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7 Sirius XM Radio Inc.

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

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

12 Plaintiffs,

13 v.

14 SIRIUS XM RADIO INC., a Delaware  
15 corporation, and DOES 1 through 10,

16 Defendants.

Case No. CV 13-05693 PSG (GJS)

**DECLARATION OF CASSANDRA  
L. SETO IN SUPPORT OF  
DEFENDANT SIRIUS XM RADIO  
INC.'S OPPOSITIONS TO  
PLAINTIFFS' MOTIONS IN  
LIMINE NOS. 1-3, 11, 12, & 13**

Hon. Philip S. Gutierrez

**Hearing Date:**

Oct. 31, 2016 at 2:30 p.m.

**Final Pretrial Conference:**

Oct. 31, 2016 at 2:30 p.m.

**Trial Date:**

Nov. 15, 2016 at 9:00 a.m.

**DECLARATION OF CASSANDRA L. SETO**

I, Cassandra L. Seto, declare and state:

1. I am a partner at the law firm of O’Melveny & Myers LLP, counsel of record for defendant Sirius XM Radio Inc. (“Sirius XM”) in the above-entitled action. I make this declaration in support of Sirius XM’s Oppositions to Plaintiffs’ Motions *in Limine* Nos. 1-3, 11, 12, and 13. I have personal knowledge of the matters set forth in this declaration, and if called to testify thereto, I could and would do so competently.

2. Attached hereto as Exhibit A is a true and correct copy of the June 24, 2014 Expert Report of Michael J. Wallace disclosed in the related Florida case, *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, Case No. 13-cv-23182 (S.D. Fla.).

3. Attached hereto as Exhibit B is a true and correct copy of the September 21, 2016 Supplemental Expert Report of Michael J. Wallace.

4. Attached hereto as Exhibit C is a true and correct copy of relevant excerpts from the transcript of the April 20, 2015 deposition of Mr. Wallace.

5. Attached hereto as Exhibit D is a true and correct copy of relevant excerpts from the transcript of the October 7, 2016 deposition of Mr. Wallace.

6. Attached hereto as Exhibit E is a true and correct copy of a news feed from Sirius XM’s Facebook page announcing Mr. Kaylan’s appearance on Sirius XM’s Freewheelin’ broadcast on April 25, 2013. Sirius XM will lodge herewith a true and correct copy of an audio recording of that appearance, which Sirius XM designates as Exhibit F. During that appearance, the following exchange between Mr. Kaylan and Sirius XM DJ “Chris T.” took place:

**Howard Kaylan:** They figured out a way to do it. I know that for us as the Turtles we see more money now from BMI and reporting agencies than we have in the last 20 years of trying to sell hard copies of our music. Now downloads are common, uh satellite radio has helped a great deal. Internet downloads have helped a great, great deal. So instead of record stores, yeah you’re right, bitch

1 and moan, there isn't a Tower Records anymore. But the convenience of  
2 owning everything you want, you know with the touch of your iPhone button,—

3 **Chris T.:** Yes

4 **Howard Kaylan:** Is the price that we pay for technology. And if you want to  
5 hear it the right way, buy our stuff on vinyl. We're putting everything out again  
6 on vinyl. And in fact releasing a lot of the stuff on 45s again.

7 7. Attached hereto as Exhibit G is a true and correct copy of relevant  
8 excerpts from the transcript of the June 6, 2016 deposition of Bob Irwin of  
9 Sundazed Records.

10 8. Attached hereto as Exhibit H is a true and correct copy of relevant  
11 excerpts from the transcript of the May 25, 2016 deposition of Tommaso  
12 Gramulgia of Hindsight Records.

13 9. Attached hereto as Exhibits I, J, K, L, and M are true and correct  
14 copies of email communications between Sirius XM program director Lou Simon  
15 and DJ Bruce Morrow, and Cary E. Mansfield of Varese Sarabande Records, LLC  
16 dated between April 5, 2015 and July 5, 2016.

17 I declare under penalty of perjury under the laws of the United States that the  
18 foregoing is true and correct and that this declaration is executed this 14th day of  
19 October 2016 at Los Angeles, California.

20 /s/ Cassandra L. Seto  
21 Cassandra L. Seto

22  
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# **EXHIBIT A**

**Redacted Version of Document Proposed to be  
Filed Under Seal**

**(pgs. 3-10)**

# **EXHIBIT B**

**Redacted Version of Document Proposed to be  
Filed Under Seal**

**(pgs 11-32)**

# **EXHIBIT C**

**Redacted Version of Document Proposed to be  
Filed Under Seal**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FLO & EDDIE, INC., a )  
California corporation, )  
individually and on behalf ) Case No.  
of all others similarly ) CV 13-05693 PSG (RZx)  
situated, )  
Plaintiff, )  
vs. )  
SIRIUS XM RADIO, INC., a )  
Delaware corporation; and )  
DOES 1 through 10, )  
Defendants. )  
\_\_\_\_\_ )

VIDEOTAPED DEPOSITION OF MICHAEL J. WALLACE  
Los Angeles, California  
Monday, April 20, 2015

Reported by:  
SHANDA GABRIEL, CSR No. 10094  
Job No. 2014106  
Pages 1-346

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FLO & EDDIE, INC., a )  
California corporation, )  
individually and on behalf ) Case No.  
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situated, )  
Plaintiff, )  
vs. )  
SIRIUS XM RADIO, INC., a )  
Delaware corporation; and )  
DOES 1 through 10, )  
Defendants. )  
\_\_\_\_\_ )

Videotaped deposition of MICHAEL J.  
WALLACE, taken on behalf of the Defendant at  
1999 Avenue of the Stars, Los Angeles, California,  
commencing at 10:03 a.m., Monday, April 20, 2015,  
before SHANDA GABRIEL, CSR No. 10094.



1 APPEARANCES :

2

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23

24 ALSO PRESENT :

25 STEVE TOGAMI, VIDEOGRAPHER

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1 musical recordings? 10:11:48

2 MR. GRADSTEIN: Vague and ambiguous. 10:11:49

3 THE WITNESS: I probably shouldn't have 10:11:50

4 been so narrow in using the word "distribution," 10:11:51

5 because I've also studied revenues and expenses 10:11:55

6 related to producing and recording music, but -- but 10:11:57

7 in terms of the idea of distribution, yes, I mean 10:12:01

8 selling records, digitally distributing records, and 10:12:05

9 in some cases broadcasting music over the radio. 10:12:11

10 Q. All right. Let's focus on that and let me 10:12:15

11 start by asking you a separate question. 10:12:18

12 Have you done anything in your 29-year 10:12:20

13 professional career involving valuing the right to 10:12:22

14 perform a musical recording on a radio station, 10:12:25

15 whether it's a terrestrial, that's AM and FM, AM or 10:12:29

16 FM, or satellite radio? 10:12:34

17 A. Well, again, I've studied the revenues and 10:12:36

18 expenses related to that process all the way from 10:12:49

19 the beginning in the creation of the music to the 10:12:54

20 ultimate delivery of the sound recording to the 10:12:58

21 listener. 10:13:04

22 If you're focusing on doing, like, an 10:13:04

23 analogy to a business valuation or something going 10:13:09

24 in and saying what -- what is the value to the 10:13:11

25 listener or the radio station of delivering one 10:13:13

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1 sound recording over the airwaves, I probably can't 10:13:18  
2 think of one that's quite that specific, other than, 10:13:24  
3 you know, arguably this case. 10:13:29

4 Q. So just so we're clear, this is the -- the 10:13:31  
5 only case in your career where you've been asked to 10:13:34  
6 value the performance of a sound recording on being 10:13:40  
7 played on any type of a radio station, be it AM, FM 10:13:46  
8 or satellite? 10:13:52

9 A. I haven't been asked in this case to value 10:13:53  
10 the playing of a -- of a sound recording. I've been 10:13:57  
11 asked to calculate the revenues attributable -- 10:14:02  
12 sorry, SiriusXM's revenues attributable to the use 10:14:07  
13 of pre-1972 recordings. 10:14:13

14 Q. All right. I understand what -- what 10:14:18  
15 you've been asked to do in this case. 10:14:19

16 I just want to make sure I understand what 10:14:21  
17 you have or haven't done in your professional 10:14:23  
18 career. 10:14:26

19 So, yes or no, have you ever placed a value 10:14:26  
20 such as -- let me do it this way: Have you ever 10:14:29  
21 placed a value to a broadcaster of performing a 10:14:32  
22 sound recording on its radio station, whether it's 10:14:37  
23 an AM, FM, satellite radio station? 10:14:39

24 A. Well, I'd hate to say no, because I've done 10:14:44  
25 probably 40 or 50 different music-related cases, and 10:14:53

1 also a number of motion picture and television cases 10:14:57  
2 that involve the use of sound recordings. So I 10:15:01  
3 can't give you an unequivocal no. But I can't, off 10:15:07  
4 the top of my head, think of a case where I 10:15:12  
5 specifically tried to isolate the value of a sound 10:15:16  
6 recording to a radio broadcaster or satellite 10:15:19  
7 broadcaster, you know, arguably, other than this 10:15:22  
8 case, which is your suggestion here, I think. 10:15:27

9 Q. Have you -- so just -- nobody's ever said, 10:15:31  
10 "Mr. Wallace, we play sound recordings on radio 10:15:36  
11 stations and we'd like you to assess what the value 10:15:40  
12 of those is to our business, how much revenue we 10:15:45  
13 generate, how much" -- in any way, shape or form, 10:15:49  
14 the value to a broadcaster of the performance of a 10:15:52  
15 sound recording, you've never done that before this 10:15:55  
16 case? 10:15:58

17 A. Well, no one's ever asked me that exact 10:15:58  
18 question. 10:16:02

19 But I did do work on a case involving the 10:16:04  
20 licensing of sound recordings for a variety of 10:16:09  
21 different uses, which may have included radio 10:16:12  
22 broadcasts. I don't recall. They included use in 10:16:16  
23 television shows and motion pictures and commercials 10:16:19  
24 and, you know, they could have included radio ads, 10:16:22  
25 they could have included radio broadcasts. I don't 10:16:27

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1 Q. Why don't we take the tasks separately. 11:40:37  
2 A. Okay. 11:40:39  
3 Q. And by the way, approximately how much time 11:40:39  
4 did you spend on your work in this case up to the 11:40:46  
5 point where you completed your expert report on 11:40:50  
6 March 13, 2015? 11:40:52  
7 MR. GRADSTEIN: It's -- I know it seems a 11:40:54  
8 little bit splitting hairs, but this case is a bit 11:40:58  
9 ambiguous because of the work that was also done 11:40:59  
10 leading up to this case in Florida so I'm not sure 11:41:01  
11 what you mean by "this case." 11:41:04  
12 BY MR. SCHWARTZ: 11:41:04  
13 Q. I -- there's -- there's overlap, isn't 11:41:06  
14 there, between the analytical or economic -- strike 11:41:11  
15 "analytical." Between the work you did in 11:41:14  
16 connection with the Florida report or the Florida 11:41:16  
17 case and your work in this California case, correct? 11:41:18  
18 A. Yes. 11:41:18  
19 Q. All right. So putting them all together, 11:41:20  
20 for both cases, how much time did you spend working 11:41:23  
21 on these two cases or any others for Flo & Eddie 11:41:27  
22 against SiriusXM up until the completion of your 11:41:31  
23 report on March 13, 2015? 11:41:35  
24 A. It's actually even hard for me to estimate, 11:41:39  
25 because it's been over the course of -- of a year 11:41:43

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1 off and on. The bills that I produced to you would 11:41:45  
2 tell you exactly how many hours and what days I -- I 11:41:48  
3 worked on it. But, you know, it might be a hundred 11:41:52  
4 hours. 11:41:57

5 Q. All right. All right. So looking -- 11:42:00

6 A. Could be less. I just -- 11:42:01

7 Q. All right. 11:42:02

8 A. I just don't know. 11:42:02

9 Q. But do you believe your time records are 11:42:03  
10 accurate? 11:42:05

11 A. Yes. 11:42:05

12 MR. GRADSTEIN: And by "you," you meant 11:42:07  
13 you. 11:42:07

14 MR. SCHWARTZ: I mean Mr. Wallace. 11:42:08

15 Q. The time that shows up in your bills for 11:42:09  
16 the time you personally spent on this matter, you 11:42:11  
17 believe them to be -- to accurat- -- accurately 11:42:14  
18 reflect the amount of time you spent? 11:42:16

