp. 7,8,16,  
13 49, 53-62.) Without limitation, he deducts costs for: “Programming and Content,  
14 Customer Service and Billing, Satellite and transmission, Cost of equipment,  
15 Subscriber Acquisition Costs, Sales and Marketing, Engineering, Design, and  
16 Development, General and Administrative, Depreciation and Amortization,  
17 Restructuring and Related Costs.” *Id.* at Ex. 7. He then allocates the costs as  
18 between music channels and talk channels (which is further problematic as  
19 discussed below) and calculates “music-specific adjusted operating margins ranging  
20 from 22.5% in 2009 to 38.6% in 2014.” (Ugone Rebuttal Report pp. 31, Ex. 13.)  
21 From there, he engages in wholesale additional deductions “relating to Sirius XM’s  
22 contributions to its financial success” (Ugone Rebuttal Report pp. 31-38) which  
23 results in his ultimate opinion that Sirius XM’s unauthorized use of pre-1972  
24 recordings – for which they have been found liable already, and for which they have  
25 already paid over \$210 million to exploit – nets Sirius XM next to nothing.

26 Dr. Ugone further ignores this Court’s rulings and opines that Sirius XM’s  
27 gross revenues from pre-1972 recordings calculated by Sirius XM in accordance  
28

1 with 37 C.F.R. § 382.11 is not a proper measure of damages as approved by the  
2 Court. Instead, Dr. Ugone proposes alternative measures of damages not approved  
3 by the Court, including a “royalty measure as a measure of economic harm” (Ugone  
4 Rebuttal Report pp. 7, 39-44; Ugone Supplemental Rebuttal Report pp. 9, 64-79), a  
5 variation thereof described as “fair market value of the performance right to pre-  
6 1972 recordings” (Ugone Supplemental Rebuttal Report pp. 4, 16-18, 64), and  
7 “benefits that may have been received by putative class members” (Ugone Rebuttal  
8 Report pp. 14, 38-39; Ugone Supplemental Rebuttal Report pp. 8, 16) less the  
9 “detriment caused.” (Ugone Supplemental Rebuttal Report pp. 80-81).

10 None of this is proper, and all of it should be deemed inadmissible under the  
11 Federal Rules of Evidence. Evidence that runs contrary to prior decisions of the  
12 Court is irrelevant and should be excluded. *See Fahmy v. Jay Z*, 2015 U.S. Dist.  
13 LEXIS 129446, at \*31 (C.D. Cal. Sep. 24, 2015) (“To the extent defendants argue  
14 that plaintiff should be precluded from introducing evidence or argument intended  
15 to re-litigate [various issues], the Court agrees with defendants that these issues have  
16 already been resolved and that plaintiff may not submit evidence which contradicts  
17 the Court’s rulings.”); *Oracle America, Inc. v. Google Inc.*, 2012 WL 877125, at \*4  
18 (N.D. Cal. Mar. 15, 2012) (striking portions of expert opinion that were “too close  
19 to an inappropriate suggestion of law” because permitting the testimony “that is  
20 contrary to law would intrude on the Court’s role in instructing the jury.”). Indeed,  
21 Dr. Ugone’s opinions have been stricken in other matters for failing to adhere to the  
22 prevailing law governing damages. *Tex. Advanced Optoelectronic Solutions, Inc. v.*  
23 *Intersil Corporation*, No. 4:08-cv-451, 2015 WL 602284, at \*2 (E.D. Tex. Feb. 11,  
24 2015) (striking elements of Dr. Keith Ugone’s opinion that were inconsistent with  
25 Federal Circuit law on patent damages); *Ultratec, Inc. v. Sorenson Commc’ns, Inc.*,  
26 No. 13-CV-346-BBC, 2014 WL 5361940, at \*3 (W.D. Wis. Oct. 21, 2014)  
27 (precluding Dr. Keith Ugone from testifying on proposed royalty rates); *I/P Engine*,

1 *Inc. v. AOL Inc.*, No. 2:11CV512, 2012 WL 12068846, at \*3 (E.D. Va. Oct. 12,  
2 2012) (striking reasonably royalty calculation of Dr. Keith Ugone for using  
3 methodologies contrary to law and limiting Dr. Ugone to only “using established  
4 methods of calculating damages” in the proceedings).