19 A. Well, it accurately reflects the time I 11:42:19  
20 billed. Sometimes my mind continues to process 11:42:21  
21 things when I'm not billing. But as far as 11:42:25  
22 concentrated specific work on this matter that I 11:42:28  
23 billed, that's in the -- in the bills. 11:42:32

24 Q. So at least -- okay. Thank you. 11:42:34

25 All right. So task 1 in your report is: 11:42:36

1 "Determine whether damages 11:42:41  
2 are capable of measurement on a 11:42:42  
3 class-wide basis." 11:42:45

4 Tell me what you did to determine whether 11:42:48  
5 class -- whether damages are capable of measurement 11:42:50  
6 on a class-wide basis. 11:42:53

7 A. Well, there's a few parts to that. One is 11:42:56  
8 understanding what the measure of damages would be 11:43:01  
9 for the claims being made by the plaintiff in this 11:43:06  
10 case. 11:43:09

11 So for that, I asked counsel to direct me 11:43:11  
12 on what the law is for damages related to the claims 11:43:19  
13 in the California case. And for that purpose, I was 11:43:24  
14 given an assumption to make, because that's a legal 11:43:29  
15 question. 11:43:32

16 And once I had an assumption to follow as 11:43:33  
17 far as what the proper measure of damages is, then I 11:43:38  
18 assessed what data I might need to make that 11:43:44  
19 calculation. 11:43:51

20 And in connection with this report, I had 11:43:53  
21 prior familiarity with a bunch of the information 11:43:55  
22 exchanged in the -- in this California case and also 11:44:00  
23 the Florida case and some other matters involving 11:44:06  
24 SiriusXM. 11:44:12

25 And so in -- in my independent thinking, 11:44:15

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1 between revenues that were related to sound 12:22:09  
2 recordings and revenues that were related to other 12:22:11  
3 things that weren't covered by the Federal Copyright 12:22:13  
4 Act. 12:22:15

5 Q. I'm sorry. My question was simply what 12:22:15  
6 number did you use? 12:22:18

7 A. The numbers in the Attachment G. 12:22:19

8 MR. GRADSTEIN: Assumes a fact that there's 12:22:22  
9 a number for -- a single number for the entire 12:22:24  
10 period. 12:22:26

11 BY MR. SCHWARTZ: 12:22:26

12 Q. Okay. So you didn't make that calculation 12:22:27  
13 of -- you didn't attempt, yourself, to apportion 12:22:28  
14 between -- in taking all of SiriusXM's gross 12:22:32  
15 revenues, you, Mike Wallace, or nobody under your 12:22:36  
16 direction attempted to apportion between sound 12:22:39  
17 recordings and other forms of content on SiriusXM, 12:22:44  
18 correct? 12:22:44

19 A. We attempted to do it. But we didn't have 12:22:48  
20 the information available to do it independently and 12:22:50  
21 so the fact that SiriusXM did it was convenient. 12:22:53

22 Q. Okay. I'm going to repeat my question, see 12:23:02  
23 if it's a "yes" or "no" question. 12:23:03

24 You did not do it in the course of your 12:23:05  
25 report. You did not come up with that separation of 12:23:07



1 SiriusXM's gross revenue between music content and 12:23:11  
2 non-music content, did you? 12:23:15  
3 A. That is not how I performed the analysis 12:23:17  
4 that ultimately ended up in my report, but I 12:23:20  
5 attempted to do it from SiriusXM's public financial 12:23:22  
6 information and other information I had available to 12:23:26  
7 me, and determined that I didn't have the 12:23:29  
8 information necessary to do the calculation. And, 12:23:33  
9 therefore, I relied on the information provided by 12:23:36  
10 SiriusXM which, as far as I could tell, was exactly 12:23:41  
11 what I would have calculated if the data was 12:23:45  
12 available to me, personally. 12:23:49  
13 Q. Did you understand my question to ask you 12:23:50  
14 whether you attempted to perform such a calculation? 12:23:52  
15 A. Yes, I did. 12:23:55  
16 Q. All right. All I asked you was whether you 12:23:55  
17 did perform the calculation. And it's a "yes" or 12:23:57  
18 "no" question. 12:24:01  
19 The answer is no, you did not perform that 12:24:01  
20 calculation in your report? 12:24:03  
21 A. Not -- 12:24:06  
22 MR. GRADSTEIN: That is ambiguous. 12:24:06  
23 You can answer. 12:24:08  
24 THE WITNESS: Not in my report I didn't 12:24:08  
25 perform that calculation. 12:24:10

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1 BY MR. SCHWARTZ: 12:24:10

2 Q. Okay. On -- 12:24:13

3 A. I didn't perform the calculation to 12:24:13

4 determine how much of SiriusXM's total revenue was 12:24:15

5 attributable to sound recordings in my report. I 12:24:20

6 attempted to do that previously, but for the 12:24:23

7 purposes of my report, I relied on Attachment G to 12:24:26

8 the interrogatory responses which stated that 12:24:29

9 conclusion. So I started with that number. 12:24:33

10 MR. GRADSTEIN: Hold on one sec. We're 12:24:36

11 like at 12:20. This is going to be many hours to 12:24:37

12 figure out how far you want to go down this road 12:24:40

13 because you can keep going and you said we're going 12:24:43

14 to break for lunch soon. 12:24:45

15 MR. SCHWARTZ: We're going to break for 12:24:46

16 lunch. 12:24:47

17 Q. Mr. Wallace, please, I only have seven 12:24:48

18 hours. If I ask you "yes" or "no," did you do 12:24:50

19 something, and the answer is "yes" or "no," just 12:24:53

20 say "yes" or "no." 12:24:54

21 It's not helping -- frankly, it's not 12:24:55

22 helping you, either, to -- to do these things where 12:24:57

23 you just go on and on and explain that. Okay? It's 12:24:59

24 really taking up a lot of time on the record. And I 12:25:02

25 would hate to go have to ask the magistrate judge 12:25:04

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1 for more time for your deposition. If I have to, I 12:25:06  
2 will, but I really would rather not do that. Okay? 12:25:08  
3 While we're on the lunch break, can you consider 12:25:12  
4 that. 12:25:13  
5 A. I will consider it. I think if you look 12:25:13  
6 back at your first question on this line of 12:25:15  
7 questioning, you asked if I attempted to do it. And 12:25:17  
8 so -- 12:25:19  
9 Q. So it would be either, "I did" or "I 12:25:21  
10 didn't." It would be either "yes" or "no." 12:25:23  
11 Wouldn't it? 12:25:24  
12 MR. GRADSTEIN: Can we not -- 12:25:24  
13 BY MR. SCHWARTZ: 12:25:24  
14 Q. Can we just -- can we understand -- I just 12:25:26  
15 want to make sure I understand -- do you not? 12:25:27  
16 MR. GRADSTEIN: This is an expert -- this 12:25:29  
17 is an expert that you've retained in the past. 12:25:29  
18 MR. SCHWARTZ: I don't care. You know -- 12:25:32  
19 MR. GRADSTEIN: Some of it is your own 12:25:33  
20 questioning. 12:25:36  
21 MR. SCHWARTZ: You're interrupting. 12:25:36  
22 MR. GRADSTEIN: I know, but you're not 12:25:37  
23 asking proper questions now. This is argument. 12:25:38  
24 MR. SCHWARTZ: If I'm not asking proper 12:25:38  
25 questions, then you can simply say "improper 12:25:41

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1 I -- I don't think there would be any such cost 13:53:46  
2 deductions, since it's a gross revenue measure. But 13:53:48  
3 I -- I have not, in my calculation, deducted any 13:53:51  
4 amounts for cost. 13:53:54  
5 Q. And that's -- you didn't investigate that 13:53:55  
6 as part of your work, either, what the costs of 13:53:57  
7 SiriusXM are, correct? 13:54:00  
8 A. That's -- well, it depends on if you mean 13:54:04  
9 in connection with just the work I did exclusively 13:54:06  
10 related to the California report or the work that I 13:54:09  
11 did on -- under my retention in this group of 13:54:13  
12 matters. 13:54:17  
13 So I certainly considered SiriusXM's costs 13:54:18  
14 of both their satellite systems and other costs of 13:54:23  
15 their services. But I haven't performed any cost 13:54:28  
16 analysis in connection with my California report. 13:54:34  
17 Q. Why were you looking at costs in connection 13:54:36  
18 with other work but not in connection with your work 13:54:39  
19 on the California case? 13:54:43  
20 A. My assignment in the California case was 13:54:46  
21 based on the assumption that the costs are not 13:54:51  
22 deductible from gross revenues in measuring damages 13:54:54  
23 under California law. So I didn't need to analyze 13:54:56  
24 the costs because of that. 13:55:01  
25 In my prior work on the Florida matter, it 13:55:03

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1 was not clear to me whether costs would be 13:55:07  
2 deductible under Florida law, and so I did give that 13:55:09  
3 some consideration. 13:55:14  
4 Q. All right. But in connection with your 13:55:16  
5 work in the California case, you did not analyze 13:55:17  
6 SiriusXM's costs, correct? 13:55:21  
7 A. Well, okay. So let's be clear. I didn't 13:55:25  
8 analyze it in -- I didn't perform any analysis or 13:55:27  
9 calculations of costs in my report in the California 13:55:34  
10 action. 13:55:36  
11 Q. That's what I asked you. Thank you. 13:55:37  
12 A. Okay. 13:55:39  
13 Q. That's all I was asking. I just want to 13:55:40  
14 know what you did, what your work was in connection 13:55:43  
15 with California. 13:55:45  
16 MR. GRADSTEIN: That's different -- that's 13:55:46  
17 different. He said in connection with his report 13:55:47  
18 and your other question was in connection with your 13:55:49  
19 work in California. So -- 13:55:51  
20 BY MR. SCHWARTZ: 13:55:51  
21 Q. So if there is a difference please explain 13:55:52  
22 it. I want to know what, if any -- well, I don't 13:55:54  
23 want to -- just explain your answer. 13:55:57  
24 A. There's --there's a difference. 13:56:00  
25 So -- so because I was asked to assume 13:56:01

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1 costs were not deductible, I didn't perform any 13:56:04  
2 calculations related to costs in my report. 13:56:07  
3 Q. Okay. 13:56:10  
4 A. But in examining the materials related to 13:56:11  
5 the claims in this case, I was aware that SiriusXM 13:56:13  
6 has identified the incremental costs that they say 13:56:18  
7 are attributable to the use of pre-'72 recordings in 13:56:22  
8 connection with their satellite service, and also 13:56:27  
9 have evaluated the question of costs in connection 13:56:33  
10 with the rebuttal reports that were presented. 13:56:36  
11 Q. So are you going to be testifying about 13:56:41  
12 what SiriusXM's costs are in connection with the 13:56:44  
13 performance of sound recordings, non-music 13:56:47  
14 recordings, whatever, in this case? 13:56:51  
15 A. I don't know. I don't -- I guess I don't 13:56:52  
16 know what opportunities or requirements there might 13:56:56  
17 be for me to comment on the testimony or the -- 13:57:01  
18 either the reports or the testimony of Dr. Ugone or 13:57:05  
19 Mr. Goldman. 13:57:09  
20 Q. Well, if the costs are relevant in some 13:57:10  
21 measure related to the damages in this case, what is 13:57:17  
22 your opinion as to what those costs are, as you sit 13:57:19  
23 here today? 13:57:22  
24 A. Well, I guess I have two opinions. And 13:57:22  
25 then the rest of it would probably be driven by 13:57:30

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1 legal conclusion, actually. 14:13:10