5 Moreover, it is improper to attempt to circumvent the decisions of the Court  
6 through the back door of an expert’s testimony. *See, e.g., AngioScore, Inc. v.*  
7 *TriReme Med., Inc.*, 2015 U.S. Dist. LEXIS 120152, at \*7 (N.D. Cal. Sep. 8, 2015)  
8 (granting, in relevant part, motion *in limine* to preclude expert testimony  
9 encompassing argument previously rejected by the Court); *Ramirez v. Las Vegas*  
10 *Metro. Police Dep’t*, 2012 U.S. Dist. LEXIS 31604, at \*8 (D. Nev. Mar. 9, 2012)  
11 (granting motion *in limine* to preclude evidence, argument, expert testimony, or  
12 opinion contrary to the court's prior summary judgment order); *Carson Harbor Vill.,*  
13 *Ltd. v. Unocal Corp.*, 2003 U.S. Dist. LEXIS 14438, at \*8 (C.D. Cal. Aug. 8, 2003)  
14 (noting that expert cannot offer testimony contrary to the law of the case); *see also*  
15 *United States v. Boyajian*, 2015 U.S. Dist. LEXIS 64220, at \*6 (C.D. Cal. May 13,  
16 2015) (improper that “defendant continues to seek to present his contrary view of  
17 the law to the jury through expert testimony”) (citing *Hangerter v. Provident Life &*  
18 *Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) and *United States v.*  
19 *Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993); *Webb v. Estate of Cleary*, 2011  
20 U.S. Dist. LEXIS 8305, at \*14 (W.D. Wash. Jan. 20, 2011) (“Expert opinion to the  
21 contrary does not change [an] established principle of law.”).

22 Accordingly, Dr. Ugone should not be permitted to testify contrary to the  
23 orders of this Court and offer any opinions regarding costs or alternative measures  
24 of damages.

**B. Dr. Ugone Should Not Be Permitted to Testify That 50% of the Pre-1972 Revenues Sirius XM Deducted Under 37 C.F.R. § 382.11 Are Actually Revenues from Non-Music Channels**

Dr. Ugone should not be permitted to testify that 50% of the pre-1972 Gross Revenues that Sirius XM deducted under 37 C.F.R 382.11 consists of subscription revenue from non-music channels and that therefore Sirius XM’s recognition (and deduction) of such pre-1972 revenues should be cut in half. Ugone’s observation is based on an intentional misreading of the CRB proceeding known as Satellite II and an offhand comment from a Sirius XM radio executive (contradicted by Dr. Ugone’s own deposition testimony) to the effect “that Sirius XM generally considers its music and non-music content to contribute equally to its revenue earned from subscription packages.” (Ugone Report p. 22-27) Dr. Ugone then concludes that “the above considerations indicating an approximately equal apportionment between music and non-music content,” “reduce[s] [Plaintiffs’ expert’s] calculation of Sirius XM’s revenues related to Pre-1972 Recordings from California subscribers by 50%.” *Id.*

In order to understand the absurd and unfounded nature of Dr. Ugone’s hearsay conclusion – which cannot survive *Daubert* -- a brief review of Sirius XM’s methodology for calculating its pre-1972 revenue is in order. In connection with its statutory license for *post*-1972 recordings, Sirius XM calculates, segregates, and then deducts all of the revenue that *it* has determined *pursuant to GAAP* is attributable to its exploitation of *pre*-1972 recordings, not to its exploitation of non-music content. Specifically, under 37 C.F.R. 382.11, “Gross Revenues shall exclude...[r]evenues recognized by the Licensee for the provision of...sound recordings ...exempt from any license requirement.” (Emphasis added) As David Frear, Sirius XM’s CFO and arguably the originator of its methodology, testified in this case: “Because we pay for the federal statutory license under a percentage of

1 revenue formula, we needed a way to reduce our revenue (and thus our payments to  
2 SoundExchange) *to account for the proportion of our subscription fees attributable*  
3 *to the performance of Pre-1972 Recordings.*” Dkt 89, Decl. of David J. Frear in  
4 Opposition to Plaintiff’s Motion for Summary Judgment, at ¶ 7 (emphasis added).

5 The definition of Gross Revenues in 37 C.F.R. § 382.11 was expressly  
6 vetted by the CRB following extensive economic testimony, including by Sirius  
7 XM, so that it would “unambiguously relate the fee charged for a service that an  
8 SDARS provided to the value of the sound recording performance rights covered  
9 by the statutory license.” Satellite II, 78 Federal Register, No. 74 at p. 23072. The  
10 definition was fully supported by Sirius XM. In fact, “Sirius XM request[ed]  
11 continuance of the current definition of *Gross Revenues* in 37 CFR 382.11, arguing  
12 that it properly identifies only those revenues that are related to the provision of  
13 statutorily licensed sound recordings.” *Id* at 23071. Mr. Frear testified in his  
14 Written Rebuttal Testimony in the Satellite II proceeding, “[t]he regulations define  
15 ‘Gross Revenue’ through a variety of exclusions in order to ‘more clearly delineate  
16 the revenues related to the value of the sound recording performance rights at  
17 issue’” and represent a “carefully tailored approach to reportable revenues.” (Dkt.  
18 203-1).<sup>2</sup>