2 THE WITNESS: There's different motivations 14:13:12

3 for measures of -- of damages. Som- -- sometimes 14:13:13

4 they're intended to make a plaintiff whole. 14:13:17

5 Sometimes they're intended to create an incentive to 14:13:18

6 prevent conduct, certain types of conduct. And 14:13:24

7 sometimes they're intended to be punitive. 14:13:29

8 I've -- I've worked on lots of different 14:13:32

9 cases where the motivations for the measures of 14:13:34

10 damages are not limited to making the plaintiff 14:13:37

11 economically whole. I mean, unjust enrichment is a 14:13:39

12 classic example. That really doesn't have anything 14:13:43

13 to do with making the plaintiff whole. It has to do 14:13:46

14 with creating some effect on a defendant. 14:13:49

15 Q. Okay. Do you agree with me that when 14:13:55

16 calculating damages, the plaintiff's loss must be 14:13:57

17 netted against any benefits attributable to the 14:14:02

18 defendants' wrongful actions? 14:14:05

19 MR. GRADSTEIN: Objection. Calls for a 14:14:06

20 legal conclusion. 14:14:07

21 THE WITNESS: Now I think you're talking 14:14:11

22 about lost profits, which is not what I've -- I've 14:14:11

23 not even gotten close to lost profits in my report. 14:14:14

24 But if you want to talk theoretically about 14:14:16

25 lost profits, which is a measure designed to make a 14:14:19

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1 plaintiff whole, then generally you attribute any -- 14:14:21  
2 any losses suffered by the plaintiff that are 14:14:32  
3 directly or proximately caused by the complained-of 14:14:36  
4 conduct in- -- into the measure of damages, and you 14:14:40  
5 also include any benefits that are directly or 14:14:44  
6 proximately caused that would not otherwise have 14:14:50  
7 occurred. So you usually net those two things. 14:14:52

8 And so, for example, you might -- I mean, 14:14:54  
9 the classic example is you count lost revenues but 14:14:56  
10 you credit avoided expenses, which are benefits 14:15:02  
11 received usually by a reduction in business 14:15:06  
12 activity. 14:15:09

13 BY MR. SCHWARTZ: 14:15:09

14 Q. Now, in this case, that's not the approach 14:15:10  
15 you took, correct? 14:15:13

16 A. I'm not calculating plaintiff's losses. 14:15:15  
17 I'm calculating gross revenues earned by the 14:15:17  
18 defendant. 14:15:21

19 Q. Now, earlier -- did you study whether 14:15:22  
20 SiriusXM's performance of pre-1972 sound recordings 14:15:28  
21 might have had the effect of causing people to want 14:15:32  
22 to go see those performers perform live when they 14:15:36  
23 were on concert tours? 14:15:40

24 A. I only considered it in my economic 14:15:45  
25 reasoning in the same way that I considered whether 14:15:49



1 or not it would influence sales of records. 14:15:54

2 Q. Well, I -- I -- I don't want to put a gloss 14:16:00

3 on what you did or didn't do there. 14:16:02

4 So can you just explain what investigation 14:16:04

5 you did, if any, of whether SiriusXM's performance 14:16:08

6 of pre-1972 sound recordings might have caused 14:16:11

7 people to want to go see those performers perform 14:16:16

8 live, such as on concert tours? 14:16:19

9 MR. GRADSTEIN: Objection. Not reasonably 14:16:21

10 calculated to lead to the discovery of admissible 14:16:23

11 evidence when you're talking about touring and the 14:16:25

12 impact on touring. It's not even in the ballpark. 14:16:27

13 I'm not going to instruct him not to answer. 14:16:30

14 THE WITNESS: I only considered it in -- in 14:16:32

15 my economic reasoning that I could see with respect 14:16:35

16 to music that has been in the marketplace for many 14:16:39

17 decades, that it could cut either way. It could 14:16:41

18 either satisfy demand for the listening experience 14:16:44

19 that would cause someone to not then choose to go 14:16:49

20 see the live performance, or it could encourage a 14:16:54

21 further desire to see a live performance. And I 14:17:01

22 haven't made a conclusion one way or another how it 14:17:03

23 would cut. 14:17:05

24 BY MR. SCHWARTZ: 14:17:06

25 Q. And because you haven't made a conclusion 14:17:06

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1 that. So take your break and don't talk to him 15:53:23  
2 about his testimony. 15:53:25  
3 MR. GRADSTEIN: Okay. 15:53:25  
4 THE VIDEOGRAPHER: This marks the end of 15:53:26  
5 media number 4. Going off the record at 3:53 p.m. 15:53:28  
6 (Brief recess.) 16:00:58  
7 THE VIDEOGRAPHER: This marks the beginning 16:00:58  
8 of media number 5. Going back on the record at 4:01 16:01:02  
9 p.m. 16:01:05  
10 BY MR. SCHWARTZ: 16:01:05  
11 Q. Okay. Mr. Wallace, before we left off, I 16:01:10  
12 had -- we were looking at Attachment G and the 16:01:15  
13 revenue numbers that you relied on in your analysis. 16:01:22  
14 And I'd asked you specifically about July 2009 and 16:01:27  
15 the [REDACTED]. 16:01:32  
16 And I said that: 16:01:35  
17 "What you're testifying to is 16:01:37  
18 that the SiriusXM subscribers of 16:01:39  
19 the [REDACTED] they paid in July 16:01:41  
20 2009, zero dollars of that in your 16:01:48  
21 judgment is attributable to the 16:01:49  
22 non-music content that was 16:01:52  
23 available to those subscribers?" 16:01:54  
24 Your answer was: 16:01:55  
25 "I haven't made that 16:01:56

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1 conclusion. I've indicated that 16:01:56  
2 that's a reasonable assumption for 16:01:58  
3 the purpose of what I'm trying to 16:02:00  
4 determine." 16:02:01  
5 My follow-up question is simply to make 16:02:04  
6 sure -- I just want to say, that's applicable to all 16:02:06  
7 of the numbers you pulled off of Exhibit G, correct? 16:02:09  
8 MR. GRADSTEIN: Vague and ambiguous, 16:02:12  
9 "that." 16:02:12  
10 You can answer. 16:02:13  
11 THE WITNESS: Yes. I made the same 16:02:14  
12 assumption with respect to all the revenue figures 16:02:16  
13 in the Attachment G. 16:02:18  
14 BY MR. SCHWARTZ: 16:02:18  
15 Q. Okay. And the -- one of the other reasons 16:02:22  
16 you gave for why you didn't make an adjustment 16:02:31  
17 further to those numbers or before you made the -- 16:02:35  
18 the California calculation, what I wrote down is you 16:02:37  
19 said some of the non-music content is ad-driven. 16:02:47  
20 And I didn't understand why that would 16:02:52  
21 support your decision not to make an adjustment. 16:02:55  
22 Can you explain it? 16:02:57  
23 A. Yes, I can try. I think it's well 16:03:03  
24 recognized that commercial-free content -- people 16:03:07  
25 are willing to pay more money for commercial-free 16:03:12

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1 content than content with advertising. 16:03:14

2 In fact, traditionally, for example, 16:03:19

3 television was free because you had to put up with 16:03:20

4 the commercials. And television networks would make 16:03:25

5 money selling advertising rather than charging 16:03:30

6 subscriptions. 16:03:32

7 And cable companies came along and said, 16:03:33

8 "Hey, we'll give you commercial-free programming for 16:03:35

9 a fee." 16:03:40

10 So there's a tradeoff between paying 16:03:41

11 subscription fees for commercial-free content and 16:03:43

12 getting free content and suffering through the ads. 16:03:47

13 And you see that with respect to some of 16:03:52

14 the music distr- -- Internet-based music 16:03:55

15 distribution services like Spotify and Rhapsody, you 16:03:58

16 can get free music if you'll listen to their ads and 16:04:01

17 you can pay a subscription and they take out the -- 16:04:05

18 the ads. 16:04:09

19 So I think to a large degree the music 16:04:09

20 content in SiriusXM's satellite offering is 16:04:17

21 commercial free. And the -- to a large extent, and 16:04:20

22 I can't go to the extremes on either of these, but 16:04:23

23 to a large extent, much of the non-music or 16:04:27

24 non-music programming has advertising, with the 16:04:33

25 exception of the non-music programming, which is 16:04:36

1 available for an upcharge. 16:04:41

2 And so that factor weighs against the idea 16:04:45

3 that for an equivalent, say, clock time of 16:04:50

4 programming, that a subscriber would pay the same 16:04:54

5 amount of dollars for programming with advertising 16:04:59

6 and programming without advertising. And it's 16:05:03

7 entirely possible that subscribers wouldn't pay for 16:05:06

8 non-music programming with ads. 16:05:15

9 So that -- that supports the -- the 16:05:21

10 possibility, along with the other factors I 16:05:26

11 mentioned, that really none of that revenue -- or 16:05:29

12 it's possible that there is no revenue on Attachment 16:05:36

13 G that's actually attributable to the non-music 16:05:38

14 content. 16:05:42

15 Q. What does it take, in your view, for a 16:05:45

16 dollar of revenue paid by a SiriusXM subscriber to 16:05:49

17 be attributable or not attributable either to music 16:05:52

18 content or non-music content? 16:05:57

19 A. Well, one factor, as I've mentioned, is 16:06:04

20 whether SiriusXM determines that it's attributable. 16:06:08

21 And they have an economic incentive to identify 16:06:09

22 revenue on Attachment G that's attributable to 16:06:14

23 non-music sources and operate their business in a 16:06:18

24 way that they don't have to pay royalties on 16:06:23

25 material that's not subject to royalty. 16:06:25

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1 where I just want to understand whether you have any 18:11:58  
2 other opinions in this case besides the ones that 18:12:00  
3 are described here in paragraph 2 of your report. 18:12:04

4 A. I would say the only additional opinions 18:12:11  
5 that I may have at trial would relate to these -- 18:12:15  
6 this -- these topics, but would be more specifically 18:12:23  
7 related to some of the critiques raised in the 18:12:26  
8 rebuttal report of Dr. Ugone or Mr. Goldman, if I -- 18:12:30  
9 if I got his name right. Only in the sense of 18:12:37  
10 explaining to what extent I think those critiques, 18:12:42  
11 you know, either are legitimate or not valid or how 18:12:46  
12 I have addressed them in my analysis. 18:12:49

13 Q. Okay. Just so I'm clear and I don't get 18:12:53  
14 surprised at trial, I just want to make sure, am I 18:12:57  
15 correct that you are not offering any opinions in 18:13:00  
16 this case on the lost profits of Flo & Eddie arising 18:13:01  
17 from SiriusXM's performance of their pre-1972 sound 18:13:07  
18 recordings? 18:13:10

19 A. Not performing any calculation. I would 18:13:13  
20 offer the opinion it would fall into the previous 18:13:15  
21 category that this concept of benefits received 18:13:17  
22 would be relevant to a lost profits claim, but not 18:13:20  
23 relevant to a gross revenues claim. 18:13:23

24 So only in that sense, again, as it comes 18:13:30  
25 back to relate to my measure of damages. But I'm 18:13:32

1 not -- I'm not offering or calculating lost profits 18:13:33  
2 on behalf of Flo & Eddie or class members. 18:13:35  
3 Q. That was really what I wanted to know. 18:13:38  
4 So now I'm not sure what you meant between 18:13:40  
5 when I asked you the question and the last part of 18:13:43  
6 your answer. 18:13:44  
7 You're not presenting a lost profits 18:13:45  
8 calculation on behalf of Flo & Eddie or the class 18:13:47  
9 members in this case, are you? 18:13:49  
10 MR. GRADSTEIN: I'm -- I think it's vague 18:13:51  
11 and ambiguous. I lost it myself now. 18:13:53  
12 But go ahead. 18:13:54  
13 THE WITNESS: I'm not -- I haven't been 18:14:00  
14 asked to and I, at the present time, have no 18:14:01  
15 intention to. 18:14:03  
16 BY MR. SCHWARTZ: 18:14:03  
17 Q. Okay. And is it correct, also, you're not 18:14:05  
18 presenting testimony in this case or an opinion in 18:14:06  
19 this case on what would be a reasonable license to 18:14:12  
20 Flo & Eddie or the class members for their -- 18:14:14  
21 SiriusXM's use of their sound recordings, are you? 18:14:20  
22 A. I think I -- the only testimony I might 18:14:31  
23 proffer on that subject is -- is the extent to which 18:14:35  
24 my measure of gross revenues could be useful or 18:14:38  
25 relevant to such an analysis. But not an actual 18:14:41

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1 royalty rate or calculation of a -- of an actual 18:14:44  
2 reasonable royalty itself. 18:14:47  
3 Q. Okay. And -- 18:14:50  
4 A. I'm sorry. Now, it's possible, because 18:14:52  
5 I -- I know that this is a subject of Dr. Ugone's 18:14:56  
6 report, I believe he identifies some reasonable 18:15:01  
7 royalty figures. 18:15:03  
8 It's possible I might comment on -- I might 18:15:06  
9 been asked to comment on those. I don't -- I 18:15:08  
10 haven't been at this point. But it's a rebuttal to 18:15:10  
11 my analysis. So I guess depending on what happens 18:15:12  
12 in his deposition, I suppose I could be asked to 18:15:14  
13 supplement. But not at this time. 18:15:17  
14 Q. All right. And am I correct you're not 18:15:20  
15 offering an opinion in this case that SiriusXM acted 18:15:23  
16 with oppression, fraud or malice, are you? 18:15:26  
17 A. No. 18:15:30  
18 Q. Am I also correct you're not offering 18:15:34  
19 opinion testimony or any testimony in this case that 18:15:36  
20 SiriusXM was unjustly enriched? 18:15:38  
21 MR. GRADSTEIN: Objection. Vague and 18:15:44  
22 ambiguous. 18:15:44  
23 This whole theory is a discouragement 18:15:46  
24 theory. I'm not sure what you're going at. 18:15:50  
25 Vague and ambiguous. 18:15:54

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1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth;  
6 that any witnesses in the foregoing proceedings,  
7 prior to testifying, were administered an oath; that  
8 a record of the proceedings was made by me using  
9 machine shorthand which was thereafter transcribed  
10 under my direction; that the foregoing transcript is  
11 a true record of the testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal  
14 Case, before completion of the proceedings, review  
15 of the transcript [ ] was [ ] was not requested.