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19  
20 <sup>2</sup> “Gross Revenues” as defined at 37 C.F.R. § 382.11 expressly exclude advertising  
21 revenues attributable to channels that “use only incidental performances of sound  
22 recordings” and “channels, programming, products and other services offered for a  
23 separate charge where such channels use only incidental performances of sound  
24 recordings.” This definition was designed to assure that the revenue base was  
25 “related to the value of sound recording performance rights at issue” and did not  
26 include advertising revenues from bundled non-music channels. It also provides  
27 Sirius XM with an element of discretion to assure that it is not paying royalties on  
28 subscription revenues it believes are not related to the value of sound recordings by  
offering non-music channels for a separate charge, such as for Howard Stern,  
premium sports packages, and other premium services.

1 Dr. Ugone had *never even read* the definition of Gross Revenues in 37  
2 C.F.R. § 382.11 until his deposition following submission of his Rebuttal Report.  
3 (Ugone Depo. 103:17-104:24) (Cited pages of Ugone Depo. Gradstein Dec. Exhibit  
4 1) Dr. Ugone relied solely on references to expert testimony in Satellite II to come  
5 to the erroneous conclusion that 50% of pre-1972 revenue was allocable to non-  
6 music channels. (Ugone Depo. 259:19-260:12) But because Dr. Ugone had not read  
7 37 C.F.R. § 382.11, he could not have understood how “the variety of  
8 exclusions...more clearly delineate the revenues related to the value of the sound  
9 recording performance rights at issue” and represent a “carefully tailored  
10 approach to reportable revenues” as Mr. Frear had testified. (Dkt. 203-1.)<sup>3</sup>

11 Dr. Ugone did nothing at all to confirm an equal allocation of subscription  
12 revenue, or any allocation at all. He has not counted channels, evaluated clock  
13 time, considered listening percentages on Sirius XM’s internet service as a proxy  
14 for its satellite service, or performed any financial analysis whatsoever as to  
15 whether bundling subscription packages with non-premium, non-music channels  
16 with *advertising* contributes to subscription revenue at all (as distinct from  
17 advertising revenue). (Ugone Depo. 260:18-25; 261:2-19; 265:8-13; 274:10-  
18 275:22; 283:24-284:6; 291:22-292:8; 299:23-300:19; 312:21-313:13) Nor has he  
19 investigated how much of the assumed equal contribution from non-music content  
20

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21  
22 <sup>3</sup> In his Rebuttal Report, Dr. Ugone also short cites the CRB to support his 50/50  
23 valuation of music and non-music channels, stating: “According to the CRB, ‘[t]he  
24 value of Sirius XM’s satellite radio service is the bundling of music and non-music  
25 content with its delivery platform.’” (Ugone Rebuttal Report at p. 24.) In fact, the  
26 full quote had the opposite meaning: “The value of Sirius XM’s satellite radio  
27 service is the bundling of music and non-music content with its delivery platform,  
28 *and Sirius XM has failed to present convincing evidence that its delivery platform  
and non-music content, alone, present a viable business.*” Satellite II, *supra*, at p.  
23065 (emphasis added).

1 comes from premium channels for which there is a separate charge. (Ugone Depo.  
2 283:24-284:6; 307:2-12) Nor did he even discuss with Sirius XM executives, as he  
3 said in his Rebuttal Report, whether “Sirius XM generally considers its music and  
4 non-music content to contribute equally to its revenue earned from subscription  
5 packages.” Rather, Dr. Ugone testified that this discussion was in the context of  
6 allocating costs:

7 Q. Did you -- and did you also talk to someone at SiriusXM to determine --  
8 to come up with that determination that roughly half of SiriusXM's content-  
9 related revenue was attributable to non-music content?

10 A. Not necessarily in this context, but I believe the subject came up.

11 Q. With whom?

12 A. That would have been with Mr. Byrd and Ms. Brooker, I think it is.

13 Q. And who are they?

14 A. Mr. Byrd is a director of financial reporting, and Ms. Brooker, I think it  
15 is, is a vice president on the corporate finance end.

16 Q. What did they tell you on this topic?

17 A. I'm saying it wasn't directly related to this topic, but where we do some  
18 cost divisions, we use the 50 percent figure in another context.

19 (Ugone Depo. 261:2-19)

20 To Dr. Ugone, “it just seemed intuitively obvious that when you look at the  
21 packages that are included in the subscription revenues, that that includes non-music  
22 content.” (Ugone Depo. 260:18-25) But the *Daubert* “gatekeeping” function requires  
23 so much more than the intuitive speculations of an expert who merely repeats  
24 hearsay. Dr. Ugone has not articulated any substantive foundation for his opinion  
25 that 50% of the pre-1972 Gross Revenues that Sirius XM deducted under 37 C.F.R.  
26 382.11 consists of subscription revenue from non-music channels. His opinion was  
27 developed specifically for this litigation based on what he was ambiguously told by  
28 Sirius XM executives and from a misreading of the work of other experts in Satellite  
II. His only applied expertise was to divide pre-1972 subscription revenue in half.  
His testimony is not (1) based on sufficient facts and data, but rather hearsay; (2) the  
product of reliable principles and methods; and (3) the application of any principles

1 and methods to the case. Accordingly it is inadmissible under FRE §§ 401-403,  
2 702, and 703.

3 There is an additional reason that Dr. Ugone’s opinion should not be  
4 admissible, and that is judicial estoppel. As discussed above, Sirius XM has asserted  
5 the propriety of its calculation and deduction of subscription fees attributable to the  
6 performance of Pre-1972 Recordings in (1) testimony and interrogatory responses in  
7 this litigation; (2) testimony and pleadings filed in the *Satellite I* and *Satellite II*  
8 proceedings before the CRB; and (3) monthly certified Statements of Account to  
9 SoundExchange. As a result, Sirius XM should be judicially estopped from trying to  
10 assert a completely different and contrary position on that subject through the  
11 purported “expert opinion” of Dr. Ugone. *See, e.g., Rissetto v. Plumbers &*  
12 *Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996) (citing *Milgard Tempering,*  
13 *Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990)); *Humetrix, Inc. v.*  
14 *Gemplus S.C.A.*, 268 F.3d 910, 917 (9th Cir. 2001) (citing *Yniguez v. Arizona*, 939  
15 F.2d 727, 738 (9th Cir. 1991), *vacated on other grounds sub nom. Arizonans for*  
16 *Official English v. Arizona*, 520 U.S. 43 (1997)).

17 **C. Dr. Ugone’s Unfounded Opinions Regarding the Relative Value of**  
18 **Recordings, Subscription Fees for a “Commercial Free Listening**  
19 **Experience”, and a Sampling Methodology to Establish What**  
20 **Sirius XM Licensed Should Be Excluded**

21 1. Dr. Ugone’s Unfounded Opinions Regarding the Relative Value of  
22 Musical Recordings Should Be Excluded.

23 Dr. Ugone opines that “to conduct a reliable analysis from an economic  
24 perspective, [Plaintiff’s expert] would have needed to develop a claimed damages  
25 model that attributed weights to each Pre-1972 Recording based upon value  
26 indicators such as the artist, popularity (including genre, placement on the top hits  
27 charts, and weeks on the top hits charts), the time of day played, and the channel on  
28



1 which it was played, among other considerations,” all of which he discusses in his  
2 Rebuttal Report without a shred of expertise. (Ugone Rebuttal Report at pp. 3-4, 17-  
3 19.). Again, Dr. Ugone attempts to circumvent the orders of this Court, which held  
4 that by looking at the number of times a recording has been played, the relative value  
5 of the recording is already baked in to the damages model. Dkt. 225 at 22.

6 In any event, Dr. Ugone is not qualified to render such an opinion. In his entire  
7 history as an expert, he has never worked on a matter regarding the market for sound  
8 recordings except tangentially in an antitrust dispute between two Christian record  
9 labels. (Ugone Depo.28:17-29:25; 32:5-9) He has never acted as a consultant or  
10 offered any opinions in connection with the music industry. (Ugone Depo. 35:6-11)  
11 He has never been retained by a terrestrial radio company. (Ugone Depo.97:15-99:4)  
12 He has never been retained to provide economic consulting and expert testimony by  
13 an online provider of music regarding their music service. *Id.* He has never  
14 performed an economic evaluation of a music catalog. (Ugone Depo. 227:2-6)

15 And notwithstanding Dr. Ugone’s opinion that a damage model must  
16 “attribute[] weights to each Pre-1972 Recording based upon value indicators such as  
17 the artist, popularity (including genre, placement on the top hits charts, and weeks  
18 on the top hits charts), the time of day played, and the channel on which it was  
19 played, among other considerations,” he testified that he does not have an  
20 independent opinion as to any viable alternative methodology to that of Plaintiff’s  
21 expert and Sirius XM’s proration approach:

22 Q. Okay. In your report, you have pointed out that some songs are more  
23 popular than other songs; different genres are more popular than other  
24 genres; right?