16 I further certify I am neither financially  
17 interested in the action nor a relative or employee  
18 of any attorney or any party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21 Dated: 4/30/15

22



23

SHANDA GABRIEL

24

CSR No. 10094

25

# **EXHIBIT D**

**Redacted Version of Document Proposed to be  
Filed Under Seal**

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3  
4

5 \_\_\_\_\_ )  
6 FLO & EDDIE, INC., a )  
7 California corporation, )  
8 individually and on behalf of) )  
9 all others similarly )  
10 situated, ) No. CV13-05693 PSG (GJSx)  
11 ) )  
12 Plaintiff, )  
13 ) )  
14 vs. )  
15 ) )  
16 SIRIUS XM RADIO, INC., a )  
17 Delaware corporation; and )  
18 DOES 1 through 10, )  
19 ) )  
20 Defendants. )  
21 \_\_\_\_\_ )

22 VIDEOTAPED DEPOSITION OF MICHAEL J. WALLACE  
23 Los Angeles, California  
24 Friday, October 7, 2016  
25 Volume II

26 Reported by:  
27 NADIA NEWHART  
28 CSR No. 8714  
29 Job No. 2455103  
30 PAGES 347 - 658

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF CALIFORNIA  
3  
4

5 \_\_\_\_\_ )  
6 FLO & EDDIE, INC., a )  
7 California corporation, )  
8 individually and on behalf of) )  
9 all others similarly )  
10 situated, ) No. CV13-05693 PSG (GJSx)  
11 ) )  
12 Plaintiff, )  
13 ) )  
14 vs. )  
15 ) )  
16 SIRIUS XM RADIO, INC., a )  
17 Delaware corporation; and )  
18 DOES 1 through 10, )  
19 ) )  
20 Defendants. )  
21 \_\_\_\_\_ )  
22 )  
23 )  
24 )  
25 )

15 Videotaped deposition of MICHAEL J. WALLACE,  
16 Volume II, taken on behalf of Defendant Sirius XM  
17 Radio, Inc., at 1901 Avenue of the Stars, Suite 950,  
18 Los Angeles, California, beginning at 10:12 a.m. and  
19 ending at 7:20 p.m. on Friday, October 7, 2016,  
20 before NADIA NEWHART, Certified Shorthand Reporter  
21 No. 8714.  
22  
23  
24  
25

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1 APPEARANCES (Continued):

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5

6 Videographer:

7 STEVEN TOGAMI

8

9

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25

1 Q Was there anything else you were asked to do  
2 as part of this assignment?

3 A I think that covers it.

4 Q Were you also asked to calculate prejudgment  
5 interest, or was that part of number 4, number 5? 10:25:40

6 A I think you could consider that an additional  
7 task. I mean, it's part of the damages, but -- but  
8 certainly, there's a separate calculation of  
9 prejudgment interest that I included in my  
10 supplemental report. So I think it's fair to count 10:25:58  
11 that as a sixth item.

12 I mean, just to be clear, there's all kinds  
13 of components to those five categories that I gave  
14 you. So whether 6 is part of 5 or if it's a  
15 separate task, there's -- there will be other 10:26:17  
16 calculations I perform that would be similar. They  
17 could be considered a separate task, or they could  
18 be considered part of the five major categories of  
19 my work.

20 Q I'm fine either way. 10:26:30

21 A Yeah.

22 Q I'll consider them these are the six major  
23 tasks, understanding there's some subtasks within  
24 those.

25 A That's good. 10:26:38

1 Q In connection with these -- with -- strike  
2 that.

3 In connection with this assignment, were you  
4 asked to assume anything?

5 A Yes. 10:26:54

6 Q What were you asked to assume?

7 A Well, just in vernacular -- I have it more  
8 precisely in my reports, but I was asked to assume  
9 that the appropriate measure of damages for Flo &  
10 Eddie's claims in this case are gross revenues 10:27:14  
11 attributable to pre-'72 recordings without deduction  
12 of costs.

13 Q And who told you to assume that?

14 A It was either Henry Gradstein or Harvey  
15 Geller. They probably both told me, but I don't 10:27:40  
16 know who told me first.

17 Q So it was the lawyers who hired you who told  
18 you to assume that the correct measure of damages in  
19 this case is the gross revenue attributable to  
20 pre-'72 recordings without a deduction for costs? 10:27:51

21 A Correct.

22 MS. SRINIVASAN: Object to the form.

23 THE WITNESS: That's right.

24 BY MR. WINTER:

25 Q Were there any other assumptions that you 10:28:00



1 were asked to make?

2 A That the damage period begins in August 2009  
3 and would continue forward to the time of trial. I  
4 mean, frankly, I'm -- I'm not sure I was asked to  
5 make that assumption. I was asked to perform the 10:28:24  
6 calculation beginning August 2009 under the  
7 presumption that -- that that was the appropriate  
8 damage period.

9 Q Were there any other assumptions that you  
10 were asked to make? 10:28:36

11 A I don't believe so, not that I was asked to  
12 make. I just -- I'm sorry. Let me just clarify  
13 when I sort of qualified that.

14 In -- in my initial report, I made the  
15 assumption that the plaintiffs would establish 10:28:55  
16 liability, which is the assumption one always makes  
17 when calculating damages. At the time, liability  
18 had not been established. But I wasn't asked to  
19 make that assumption; it's just the assumption that  
20 I make as a damages expert. 10:29:08

21 Q During the course of your engagement, have  
22 you formed any opinions?

23 A Yes.

24 MS. SRINIVASAN: Counsel, just for  
25 clarification, do you mean as to his supplemental 10:29:22

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CONFIDENTIAL PORTION

1 are excluded.

2 Q And what is your conclusion regarding the  
3 amount of damages in this case without prejudgment  
4 interest?

5 A Uh-huh. So it comes in two parts. One is 10:36:22  
6 the amount that would be associated with all owners  
7 of pre-'72 sound recordings, and that is sort of  
8 from an accounting or economic definition that  
9 Sirius XM's gross revenue's attributable to the use  
10 of pre-'72 recordings from California subscribers. 10:36:53  
11 [REDACTED].

12 And then I've separately calculated the  
13 amount of those gross revenues that would be  
14 attributable to the sound recordings of remaining  
15 class members after excluding parties who have opted 10:37:17  
16 out and parties for which Sirius XM asserts they  
17 have a direct license, and that damages for the  
18 remaining class are [REDACTED]. And then -- and  
19 then there's prejudgment interest which you didn't  
20 ask me about at this time. 10:37:44

21 (Whereupon, the confidential portion ends.)

22 BY MR. WINTER:

23 Q So at trial, you intend to offer the opinion  
24 that the damages to the class are [REDACTED],  
25 correct? 10:37:54

1 A It -- it will be probably close to that  
2 number. I may make some adjustments.

3 Q But looking at your report, that number  
4 you're referring to here, without making adjustments  
5 for a longer period and without making an adjustment 10:38:10  
6 for interest, your opinion is that damages that the  
7 class has suffered over the period of time you have  
8 analyzed is [REDACTED] correct?

9 A I guess I wouldn't put it in those words. I  
10 would say that the amount of damages related to the 10:38:27  
11 claims of the remaining class members pursuant to my  
12 assumption about what the appropriate measure of  
13 damages is and -- and what I understand to be the  
14 court's rulings on the appropriate measure of  
15 damages is would be roughly that [REDACTED] figure. 10:38:46

16 Q Do you have an opinion -- well, let's --  
17 strike that.

18 Do you have an opinion regarding the  
19 appropriate measure of damages in this case?

20 MS. SRINIVASAN: Object to the form. 10:39:11

21 THE WITNESS: I don't have an expert opinion  
22 about what the appropriate measure of damages is in  
23 this case. I think that's a legal question that's  
24 disputed.

25 BY MR. WINTER: 10:39:21

1 Q You're simply relying on the measure of  
2 damages that counsel has communicated and asked you  
3 to assume, correct?

4 MS. SRINIVASAN: Object to the form.

5 THE WITNESS: Well, I wouldn't say I'm simply 10:39:32  
6 relying on that. I -- that was my initial  
7 assignment, and I performed the calculation in that  
8 way, and I gave my opinions as of the time of my  
9 initial report and first two declarations.

10 Since that time, the court has, in several 10:39:47  
11 different proceedings, evaluated and commented on  
12 the measure of damages in the case. So I'm also  
13 taking that into consideration. And I, you know,  
14 also am familiar generally with different remedies  
15 and different types of cases. And I know that in 10:40:09  
16 certain types of cases, the measure that I'm using  
17 is an appropriate measure of damages.

18 So I'm sort of -- it's all those things  
19 together, I guess, I have as a consideration, but  
20 ultimately, I'm performing the calculation and the 10:40:25  
21 court will decide if it's an appropriate measure.

22 BY MR. WINTER:

23 Q Is it your opinion that it's an appropriate  
24 measure of damages in this case?

25 MS. SRINIVASAN: Object to the form. 10:40:35

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1 they do pay royalties to SoundExchange for post-'72  
2 sound recordings, and because David Frear has  
3 testified to that's the case.

4 Q How do you know this number is not just the  
5 gross revenue attributable to both the non-music 03:01:36  
6 content and the music content?

7 A Because it would be improper to deduct an  
8 amount using the pre-'72 share from that amount. It  
9 would be a violation of the Copyright Royalty Board  
10 rulings. It would mean that their attestation to 03:01:59  
11 SoundExchange was false, and it would mean that  
12 David Frear's testimony is false.

13 So I presume none of those things were true,  
14 and I relied on the fact that Sirius XM was honestly  
15 and accurately reporting in all of those places as 03:02:16  
16 to what this revenue is and why they're entitled to  
17 exclude the amount related to pre-'72 sound  
18 recordings.

19 Q Is there any -- did anyone tell you from  
20 Sirius XM or from Flo & Eddie that these revenues 03:02:33  
21 are revenues attributable to sound recordings?

22 MS. SRINIVASAN: Object to the form.

23 THE WITNESS: Well, David Frear's testimony  
24 tells me that, and Sirius XM's filings in the  
25 lawsuit with SoundExchange tell me that, and the 03:02:50

1 copyright royalty judges concluded that, as well.

2 BY MR. WINTER:

3 Q Do you have an understanding of what fair  
4 market value is?

5 A Yes, I do. 03:03:08

6 Q What is fair market value?

7 A It's an amount that a willing buyer and a  
8 willing seller would agree to both with full  
9 knowledge of the facts and neither under undue  
10 duress. 03:03:20

11 Q Have you offered any opinions regarding what  
12 the fair market value of the performance right for  
13 the class members' pre-'72 recordings is?

14 A Like an amount or -- or an opinion related to  
15 the topic? 03:03:38

16 Q No, an amount.

17 A Not a specific amount, no.

18 Q Continuing with Exhibit 16 and the  
19 recognition that the Sirius XM Select package offers  
20 both music and non-music content, do you have any 03:04:17  
21 view on the percentage of the revenue as defined in  
22 the CFR that should be attributable to the non-music  
23 content?

24 A Like a percentage number?

25 Q A percentage or a number. 03:04:46

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1           A    I mean, I know roughly how much of Sirius  
2 XM's revenue was excluded in calculating the amount  
3 attributable to sound recordings. But as we  
4 discussed earlier, there's a variety of deductions  
5 and exclusions, so I don't -- I don't know how much       03:05:07  
6 of it might be related to non-music content; some  
7 subset of the total deduction, presumably.

8           Q    From Sirius XM's revenue, some portion of  
9 that is attributable to the sound recordings, and  
10 some portion of that is attributable to the               03:05:39  
11 non-music content, correct?

12          A    I think it's fair to say that, according to  
13 Sirius XM, it is, yes.

14          Q    Doesn't it also make sense to you, as an  
15 economist, that when you offer a package with two       03:05:57  
16 components to it and people pay for that package,  
17 it's likely that both components of that package  
18 have some value?

19          A    That's entirely dependent on the  
20 circumstances.   03:06:13

21          Q    Well, let's take the circumstances that when  
22 that package is sold separately --

23          A    Uh-huh.

24          Q    -- that they're both sold for the same price,  
25 that if you sell a mostly music or -- strike that.       03:06:23

1 portion of this package have independent economic  
2 value?

3 A Well, assuming that there's at least one  
4 person that would be willing to enter into a fair  
5 market exchange with Sirius XM for each of the 03:10:27  
6 packages, then it makes sense that they each have  
7 some economic value.

8 And that's as far as you could go with that  
9 without knowing how many people subscribe to the  
10 different packages and why they agree to pay a 03:10:44  
11 certain amount and what Sirius XM believes is  
12 driving the revenues and why they structure the  
13 packages a certain way to maximize revenues and how  
14 changing the structure of the packages and the  
15 pricing causes their total revenue to go up and 03:11:01  
16 down.

17 And so they're really the experts at that,  
18 and I would look to them to tell us how much is  
19 attributable to the sound recordings versus any  
20 other content. But if -- as long as there was one 03:11:15  
21 person willing to buy it, then it would have at  
22 least some economic value.

23 Q Did you do anything to apportion the revenue  
24 between the music package -- or the music component  
25 of the package and the non-music component of the 03:11:34



1 package?

2 MS. SRINIVASAN: Object to the form.

3 THE WITNESS: I did a lot of things. I

4 studied the Copyright Royalty Board rulings, the

5 definition of gross revenues, Mr. Frear's 03:11:49

6 explanation of how the company determined the

7 revenue related to sound recordings to meet their

8 royalty obligations and to avoid royalty obligations

9 they thought they weren't obligated for. I read the

10 interrogatory responses. 03:12:10

11 I did all those things to understand how I

12 could identify the gross revenues that were just

13 attributable to the sound recordings within a range

14 of reasonable approximation.

15 BY MR. WINTER: 03:12:26

16 Q But you didn't do anything to determine what

17 portion of the revenue was attributable to the

18 non-music content, correct?

19 A I didn't do anything to calculate that

20 amount, because it's not relevant to my analysis. 03:12:37

21 But I did a lot of things to understand it, and I've

22 read a lot of arguments about it, first brought in

23 by SoundExchange and then now brought in by Sirius

24 XM. But I haven't performed any separate

25 calculations of any amounts attributable to 03:12:57

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1 non-music content.

2 Q So at trial, you won't offer any opinions  
3 regarding how much of Sirius XM's revenue should be  
4 attributable to the non-music content of its  
5 packages, correct? 03:13:14

6 MS. SRINIVASAN: Object to the form.

7 THE WITNESS: Well, I might offer the opinion  
8 that to the extent Sirius XM could identify it, that  
9 they would have excluded it in the roughly  
10 25 percent of their revenues that they excluded 03:13:27  
11 before reporting royalties. But, you know, I'm not  
12 going to like put a number on it.

13 BY MR. WINTER:

14 Q That's just your speculation, that they would  
15 have excluded it? 03:13:37

16 A No. I know -- I know they've excluded it. I  
17 just don't know the amount and I don't know the  
18 exact mechanism, and I don't know that they excluded  
19 100 percent versus 98 percent versus 102 percent.

20 But I know that they worked their way down 03:13:51  
21 through the formula to get to an amount of revenue  
22 attributable to sound recordings for which they have  
23 royalty obligations and for which they believed they  
24 were exempt from royalty obligations so that they  
25 could exclude huge amounts of revenue from their 03:14:08

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1 royalty base. So I know they did that, and that's  
2 how I know it was excluded, because I know they  
3 would work hard to do that.

4 Q So you believe that a portion of the revenue  
5 is attributable to the non-music content; however, 03:14:24  
6 Sirius XM has excluded that from the gross revenue;  
7 is that your understanding?

8 A A portion of Sirius XM's revenue that they  
9 earn by operating the satellite radio, I think  
10 Sirius XM believes some is related to non-music 03:14:44  
11 content, and I think they structure their packages  
12 to help them identify a way to exclude that from the  
13 royalty base.

14 Q Do you believe as the economic expert in this  
15 case, that there is some economic benefit to Sirius 03:14:57  
16 XM for -- by offering the non-music content of the  
17 Sirius Select package?

18 A Oh, now you're back to this one particular  
19 package. Because it's -- I mean, the reporting is  
20 not limited to that package. That was a 03:15:16  
21 hypothetical you were asking me questions about.

22 Q Well, I'm trying to focus you with a more  
23 specific example.

24 A Okay. Yeah, I don't know how much of the  
25 subscription revenue from the Select package that -- 03:15:29

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1 owned by one of the class members; is that correct,  
2 or did I mishear that?

3 A Well, I think that's just inside out. So  
4 we're look- -- my understanding is that there's the  
5 class of owners of the relevant sound recordings 04:11:42  
6 recorded prior to February '72 and that if Sirius XM  
7 can demonstrate they have authorization, then those  
8 sound recordings should be removed from the damages,  
9 so that my understanding is it's an affirmative duty  
10 by Sirius XM to demonstrate a license. 04:12:08

11 So we're looking to find affirmative evidence  
12 that they have given us, given the plaintiffs to  
13 say, hey, we have a license for that. And if -- if  
14 they provide that evidence, we can find it, anything  
15 to indicate that they -- that they have a license. 04:12:25  
16 And we don't question their representation. If they  
17 say we have a license, we take it out.

18 But if we search all the documents that  
19 they've produced to us which indicate the songs they  
20 have licenses for and we don't find the sound 04:12:38  
21 recording, then we don't take it out, because Sirius  
22 XM has provided no affirmative evidence that they  
23 have a license.

24 Q Would it be fair to say that your methodology  
25 identified the sound recordings that Sirius XM 04:12:51

1 claims it has a license to or are -- should not be  
2 part of the class and that anything other than that  
3 on the combined monthly playlist you have assumed  
4 should be part of the class for purposes of  
5 calculating damages? 04:13:12

6 A With the exception of the opt-outs, I would  
7 say that that's true. So we have separately  
8 received opt-out forms, and we also exclude those.  
9 But just with respect to what Sirius XM has produced  
10 to us, if they indicated they have authorization or 04:13:25  
11 license on any major label spreadsheet, MRI 1,  
12 MRI 2, we take it out.

13 Q But just to finally -- get the final point on  
14 this, you only exclude from the combined monthly  
15 playlist if Sirius XM has a license or authorization 04:13:45  
16 or the sound recording owner has opted out, and  
17 everything else is assumed to be part of the class  
18 for purposes of your damages calculation; is that  
19 fair?

20 A Yeah, I think that's fair. 04:14:01

21 Q Did you do anything to verify that the  
22 remainder that wasn't cut out by the license or  
23 authorization or the opt-out was, in fact, pre-'72  
24 sound recordings not owned by a licensee?

25 MS. SRINIVASAN: Object to the form. 04:14:27

1 THE WITNESS: You mean -- you mean other than  
2 scour the data that Sirius XM produced and the  
3 opt-out forms submitted by certain class members?

4 BY MR. WINTER:

5 Q Correct. 04:14:48

6 A I don't think so. I didn't -- I didn't  
7 independently research who owned the sound  
8 recordings and inquire whether Sirius XM had a  
9 license. I relied on Sirius XM telling us who --  
10 who they believed they were licensed or authorized 04:15:11  
11 from.

12 Q So you relied on Sirius XM and the opt-outs  
13 to decide which sound recordings to exclude from the  
14 class, and you didn't do any further investigation  
15 to find out if the remainder was actually properly 04:15:25  
16 part of the class?

17 MS. SRINIVASAN: Object to the form.

18 THE WITNESS: Well, my understanding is they  
19 are properly part of the class, because my  
20 understanding from counsel is the class is owners of 04:15:38  
21 pre-'72 sound recordings played by Sirius XM in the  
22 relevant period, unless Sirius XM has demonstrated  
23 that they had a license or authorization or unless  
24 they've opted out.

25 So that's -- that's what we did. So I 04:16:00

1 First of all, I don't know that what you said is  
2 true, but I didn't -- I don't indicate what's not  
3 authorized or licensed. I indicate what appears to  
4 be authorized or licensed according to the data  
5 produced by Sirius XM, and if so, I take it out. 05:14:34

6 So to the extent these are in the remaining  
7 sound recordings, it's because we didn't identify  
8 the sound recording from the combined playlist in  
9 one of the sources of information indicating a  
10 license. 05:14:58

11 And it could have been because it didn't  
12 match and the computer didn't find it out of the  
13 111,000 attempted matches, or it could be because in  
14 the major label spreadsheet, despite the fact it  
15 says ABKCO, it was not identified as licensed 05:15:14  
16 similar to the Capital Records sound recordings that  
17 I mentioned previously.

18 But I -- my determination is not what's not  
19 licensed or authorized. My determination is to  
20 exclude sound recordings for which Sirius XM has 05:15:32  
21 indicated they have a license or authorization.

22 Q And is the -- identifying what's licensed or  
23 authorized, isn't that -- the negative of that that  
24 you're concluding that the balance is not authorized  
25 or licensed? 05:15:53

1 A No. I'm concluding that Sirius XM hasn't  
2 produced evidence to demonstrate that they had  
3 authorization.

4 Q So you're not expressing any opinion on  
5 whether the remaining sound recordings are licensed 05:16:05  
6 or not. You're simply saying they weren't on the  
7 list that Sirius XM provided that affirmatively  
8 stated that these are licensed or authorized; is  
9 that correct?

10 A Yeah, I think -- I think that's fair to say. 05:16:21  
11 I'm -- I'm trying to take everything out of the  
12 class damages that Sirius XM indicates they have a  
13 license for. And if they don't indicate that to me,  
14 I have no basis for taking it out of the damages.

15 Q So your opinion -- strike that. 05:16:38  
16 Do you have an opinion on whether the  
17 remaining sound recordings are not licensed or not  
18 authorized? Strike that.

19 Do you have an opinion whether the remaining  
20 sound recordings are authorized or licensed? 05:16:56

21 MS. SRINIVASAN: Object to the form, calls  
22 for a legal conclusion.

23 THE WITNESS: Well -- okay. The way you want  
24 me to answer the question is yes, yes, I do.

25 BY MR. WINTER: 05:17:10

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1 Q And what is your opinion?

2 A My opinion is based on the procedures I  
3 employed to try to identify evidence that Sirius XM  
4 asserts authorization or license to play sound  
5 recordings, I have not been able to identify any 05:17:30  
6 such evidence related to those sound recordings.

7 Q So do you have a conclusion or an opinion  
8 regarding the remaining sound recordings on whether  
9 they are licensed or authorized or opt-outs?

10 A Yeah, I don't have any evidence that they 05:17:48  
11 are, and so those are the bases for my calculating  
12 the class damages.

13 Q My -- my question is, do you have any  
14 opinions whether the remaining sound recordings are  
15 owned by the majors? 05:18:06

16 A Do you mean on any particular sound  
17 recording, do I have an opinion one way or another  
18 whether the data Sirius XM provided to me or the  
19 methodology I employed work perfectly? Of course  
20 not. That's the whole point. It's the same issue 05:18:23  
21 Dr. Ugone's -- we're dealing with.

22 So my methodology is designed to -- to the  
23 extent reasonable and appropriate, identify as many  
24 sound recordings as I can where Sirius XM has  
25 asserted a license or authorization and take those 05:18:42

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1 sound recordings are owned by the class members; is  
2 that correct?

3 A Yeah, that's a good clarification. It would  
4 also include sound recordings for which Sirius XM  
5 hasn't -- that may be owned by others for which 05:22:50  
6 Sirius XM hasn't identified that in their data.