25 A. Yes.

26 Q. But you haven't told us what to do with that information; correct?

27 A: I mean, these are all the reasons why there's issues with what Mr.  
28 Wallace did.

:

1 Q. But you don't have an independent opinion about how to take what  
2 you're saying and apply it as a methodology, and you haven't developed that  
3 methodology; correct?

4 A. Not in my report, that's correct.

5 Q. Not as of today, you haven't done it; right?

6 A. Correct.

7 Q. You haven't performed any economic analysis based on data that you  
8 researched and came up with an approach that's an alternative methodology  
9 to the proration approach; right?

10 A. I would agree with that.

11 (Ugone Depo. 232:4-233:2)

12 Dr. Ugone has failed to appreciate that the relative “weight” to be given to  
13 any recording in terms of total revenue is a function of how many times that  
14 recording is played. Any single play of a recording has the same revenue “value to  
15 Sirius XM” as any single play of any other recording because Sirius XM makes an  
16 economic choice to play that recording rather than another recording in order to  
17 maximize subscription revenue. The relative popularity and value of the recordings  
18 are reflected in the number of times they are chosen to be played or performed, but  
19 the revenue per play remains constant. Indeed, that is how Sirius XM allocates  
20 revenue, and it is the industry standard. As Mr. Frear has declared:

21 In the 2007 proceeding, the CRB adopted a definition of revenue  
22 that exempted revenues from programming “exempt from any  
23 license requirement” or “separately licensed.” We understood the  
24 former to allow a deduction from the revenue base on account of  
25 performances of Pre-1972 Recordings (which are not subject to  
26 any “license requirement”) and reduced the revenue base upon  
27 which the statutory rate is applied to reflect such performances.  
28 (Specifically, we used a straight pro-ration: if 12% percent of our  
plays of sound recordings in a particular month were Pre-1972  
Recordings, we reduced the revenue base – and thus the payment  
to SoundExchange – by 12%). We did so because we believed that  
to be the most reasonable and logical way to implement the above-  
mentioned revenue exclusion.

(Dkt 89, ¶ 11, Decl. of David J. Frear In Opposition to Plaintiff’s Motion for  
Summary Judgment). It is also the methodology approved by the Court. (Dkt. 225 at

1 22.)

2 The opinions that Dr. Ugone has offered to the contrary are *ipse dixits*, and  
3 that is not a proper basis upon which to admit expert testimony. “[N]othing in either  
4 Daubert or the Federal Rules of Evidence requires a district court to admit opinion  
5 evidence that is connected to existing data only by the ipse dixit of the expert.”  
6 *General Electric Co v. Joiner*, 522 U.S. 136, 146 (1997). In accordance to Black’s  
7 Law Dictionary, an “ipse dixit” is defined as “a bare assertion resting on the  
8 authority of an individual.” *Black’s Law Dict.* p. 743, col. 2 (5th ed. 1979).  
9 Moreover, an expert witness who is testifying “solely or primarily on his experience  
10 ‘must explain how that experience leads to the conclusions reached, why that  
11 experience is a sufficient basis for the opinion, and how that experience is reliably  
12 applied to the facts.’” *In re Toyota Motor Corp. Unintended Acceleration Mktg.,*  
13 *Sales Practices & Prods. Liab. Litig.*, 978 F.Supp. 2d 1053, 1067 (C.D. Cal. 2013).  
14 (quoting *Fed. R. Evid. 702 advisory committee’s note* (2000)). FRE 702 specifically  
15 “demands that expert testimony relate to scientific, technical, or other specialized  
16 knowledge, which does not include unsubstantiated speculation and subjective  
17 beliefs.” *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997).  
18 As a result, “[a]n expert’s testimony may be excluded where it is based on  
19 subjective beliefs or unsupported speculation which is no more than unreliable ipse  
20 dixit guesswork.” *Friend v. Time Mfg. Co.*, 422 F. Supp. 2d 1079, 1081 (D. Ariz.  
21 2005).

22 2. Dr. Ugone’s Unfounded Opinion That Subscribers Pay Subscription  
23 Fees for a Commercial Free Listening Experience but Not to Hear  
24 Music Should Be Excluded.

25 Dr. Ugone complains that “[Plaintiff’s expert]’s calculation does not  
26 attribute any portion of Sirius XM’s revenue to Sirius XM’s commercial-free music  
27 business model – which has value to subscribers beyond the music that is played.  
28

1 For the purpose of an illustrative comparison, Pandora offers Internet radio with  
2 commercials for free and Internet radio without commercials for \$4.99/month.  
3 During the 2009 – 2014 time period, Sirius XM’s weighted average monthly  
4 revenue per subscriber was \$11.87. Using Pandora’s pricing as a benchmark, the  
5 value of commercial-free radio accounts for 42% of Sirius XM’s average monthly  
6 revenue per subscriber.” (Ugone Rebuttal Report at p.6; *see also* Ugone Rebuttal  
7 Report at pp. 34-35; Ugone Supplemental Report at pp. 7, 50-53)

8 At the outset, Dr. Ugone’s opinion is nonsensical because it allocates all of  
9 the subscription value to the “commercial free” experience, and none of it to the  
10 music content. Dr. Ugone testified:

11 Q. And you allocate that entire \$4.99 to -- not to content, but rather to  
avoidance of commercials?

12 A: Yes, with the recognition, though, that, in a sense, if you're not listening  
13 to a commercial, there's a song being played.

(Ugone Depo. 286:17-287:12)

14 Q. With respect to Pandora, am I correct that using Pandora as a market-  
15 based indicator, you have concluded that the entirety of the \$4.99 that is  
16 paid for by a subscriber to listen to commercial-free radio is allocable to  
commercial-free experience, and not one cent is allocable to the content?

17 A. Of the \$4.99?

18 Q. Correct.

19 A. So using Pandora's fee structure as an indicator of value, a significant  
20 portion of SiriusXM's music subscription revenues are related to SiriusXM's  
offering of commercial-free radio, so yes. So in this example, I did that, yes.

21 Q. But within the Pandora example, is the \$5 a month that's paid for by the  
subscriber completely unrelated to the content that the subscriber is paying  
to hear?

22 A. If I understand your question, I think you have the choice of content  
23 with commercials or without. So the content is a wash, except for the  
commercial part of it.

24 (Ugone Depo. 347:19-348:18)

25 When it was pointed out to Dr. Ugone that the subscriber pays for music  
26 content either way, either by listening to commercials from advertisers who in turn  
27 pay Pandora or by paying a subscription fee directly to Pandora, Dr. Ugone was  
28

1 stumped and had no opinion regarding the allocation of value:

2 Q. But you haven't calculated how much revenue per subscriber Pandora  
3 earns from advertising, have you?

4 A. No.

5 Q. So you don't -- so the differential between the cost of -- the amount  
6 earned from the subscriber for a commercial-free experience versus a  
7 commercial-filled experience, isn't that the relevant metric?

8 A. I wouldn't --

9 I'm not going to say yes now. I would need to think about that because  
10 there could be all kinds of other changes in terms of even pricing changes.

11 Q. So as you sit here right now, you're not sure?

12 A. I don't have an opinion on it as I sit here.

13 (Ugone Depo. 350:2-351:6)

14 Dr. Ugone's opinion, if any, is not (1) based on sufficient facts and data, (2)  
15 the product of reliable principles and methods; and (3) the application of reliable  
16 principles and methods to the case. Accordingly it is inadmissible under FRE §§  
17 401-403, 702, and 703. Moreover, Dr. Ugone's opinion again runs counter to Sirius  
18 XM's judicial admissions as to the propriety of its calculation and deduction of  
19 subscription fees attributable to the performance of Pre-1972 Recordings.

20 3. Dr. Ugone's Sampling Methodology to Establish the percentage of Pre-  
21 1972 Recordings Licensed by Sirius XM Should Be Excluded.

22 Rather than identify the pre-1972 sound recordings which Sirius XM purports  
23 to have licensed, Dr. Ugone uses an unscientific and flawed sampling methodology  
24 to claim a higher percentage of licensed recordings and reduce class damages by  
25 \$31 million. First, it is entirely improper to use a sample at all. Establishing that it  
26 has licensed a track and therefore had authorization to play it is Sirius XM's  
27 affirmative burden -- it cannot meet this burden by relying on random statistical  
28 sampling to claim that certain tracks should be removed from the damages  
calculation because the odds say so. Sirius XM should not be permitted to meet its  
burden to establish a defense in this manner. Second, Dr. Ugone uses a "sample"  
that is not a random sample, or a representative sample, to make statistical

1 inferences (*i.e.*, extrapolate results) on an unrelated set of data. This statistical  
2 sampling method violates the most basic principles of statistical sampling and  
3 produces unreliable and prejudicial results. Dr. Ugone should be precluded from  
4 testifying at trial to this component of his analysis because it does not comport with  
5 any of the scientific requirements of FRE 702. It is worse than junk science, it is  
6 wrong science and it is intellectually and academically dishonest.