7 So, for example, if there's a sound recording  
8 owned by Capital Records and the major label  
9 spreadsheet doesn't have an asterisk on it which is  
10 designed to indicate ownership, that would be on my 05:23:08  
11 list. And if -- if someone determined it's actually  
12 owned by Capital Records, then that error in the  
13 major label spreadsheet would also affect my  
14 conclusion.

15 Q I'm going to ask the question again. 05:23:24

16 Is it your opinion -- within the margin of  
17 error related to some minor mathematical  
18 inaccuracies, is it your opinion that the remaining  
19 sound recordings are owned by the class members?

20 A It's not a mathematical issue. Based on the 05:23:37  
21 data made available to me, I believe it's a  
22 reasonable determination of the sound recordings for  
23 which -- excluding those for which Sirius XM's  
24 identified a license or authorization or a party has  
25 opted out and given a list of songs that they own. 05:24:01

1 Q Have you done anything to verify that these  
2 remaining sound recordings belong to any of the  
3 class members?

4 MS. SRINIVASAN: Object to the form.

5 THE WITNESS: Well, certainly the Turtle 05:24:18

6 songs are on there, and I know those are owned by  
7 the -- Flo & Eddie, so -- but no, I haven't gone  
8 through the 30-some-thousand sound recordings and

9 attempted to verify directly that some current

10 remaining class member actually has ownership. 05:24:38

11 BY MR. WINTER:

12 Q So aside from the Turtle sound recordings,  
13 which you say you verified are owned by the class  
14 members, are there any other sound recordings on the

15 remaining sound recordings list that you have 05:24:50

16 verified are owned by the class members?

17 MS. SRINIVASAN: Object to the form; calls  
18 for a legal conclusion.

19 THE WITNESS: No. My -- my methodology

20 didn't attempt to identify ownership. I attempted 05:25:00

21 to identify claims of license and authorization or  
22 accepted the claims of ownership for opt-outs.

23 BY MR. WINTER:

24 Q So you haven't done anything to verify that

25 the remaining sound recordings are owned by class 05:25:20

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1 members other than the Turtles songs; is that fair?

2 MS. SRINIVASAN: Object to the form.

3 THE WITNESS: Well, other than to establish  
4 my methodology, which is designed to exclude from my  
5 class damages any sound recording that -- that I can 05:25:44  
6 determine someone else has -- someone who's not in  
7 the class has asserted ownership. I mean, that's --  
8 that's what I've done.

9 BY MR. WINTER:

10 Q Understood. And you've explained that 05:25:59  
11 methodology, and we've gone through that.

12 A Uh-huh.

13 Q And now we're at the point that we have these  
14 remaining sound recordings that you used to  
15 calculate the damages in this case. 05:26:07

16 A Uh-huh.

17 Q And I'm asking you that -- after you have  
18 done that procedure that you outlined before --

19 A Uh-huh.

20 Q -- have you done anything now to verify that 05:26:15  
21 any of these remaining sound recordings that you  
22 used to calculate your damages are owned by any  
23 class members other than the Flo & Eddie recordings?

24 A No. I haven't -- I haven't attempted to  
25 validate ownership of the remaining sound 05:26:31

CONFIDENTIAL PORTION

1 deemed confidential.)

2 Q Is it your opinion that Sirius XM would have  
3 made -- strike that.

4 Is it your opinion that Sirius XM would have  
5 recognized [REDACTED] less revenue over the period 06:30:43  
6 in which you calculated damages if they had not  
7 played the class members' pre-1972 recordings?

8 A I don't think I would go that far. It's  
9 not -- I -- that's not -- I haven't analyzed that  
10 question in -- in that context, and that's not how I 06:31:04  
11 calculated the -- the [REDACTED].

12 But certainly, if there's, yeah, less content  
13 available, particularly of certain types of music,  
14 there's going to be some subscribers that would  
15 probably either not subscribe or be willing to pay 06:31:20  
16 less, and -- you know, so I'm sort of relying on  
17 Sirius XM's analysis of what drives their revenue  
18 and their -- representations that their revenue was  
19 driven in part by, you know, which songs they play  
20 and how many times they play them and that sort of 06:31:44  
21 thing. So -- but that's not how I derive the [REDACTED]

22 [REDACTED]  
23 Q Did you make any attempt to calculate how  
24 much less revenue Sirius XM would have received over  
25 your calculated damages period had they not played 06:32:01

CONFIDENTIAL PORTION

1 the class members' pre-1972 sound recordings?

2 MS. SRINIVASAN: Object to the form.

3 THE WITNESS: Only to the extent that I

4 calculated the revenue that Sirius XM indicates is

5 attributable to those recordings, so -- 06:32:18

6 BY MR. WINTER:

7 Q But you just said you didn't think that they

8 would -- that that was the correct measure of how

9 much less revenue Sirius XM would have received?

10 A I said I didn't perform my analysis for that 06:32:27

11 purpose, so that's not what the number represents in

12 my report. But it would be certainly a reasonable

13 starting point; if not, a reasonable estimate of

14 that number.

15 Q Is it your testimony that you think that 06:32:46

16 Sirius XM would have earned [REDACTED] less in

17 revenue had they not played any of the class

18 members' pre-1972 recordings?

19 MS. SRINIVASAN: Object to the form; asked

20 and answered. 06:33:00

21 THE WITNESS: Over -- over this entire

22 seven-year period? It's possible, yeah.

23 BY MR. WINTER:

24 Q I'm not asking you if it's possible. I'm

25 asking you, what is your opinion? How much less 06:33:06

CONFIDENTIAL PORTION

1 revenue would Sirius XM have recognized or realized  
2 if they had not played the class members' pre-1972  
3 recordings?

4 MS. SRINIVASAN: Object to the form.

5 THE WITNESS: Yeah, I haven't performed that 06:33:23  
6 analysis.

7 BY MR. WINTER:

8 Q Did Sirius XM stop playing the Turtles music  
9 at a certain point?

10 A It appears so. 06:34:11

11 (Whereupon, the confidential portion ends.)

12 BY MR. WINTER:

13 Q Did that have any impact on Sirius XM's  
14 revenue?

15 A I don't know. 06:34:19

16 Q Did the fact that Sirius XM stopped playing  
17 the Turtles' music have any impact on the Turtles'  
18 revenues?

19 A I don't know. I haven't analyzed that.

20 Q Is it true that consumers are willing to pay 06:34:55  
21 more to listen to audio content that does not  
22 include advertisements?

23 A You mean more than they would if it did  
24 include advertisements? Is that the comparison? I  
25 don't know what you mean by more. 06:35:19

1 Q Yes. Let me ask the question again.

2 For a radio service that has ads on it, would  
3 consumers or the listeners to that radio service be  
4 willing to pay more for that radio service without  
5 any ads? 06:35:43

6 MS. SRINIVASAN: Object to the form.

7 THE WITNESS: Do they pay anything for the  
8 service with ads? I mean, I'm just trying to  
9 understand this more. It's like a comparison of two  
10 things. 06:36:04

11 BY MR. WINTER:

12 Q Does a ad-free radio content -- strike that.  
13 Does the fact that radio content is ad-free  
14 have a value to consumers?

15 MS. SRINIVASAN: Object to the form. 06:36:20

16 THE WITNESS: I think consumers prefer  
17 ad-free music broadcasting.

18 BY MR. WINTER:

19 Q And if consumers are paying for music that  
20 has ads on it, would they be willing to pay more for 06:36:37  
21 music that has no ads on it?

22 A It appears that that's the case. I mean, you  
23 know, a lot of the broadcasters offer music with ads  
24 and music without ads, and usually there's a price  
25 differential. 06:36:56

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1 I, the undersigned, a Certified Shorthand  
2 Reporter of the State of California, do hereby  
3 certify:

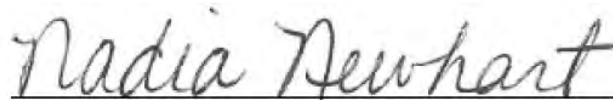
4 That the foregoing proceedings were taken  
5 before me at the time and place herein set forth;  
6 that any witnesses in the foregoing proceedings,  
7 prior to testifying, were placed under oath; that a  
8 verbatim record of the proceedings was made by me  
9 using machine shorthand which was thereafter  
10 transcribed under my direction; further, that the  
11 foregoing is an accurate transcription thereof.

12 I further certify that I am neither  
13 financially interested in the action nor a relative  
14 or employee of any attorney of any of the parties.

15 IN WITNESS WHEREOF, I have this date  
16 subscribed my name.

17 Dated: 10/12/2016

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# **EXHIBIT E**

Coming up on Freewheelin' later today... - Sirius XM'S Road Dog Trucking News

The screenshot shows the Facebook interface. At the top, there is a dark blue navigation bar with the Facebook logo, a "Sign Up" button, and login fields for "Email or Phone" and "Password". Below the navigation bar, the "News Feed" section is visible. A post from "Sirius XM'S Road Dog Trucking News" is the main focus. The post includes a profile picture, the name of the page, and the date "April 25, 2013". The text of the post reads: "Coming up on Freewheelin' later today, right before Road Dog Trucking News: Be sure and join Meredith and Chris. Here is what they have coming up --- Thursday: Happy Together or Go Your Own Way: Some who consider themselves lone-wolfs enjoy the solitude of trucking and some prefer company while they drive. What about you? How do you manage living in a small space for a long time with another person? Tell us your tales of team driving adventures. ALSO: Comedy team Cheech & Chong pop in after their Sirius XM Town Hall event, Howard Kaylan recounts his days in the Turtles and music producer Ken Caillat tells us the inside story of Fleetwood Mac!". Below the text are "Like" and "Comment" buttons. At the bottom of the post, it says "Thomthom M. Patterson and Terry Lee Alberter like this.". On the right side of the news feed, there are links for "English (US)", "Privacy", "Terms", "Cookies", and "More", along with the text "Facebook © 2014".

[https://www.facebook.com/permalink.php?id=327197117393074&story\\_fbid=377469792365806](https://www.facebook.com/permalink.php?id=327197117393074&story_fbid=377469792365806)[12/5/2014 4:13:12 PM]

SXM-F&E\_00016892  
**DX 617-003**

# **EXHIBIT F**

**EXHIBIT F,  
A TRUE AND CORRECT  
COPY OF WHICH,  
WILL BE LODGED  
WITH THE COURT.**

# **EXHIBIT G**

1 UNITED STATES DISTRICT COURT  
2 FOR THE CENTRAL DISTRICT OF CALIFORNIA

3 FLO & EDDIE, INC., a )  
4 California corporation, )  
5 Plaintiff, )

6 vs. ) CASE NO. CV-13-05693 PSG

7 SIRIUS XM RADIO, INC., a )  
8 Delaware corporation; )  
9 and DOES 1 through 10, )  
10 Defendants. )  
11 ----- )

12 VIDEOTAPED DEPOSITION OF:

13 SUNDAZED RECORDS (BOB IRWIN)

14 Taken on Behalf of the Defendants

15 June 6, 2016

16  
17  
18  
19  
20  
21  
22  
23 ALPHA REPORTING CORPORATION  
Katherine Gale  
24 Licensed Court Reporter 420  
162 8th Avenue North  
25 Nashville, Tennessee 37203



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A P P E A R A N C E S

FOR THE PLAINTIFF:

RACHEL C. BLACK, ESQ.  
Susman Godfrey LLP  
1201 Third Avenue  
Suite 3800  
Seattle, Washington 98101  
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FOR THE DEFENDANTS AND DEPONENT:

EVAN T. MAYOR, ESQ.  
O'Melveny & Myers LLP  
1999 Avenue of the Stars  
Suite 700  
Los Angeles, California 90067  
310.553.6700  
emayor@omm.com

ALSO PRESENT:

DAVID DRUMEL, Videographer

1 Q So what role, then, does radio play with  
2 respect to Sundazed and its business?

3 MS. BLACK: Object to form.

4 THE WITNESS: It's hard for me to  
5 explain that -- that it's less important and vital  
6 to a label like ours. I know that you know what  
7 I'm saying about that. But it's impossible to  
8 read.

9 You feel good when you know your  
10 release is being played on radio. I mean that's a  
11 good feeling. You like to hear, especially if you  
12 can pinpoint it as your release. That feeling  
13 comes from knowing that you're delivering the  
14 right version to the world and not something  
15 that's of lesser quality.