7        “[T]he trial court must act as a ‘gatekeeper’ to exclude junk science that does  
8 not meet Federal Rule of Evidence 702’s reliability standards by making a  
9 preliminary determination that the expert’s testimony is reliable.” *Ellis v. Costco*  
10 *Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). “The courts that have  
11 considered statistical sampling and extrapolation have concluded that ‘statistical  
12 sampling with an appropriate level of representativeness has been utilized and  
13 approved.’” *U.S. ex rel. Martin v. Life Care Centers of Am., Inc.*, No. 1:08-CV-251,  
14 2014 WL 4816006, at \*15 (E.D. Tenn. Sept. 29, 2014) (quoting *In re Chevron*  
15 *U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997)); *see also E.K. Hardison Seed Co.*  
16 *v. Jones*, 149 F.2d 252, 256 (6th Cir.1945) (“Thus it is that samples are receivable in  
17 evidence to show the quality or condition of the entire lot or mass from which they  
18 are taken. The prerequisites necessary to the admission in evidence of samples are  
19 that the mass should be substantially uniform with reference to the quality in  
20 question and that the sample portion should be of such nature as to be fairly  
21 representative.”); *In re Estate of Marcos Human Rights Litig.*, 910 F.Supp. 1460,  
22 1467 (D.Haw.1995) *aff’d sub nom., Hilao v. Estate of Marcos*, 103 F.3d 767 (9th  
23 Cir.1996). Courts, however, strike expert testimony based on improper statistical  
24 sampling as “junk science.” *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK,  
25 2013 WL 1490667, at \*3 (C.D. Cal. Jan. 28, 2013) (striking survey expert’s  
26 proposed methodology because expert did not explain the basis of his statistical  
27 sampling and, among other things, “how he plans to select a representative sample  
28

1 of SMs to participate in the survey, why such a selection would be representative.”).

2       The fundamental premise of statistical sampling is that one can make  
3 statistically reliable inferences about a population’s characteristics based on a  
4 sample of data taken from that population. The essential requirement is that the  
5 sample be taken from the population, and that the sample must be representative.  
6 This is usually accomplished by taking a random sample of data from the underlying  
7 population. “How we *collect* data is at least as important as how we analyze it. In  
8 particular, a sample should be *representative* of the population, and *random*  
9 *sampling* is the best way to achieve this. If a sample is not random, it may be worse  
10 than useless.” Introductory Statistics for Business and Economics, Third Edition,  
11 page 153, Wonnacott & Wonnacott.

12       On June 17, 2015, Sirius XM entered into a settlement agreement with the  
13 Major Labels authorizing Sirius XM to publicly perform pre-1972 recordings the  
14 Major Labels owned or controlled and releasing Sirius XM from liability for past  
15 unauthorized performances. Because of this settlement agreement, pre-1972  
16 recordings owned or controlled by the Major Labels now need to be excluded from  
17 Class Damages. In order to exclude or “carve out” from Class Damages amounts  
18 related to recordings covered by the Major Label settlement, all the pre-1972  
19 recordings played by Sirius XM must be compared to the Major Label Spreadsheet  
20 (a spreadsheet produced by Sirius XM which indicates whether or not a recording is  
21 covered by Sirius XM’s settlement agreement with the Major Labels) to identify any  
22 recordings covered by the Major Label settlement agreement.

23       Dr. Ugone admits that, of all the pre-1972 recordings on the Combined  
24 Playlists, he could only find 64% of them on the Major Label Spreadsheet. Dr.  
25 Ugone was unable to find 36% the pre-1972 recordings played by Sirius XM on the  
26 Major Label Spreadsheet (the complement to the 64% he did locate). (Ugone  
27 Supplemental Report, paragraph 58) Dr. Ugone refers to these 36% of recordings as  
28

1 the “Unmatched Recordings.” These represent pre-1972 recordings played by Sirius  
2 XM for which Sirius XM has not produced any information to indicate that the  
3 recording is covered by Sirius XM’s settlement agreement with the Major Labels –  
4 since the Major Label Spreadsheet is the *ONLY* information Sirius XM produced on  
5 this topic and these “Unmatched Recordings” are not listed.