16 If the question is does that -- does  
17 that help us with exposure and sales, it's a tough  
18 read. I mean I simply don't know how to get a  
19 read on that. There's no barometer to use whether  
20 that, in a specialty label like ours, drives --  
21 drives business to us. I -- we always have kind  
22 of traditionally viewed it from the other  
23 perspective.

24 Q And what's that?

25 A That we are enabling our friends in radio

1 to be playing the right-sounding record. And I'm  
2 speaking of primarily licensed material because,  
3 without being long-winded about this, you know,  
4 we're not the only people that have Nancy Sinatra  
5 out there, and invariably radio is going to be  
6 interested in the same handful of songs. And they  
7 can play them from our releases, or they can play  
8 them from Rhino's releases or Varese Vintage's  
9 releases. But I know that ours is the  
10 correct-sounding one, so that's the gratification  
11 in that and that's the win for us.

12 Q So you don't know one way or the other  
13 whether radio play drives sales of Sundazed's  
14 recordings?

15 A True. I do know that there are specific  
16 events that certainly can't hurt such as a station  
17 doing a label spotlight on our material. But when  
18 it's just a matter of a song being played, I have  
19 no way of measuring if that -- if it drives people  
20 to retail.

21 Q So with respect to a label spotlight, do  
22 you have an understanding as to whether that  
23 drives sales?

24 A I don't know if it drives sales. It  
25 spreads the word.

1 Q Why do you want to spread the word?

2 A To bring more people to an understanding of  
3 what our label is and what it does and, if they  
4 are interested in that music, to hopefully bring  
5 them in.

6 Q And by bringing them in, do you mean  
7 purchase recordings?

8 A Yeah.

9 Q So with respect to a label like Sundazed or  
10 let's just take Sundazed as an example, do you  
11 have an understanding that terrestrial radio can  
12 play your music without permission?

13 A Yes.

14 Q Why?

15 MS. BLACK: Object to form.

16 THE WITNESS: Well, because -- because  
17 of tradition in terrestrial radio and because I  
18 feel as though they are not directly making  
19 profits from playing our material.

20 BY MR. MAYOR:

21 Q And since when have you had this belief?

22 A Well, I'm always learning about this. I  
23 mean this is ongoing, and it's moving shape and  
24 form. But it's always been that way with me and  
25 terrestrial radio because we've always worked hand

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1 in hand. I don't know if that answers your  
2 question, but that's the best I can do.

3 Q So you've had the belief that terrestrial  
4 radio is not required to obtain your permission to  
5 play your music since when?

6 A Well, I've never felt as though they needed  
7 to obtain our permission.

8 Q In all of your years in the music business?

9 A Yes.

10 Q Now, do you have an understanding that  
11 Sirius XM has to obtain your permission before it  
12 plays one of your recordings.

13 MS. BLACK: Object to form.

14 THE WITNESS: Could you repeat the  
15 question for me?

16 BY MR. MAYOR:

17 Q Do you have an understanding as to whether  
18 Sirius XM has to obtain your permission before it  
19 plays one of your recordings?

20 MS. BLACK: Object to form.

21 THE WITNESS: They -- no. I don't  
22 really understand but know they have never asked  
23 my permission to play a song.

24 BY MR. MAYOR:

25 Q Do you have an understanding as to whether

1 MS. BLACK: Object to form.

2 THE WITNESS: Could you repeat that  
3 for me?

4 BY MR. MAYOR:

5 Q Is it your understanding that the "buy it  
6 now" or "click to buy" features drive people to  
7 make purchases of your recordings?

8 A Yes.

9 Q What is the basis for that understanding?

10 A That if they are interested enough to  
11 pursue a release further and interested enough to  
12 actually make another move and another click to  
13 perhaps read about it or hear a little bit more,  
14 you stand a chance of being able to provide them  
15 with that release.

16 Q Are you aware of any -- have you ever  
17 analyzed any data that shows that these features  
18 drive people to purchase your records?

19 A No.

20 Q Is there any benefit to you when your  
21 recordings are broadcast by Sirius XM?

22 MS. BLACK: Object to form.

23 THE WITNESS: I don't know the answer  
24 to that. Can you ask me the question one more  
25 time?

Page 137

1 BY MR. MAYOR:

2 Q Is there any benefit to you, Sundazed, when  
3 your recordings are broadcast by Sirius XM?

4 MS. BLACK: Object to form.

5 THE WITNESS: I don't know.

6 BY MR. MAYOR:

7 Q What about terrestrial radio?

8 A I don't know.

9 Q Is it good for you to have your recordings  
10 heard by a lot of people?

11 MS. BLACK: Object to form.

12 THE WITNESS: Yes.

13 BY MR. MAYOR:

14 Q Why?

15 A To increase awareness of both the artist  
16 and hopefully the brand.

17 Q And what are you hoping to accomplish by  
18 increased awareness of the artist and the brand?

19 A More sales.

20 Q Does airplay increase the popularity of  
21 your recordings?

22 MS. BLACK: Object to form.

23 THE WITNESS: I don't know.

24 BY MR. MAYOR:

25 Q Does airplay increase the popularity of

Page 138

1 your company?

2 A I don't know.

3 Q Does airplay increase the sales of your  
4 recordings?

5 A I have no way of knowing.

6 Q Has Sundazed ever purchased programming  
7 time on an AM/FM station?

8 A No.

9 Q Is there any harm to you when your  
10 recordings are broadcast by Sirius XM?

11 MR. BLACK: Object to form.

12 THE WITNESS: No.

13 BY MR. MAYOR:

14 Q Does airplay decrease the popularity of  
15 your recordings?

16 A I hope not.

17 Q Does airplay decrease the popularity of  
18 your company?

19 A I hope not.

20 Q Why do you say you hope not?

21 A Because you hope that somebody doesn't hear  
22 something and truly dislike it.

23 Q Does airplay decrease the sales of your  
24 recordings?

25 A I have no way of knowing.

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1 REPORTER'S CERTIFICATE

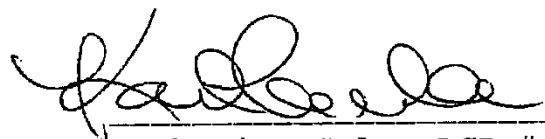
2  
3 I, Katherine Gale, CSR, RPR, LCR #420,  
4 Licensed Court Reporter and Notary Public, in and  
5 for the State of Tennessee, do hereby certify that  
6 the above deposition was reported by me, and the  
7 transcript is a true and accurate record to the  
8 best of my knowledge, skills, and ability.

9 I further certify that I am not  
10 related to nor an employee of counsel or any of  
11 the parties to the action, nor am I in any way  
12 financially interested in the outcome of this  
13 case.

14 I further certify that I am duly  
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17 LCR number and expiration date following my name  
18 below.

19 I further certify that this transcript  
20 is the work product of this court reporting agency  
21 and any unauthorized reproduction and/or transfer  
22 of it will be in violation of Tennessee Code  
23 Annotated 39-14-104, Theft of Services.

24 IN WITNESS WHEREOF, I have hereunto  
25 put my hand and affixed my notarial seal this 17TH  
day of June, 2016.



Katherine Gale, LCR #420  
Expiration Date 02/25/20

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# **EXHIBIT H**

1 UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

2 -----x

FLO & EDDIE, INC., a California corporation,

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Plaintiff,

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V. Civil Action No.: CV 13-05693 PSG

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SIRIUS XM RADIO, INC., a Delaware corporation;

6

and DOES 1 through 10,

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Defendant.

8

-----x

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Videotaped deposition of

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TOMMASO GRAMUGLIA, held on May 25, 2016, commencing

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at 10:21 a.m., at the Best Western University Inn,

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90 East Main Street, Canton, New York, before

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Taryn D. Kennedy, Registered Professional Reporter,

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and Notary Public in and for the State of New York.

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Job No 2302009

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Pages 1 - 185

Page 1

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BY: BRIAN HOGUE, ESQ.

7

8 For the Defendant:

9 O'MELVENY & MYERS, LLP

Attorneys at Law

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11 Los Angeles, California 90067-6035

Telephone: (310)553-6700

12 E-mail: Emayor@omm.com

BY: EVAN T. MAYOR, ESQ.

13

14 Also Present:

15 Mark L. Whalen, videographer

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Page 2

1 you would speak of. So no, we have not -- we have  
2 not really done that except in the last few -- in  
3 the last year or so on Country Rewind. We've  
4 promoted. We've hired a promotion guy to help us  
5 with radio play.

6 Q And --

7 A And that was only in the last year.

8 Q And what -- why did you hire someone to  
9 help you with Country Rewind?

10 A It's because we wanted to -- to get  
11 airplay on independent radio stations, because what  
12 we're doing was very unique, and we were successful.  
13 We had -- we had several number one independent  
14 radio hits with the releases we did. Because, you  
15 know, they -- they were, you know, well-accepted by  
16 the radio stations.

17 Q And what releases are these?

18 A Two Faron Young cuts from Faron Young.  
19 One was You Don't Know Me and the other one I can't  
20 remember. I'm sorry.

21 Q Are those -- go ahead.

22 A Country Rewind. Connie Smith was -- oh,  
23 it's on the tip of my tongue. There was a song by  
24 Connie Smith. And then on -- we promoted  
25 Mickey Gilley, and the song we promoted with

1 Mickey Gilley was Swinging Doors.

2 Q And is it your understanding that any of  
3 those songs you were promoting were pre-1972  
4 recordings?

5 A Again, those recordings were originally  
6 recorded pre-'72, to the best of my knowledge, and  
7 we updated those recordings. So they're protected  
8 by copyright now. They're completely, you know,  
9 brand-new recordings.

10 Q And why did you seek to promote those  
11 songs on the radio?

12 MR. HOGUE: Object to form.

13 A To make -- to make airplay, to make, you  
14 know, people hear them, because they --

15 Q Why -- go ahead.

16 Well, why did you want people to hear  
17 them?

18 A Well, because they were brand-new. You  
19 know, they were -- they weren't -- this was  
20 different than -- than, you know, the Connie Smith  
21 original hit. This is something -- or the  
22 Mickey Gilley Swinging Doors. This is a brand-new  
23 version that's different than the famous  
24 Merle Haggard cut of Swinging Doors.

25 Q Is airplay an important part of promoting

1 music?

2 MR. HOGUE: Object to form. Vague.

3 A I mean, airplay certainly helps.

4 Q How does it help?

5 MR. HOGUE: Object to form.

6 A Well, I mean, you know, if people hear  
7 something they haven't heard before, you know, they  
8 may -- may promote interest.

9 Q Does airplay promote people to purchase  
10 recordings?

11 A Well, we hope so. We can't guarantee it.

12 Q Is the reason that you promote country  
13 songs on the radio that you hope that people buy  
14 them?

15 A Yeah. And we also -- there's a  
16 difference between promoting Hindsight and promoting  
17 Country Rewind. And I'll explain what the  
18 difference is for you. Is with Country Rewind we're  
19 also trying to attract the younger audience, you  
20 know, that necessarily would not listen to classic  
21 country. Because what this -- by updating the  
22 classic country recording and adding instruments to  
23 make them more modern but still keeping the classic  
24 sound, we're hoping by getting airplay that we can  
25 get a younger audience to understand what Country

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1 Rewind is and have an interest in it.

2 Q And buy records?

3 A Yeah. And hopefully buy CDs.

4 Q And how is that different for the country  
5 product than for the Hindsight product?

6 A Well, Hindsight product is a little bit  
7 different in the sense that you're paying historical  
8 recordings, okay, and you're not promoting a new  
9 idea to a younger audience. So -- and usually the  
10 older demographics, okay, that buy Hindsight records  
11 are collectors and not necessarily are people that  
12 listen to a radio station and then go buy a record,  
13 you know ... They're buying it because of  
14 collectors, you know ... They're -- oh, I want  
15 Artie Shaw. It's not, Well, I heard Artie Shaw.

16 It's a little bit different when you're  
17 talking about a younger audience that we're trying  
18 to do with Country Rewind. We're actually trying to  
19 go after a younger, newer audience to bring them  
20 into -- hopefully in liking classic country  
21 so-called versus the new country, you know ...

22 Q And you're doing that by promoting your  
23 records on the radio?

24 A Well, getting it played. We don't --  
25 and, remember, our very limited promotion that we

1 understanding as to how he promotes your music?