6         Rather than accept the clear conclusion that these 36% of the pre-1972  
7 recordings were not covered by the Major Label settlement – because it is Sirius  
8 XM’s burden to establish affirmatively that a recording is licensed – Dr. Ugone  
9 attempts to use statistical theory to “carve-out” another \$31 million of Class  
10 Damages. He does this by improperly *assuming* that the pre-1972 recordings on the  
11 Major Label Spreadsheet are “effectively a sample of the Combined Playlists”  
12 (which contain all pre-1972 recordings played by Sirius XM). (*Id.* at paragraph 59)  
13 However, this assumption is false; because it is not a “random sample” or a  
14 “representative sample,” it has no value for making any reliable statistical  
15 inferences. Nevertheless, based on the false assumption that the Major Label  
16 Spreadsheet is “effectively a sample” of the Combined Playlists, Dr. Ugone  
17 extrapolates the results he obtained from the 64% of recordings in the Combined  
18 Playlists that he could find on the Major Label Spreadsheet to the 36% of recordings  
19 that he could not find (the “Unmatched Recordings”).

20         Since 84% of the recordings he could find on the Major Label Spreadsheets  
21 were covered by the Major Label settlement, Dr. Ugone wrongly extrapolates his  
22 “sample” results to assume 84% of the recordings he could *NOT FIND* on the Major  
23 Label Spreadsheet (the “Unmatched Recordings”) must also be covered by the  
24 Major Label settlement, resulting in excluding \$31 million of Class Damages related  
25 to these Unmatched Recordings. This conclusion is absurd, since none of the  
26 recordings accounting for the \$31 million exclusion were listed on the Major Label  
27 Spreadsheet, which is the **only** list Sirius XM has produced identifying songs  
28



1 covered by the Major Label settlement.

2 Dr. Ugone's conclusion is junk science (on top of being logically incoherent)  
3 because the Major Label Spreadsheet is not a "sample" of data from the Combined  
4 Playlists. In other words, the Major Label Spreadsheet was not prepared by selecting  
5 a subset of entries contained in the Combined Playlists, where the Combined  
6 Playlist represents the population about which an inference is to be drawn and a  
7 representative sample of data from that population is selected to streamline the  
8 analysis. Rather the Major Label Spreadsheet and the Combined Playlists are two  
9 separate sets of data, derived from different sources, and neither is a "random  
10 sample" or a "representative sample" of the other.

11 Dr. Ugone's sampling methodology violates every tenet of the *Daubert*  
12 gatekeeping function. His opinion was developed specifically for this litigation  
13 based on a methodology developed solely for this litigation which does not comport  
14 with scientific standards of statistical sampling. His sampling methodology is not  
15 the product of reliable principles and methods and should be excluded under FRE §§  
16 401-403 and 702.

#### 17 **IV. CONCLUSION**

18 For all the foregoing reasons, the Court should preclude Dr. Ugone from  
19 testifying as to (1) Sirius XM's costs incurred in misappropriating pre-1972  
20 recordings; (2) alternative damage models based on "lost royalties," "imputed  
21 license fees," "fair market value," "benefits received," or "detriment caused;" (3) a  
22 50% reduction of subscription revenue from pre-1972 recordings supposedly  
23 allocable to non-music channels; and (4) unfounded matters beyond Dr. Ugone's  
24 expertise including the relative value of recordings, the conclusory assertion that  
25 subscribers pay half of their subscription fees for a "commercial free listening  
26 experience" but not to hear the music, and the use of a sampling methodology to  
27 establish the percentage of licensed versus unlicensed pre-1972 recordings.

28

1 DATED: September 30, 2016

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**UNITED STATES DISTRICT COURT for the CENTRAL DISTRICT OF CALIFORNIA**

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The following transaction was entered by Black, Rachel on 9/30/2016 at 9:46 PM PDT and filed on 9/30/2016

**Case Name:** Flo & Eddie Inc v. Sirius XM Radio Inc et al

**Case Number:** [2:13-cv-05693-PSG-GJS](#)

**Filer:** Flo & Eddie Inc

**Document Number:** [464](#)

**Docket Text:**

**NOTICE OF MOTION AND MOTION IN LIMINE (#11) to Preclude DR. KEITH R. UGONE FROM TESTIFYING CONCERNING (1) SIRIUS XMs COSTS (2) ALTERNATIVE DAMAGE MODELS (3) ALLOCATION OF PRE-1972 SUBSCRIPTION REVENUE TO TALK CHANNELS AND (4) UNFOUNDED MATTERS BEYOND UGONES EXPERTISE** filed by Plaintiff Flo & Eddie Inc. Motion set for hearing on 11/15/2016 at 09:00 AM before Judge Philip S. Gutierrez. (Attachments: # (1) Declaration Declaration of Gradstein, # (2) Exhibit Exhibit 1, # (3) Exhibit Exhibit 2, # (4) Exhibit Exhibit 3, # (5) Proposed Order)(Black, Rachel)

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