2 A No, I don't. Other than the fact that he  
3 calls radio stations and he knows people, and they  
4 say, Hey, I got a new record release by  
5 Mickey Gilley.

6 And they'll say, Well, we didn't know  
7 Mickey Gilley did a new record, you know ...

8 Or the case of Faron Young.

9 Faron Young's been dead for 12 years. And  
10 Faron Young was very popular on radio. And a couple  
11 of guys called in and want to interview him. So  
12 Charlie says -- he says, How can we dig him up?

13 I said, I have no idea.

14 Q Do you have an understanding as to  
15 whether Hindsight has ever promoted this country  
16 music on Sirius XM?

17 A I have no idea. I mean, I know we have  
18 gotten airplay on some cable radio stations.  
19 Whether that means XM, I don't know. I don't  
20 actually deal with Charlie, you know ... And when I  
21 say "deal with Charlie," I don't say, Which stations  
22 you playing, which stations you don't play? So I  
23 don't know exactly where they're getting it played.

24 Q Do you know -- do you have any  
25 understanding as to whether Charlie has a

1 relationship with any Sirius XM DJs?

2 A I have no idea, to be honest with you.  
3 It's a question I never really asked. I'm more  
4 interested if I can get it played in -- on -- on the  
5 Tubb show on -- on, you know -- on the Nashville  
6 radio stations, you know, because that's my  
7 interest. You know, I don't even think about XM  
8 radio. I don't think I've ever asked him that  
9 question, but I will ask that question now that  
10 you've asked me that question.

11 Q Do you understand that Charlie sends CDs  
12 of music to DJs?

13 MR. HOGUE: Object to form.

14 A They don't -- they don't send -- they  
15 don't really send CDs anymore. I don't know if  
16 you're aware of it. What they do is they send MP3s  
17 out. It goes on some site and -- I don't know  
18 exactly how it works. But we have to send him a  
19 digital quality -- or a high-quality MP3, and then  
20 the MP3 is loaded on some site and stations can  
21 download that MP3, the high-quality MP3. They call  
22 it a radio-quality MP3.

23 So they really -- matter of fact, from  
24 what I understand is radio stations don't want CDs  
25 anymore. They won't play them if you send it to

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1       them as a CD. I don't know if that's totally true,  
2       but that's what I've been told.

3           Q       Do you have any idea about whether Sirius  
4       XM has access to that site that you're talking  
5       about?

6           A       Not a clue. I don't know anybody at XM  
7       other than you.

8           Q       What was that?

9           A       I don't know anybody at XM --

10          Q       Oh.

11          A       -- other than you. I mean, you represent  
12       them. You don't work for XM.

13          Q       Other than Charlie Ammerson [sic]  
14       recently promoting your country music, any other  
15       promoting that Hindsight's done over the past --

16          A       No. Some of the --

17          Q       -- 25 --

18          A       Some of the artists themselves, you know,  
19       do some promotion themselves, you know ... Like,  
20       Connie Smith had a TV show with her husband, so she  
21       would promote the new release. Mickey Gilley  
22       promotes it at all his concerts, you know, buy my  
23       new release, that kind, you know ...

24          Q       Any other promotion you can think of?

25          A       No. We really don't have -- you know, we

1 really -- we really -- you know, that's something  
2 that we're about to change where we're going to be  
3 more involved in social media and all that stuff.  
4 But no, we don't do a lot of promotion.

5 Q So as -- just -- I'm trying to make the  
6 record clear. So as you sit here today, besides the  
7 Charlie Ammerson promotion and artists promoting  
8 their own music, can you think of any other  
9 promotion that Hindsight has been involved in over  
10 the past -- since it was founded?

11 MR. HOGUE: Object to form.

12 A I think that's a long period of time.  
13 There are -- have been other promotions where I've  
14 been involved. But I mean, I'm just talking about  
15 in the short term here in the last five or six  
16 years. You know, I mean, I can't remember  
17 everything we did over 40 years.

18 Q Well, I'm just asking for what you can  
19 remember today.

20 A Okay.

21 Q So tell me about any other promotions you  
22 can remember today.

23 A I mean, I don't -- you know, I recall  
24 that we must have done some, but I don't recall the  
25 specifics.

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REPORTER'S CERTIFICATE

I, TARYN D. KENNEDY, Court Reporter and Notary Public, certify:

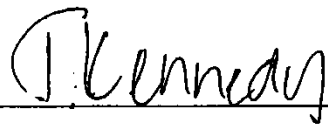
That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me;

That the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct transcript of my shorthand notes so taken;

I further certify that I am not a relative or employee of any attorney or of any of the parties nor financially interested in the action.

Dated: 06/08/2016



TARYN D. KENNEDY, COURT REPORTER

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# **EXHIBIT I**



**From:** Tom Frangione <beatletom@comcast.net>  
**Sent:** Sunday, October 25, 2015 11:02 PM  
**To:** Cary Mansfield <Cary@varesesarabande.com>  
**Cc:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Subject:** Re: Cilla and Billy J discs  
**Attach:** image001.jpg; image002.jpg

---

Out if the gate, I'd say The Fest. The catalog is very robust and target marketed - with holidays coming up it would seem to be a prudent choice

So I'm just getting in from seeing Ringo. Great all star band show. Got me to thinking - no ones ever released his "scouse the mouse" on CD ..... Just sayin .....

- Tom

On Oct 25, 2015, at 7:04 PM, Cary Mansfield <Cary@varesesarabande.com> wrote:

Hi Tom,

I was only kidding about the Mets. I hope they go on to win the series. At least there is a Dodgers connection. Yes, we have been working on the Elephants Memory album. Our plan was to release it on CD and limited edition 180 gram vinyl for Record Store Day. We have an approval from Universal to release it, but there is currently a hold on the album until Apple give us the go-a-head. Right now it is totally up in the air. As far as David Peel I have not approached that one, but would consider it if we ever get past Elephants Memory.

I will check out your promotional recommendations. If we were to pick one, which one do you think would be the best choice for us to pursue? Please let me know.

Thanks so much for your help.

Best regards,

**Cary E. Mansfield**

*Vice President of A&R*  
Varese Sarabande Records, LLC  
9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

**Follow . Watch . Listen . Like . Buy**

On Oct 23, 2015, at 7:35 PM, Tom Frangione <beatletom@comcast.net> wrote:

Hi Cary –

Sorry 'bout the Mets blurb. If it'll make you feel any better, my dad was a Brooklyn Dodgers fan growing up, and only adopted the Mets after the Dodgers fled town. He resumed loyalties in the National League, and I inherited it from him. Lou can tell you – my dad and I have a great tradition – 28 years in a row going to opening day, both at Shea, and now CitiField. Can't wait for #29. He thinks it's my gift to him every year, but it's really the other way around.

Thank you for the kind offer on the Family Way vinyl, but I was astute enough to grab one on Record Store Day. Very well done.

Speaking of Beatle related releases, when I put out a quick bulletin to my Beatle contacts about the Varese titles you sent me (encouraging them to seek both out, of course) one

replied that he'd heard Varese was going to put out a couple of albums Apple overlooked in their reissue campaign: David Peel's "the Pope Smokes Dope" and the "Elephant's Memory" album. Any truth to that ?

OK – so for my "camps", here are the contacts and possible ideas for promotion / marketing:

JOE JOHNSON'S BEATLE BRUNCH (syndicated radio special). Has Donnie Gentile ("Donnie G") from Amerimedia contacted you ? I gave him your info. I ran the idea of a "songs lennon and mccartney gave away" show past he and Joe and they thought it was a good idea. Cross promotion would be to spotlight at least one track from each album, radio ads, and put links on our website where we could direct people to check them out. Contact Donnie Gentile at [Donnie@beatlebrunch.com](mailto:Donnie@beatlebrunch.com)

BEATLEFAN MAGAZINE (35+ years of Beatles news, reviews and updates, published bi-monthly). Print ad would be good here. Also, there's a side newsletter called "Anglofile" which focuses on British pop culture. Contact Bill King at [goodpress@mindspring.com](mailto:goodpress@mindspring.com)

THE FEST FOR BEATLES FANS (fka "BEATLEFEST"): 40 years of fan conventions and the largest Beatles mail order catalog (check out [www.thefest.com](http://www.thefest.com)) including extensive Beatle-related CD section. Billy J, particularly, has been a good friend to the Fest over the years (as a matter of fact, my birthday dinner this year had Billy J as well as Mark & Carol on hand among my treasured friends/guests). Definitely worth getting these placed in the catalog, and featured on "new release" blasts as the holiday season approaches. Contact Mark Lapidos at [Mark@thefest.com](mailto:Mark@thefest.com)

In any/all cases, feel free to tell them I sent you !

Very best wishes,  
Tom

---

**From:** Cary Mansfield [<mailto:Cary@varesesarabande.com>]  
**Sent:** Friday, October 23, 2015 3:43 PM  
**To:** Tom Frangione  
**Cc:** Simon, Lou  
**Subject:** Re: Cilla and Billy J discs

Hi Tom,

Great to hear from you. Please don't talk to me about the Mets (I'm a Dodgers fan). I'm pretty sure the Mets are destined to win the World Series. I'm glad you received the CDs. If there are any other CDs you would like from our catalog please let me know. If I have any left would you like a copy the *Family Way* vinyl album we released for Record Store Day? I am interested in any promo opportunities available to get the word out about our releases. Please let me know what you have in mind.

I look forward to hearing from you.

Best regards,

**Cary E. Mansfield**

Vice President of A&R  
Varèse Sarabande Records, LLC  
9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

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On Oct 22, 2015, at 5:28 PM, Tom Frangione <[beatletom@comcast.net](mailto:beatletom@comcast.net)> wrote:

Hi Cary –

Greetings from the East Coast, and home of the NL Champion NY Mets (sorry, still on cloud nine from last night)

Just wanted to drop you a note to say THANK YOU for the Cilla and BJK discs. They look terrific – can't wait to dig in. I love the Lennon intro on the Cilla track (from the old Capitol promo, below). On the Billy J, tip of the hat on the inclusion of "I'm in Love". Was there no way to include the Lennon studio bit that was on the old UK-EMI Collectables Series disc from a bunch of years ago? I always loved that. Billy is a friend out this way, BTW.

Not sure how much or how little Lou may have filled you in. While in the medical finance space during the week, much of my time out of the office is spent freelancing on various Beatles projects – consulting, research and such. Primarily writing for BeatleFan Magazine, hosting and MC-ing at the BeatleFest and doing some production for Joe Johnson's syndicated BeatleBrunch radio program. All three present decent marketing opportunities for the new CD's .... I've already sent your contact info to Donnie at the radio show, who may have already been in touch. If you'd like contact info for any possible promotion opportunities at the magazine or Fest, just let me know – I'd be glad to put you in touch.

In the meantime, here is my contact info – if there's anything I can help you on in Beatleland, don't hesitate to reach out.

Best,  
Tom

<image001.jpg>

<image002.jpg>

The  
BEATLES



## **TOM FRANGIONE**

*Historian, archivist, consultant, writer  
Guest speaker, events & promotions*

*Joe Johnson's BeatleBrunch Radio  
The Fest For Beatles Fans  
Beatlefan Magazine*

732.669.7824

[beatletom@comcast.net](mailto:beatletom@comcast.net)



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**DX 639-005**

**EXHIBIT I**

**121**

**From:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Sent:** Thursday, April 21, 2016 8:42 AM  
**To:** Cary Mansfield <Cary@varesesarabande.com>  
**Subject:** RE: Hi Cary

---

Hi Cary

He has a long recovery road ahead. We all miss him on air and are hoping he's back sooner than later but I can't see that happening anytime soon.

I'll let you know when I can do a lunch and we'll compare calendars.

Thanks for all!

Lou

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Thursday, April 21, 2016 12:08 AM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Cc:** Cary Mansfield <Cary@varesesarabande.com>; Bruce Morrow <BRUCEMORROWNYC@ME.COM>  
**Subject:** Re: Hi Cary

Hi Lou,

Good to hear from you. How is Pat St. John doing? I miss hearing him everyday. I hope he comes back soon.

I will give Brucie a call tomorrow. Whenever you are available it would be great to get together.

Best,

**Cary E. Mansfield**

*Vice President of A&R*  
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9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

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On Apr 20, 2016, at 8:39 PM, Simon, Lou <[Lou.Simon@siriusxm.com](mailto:Lou.Simon@siriusxm.com)> wrote:

Hi Cary

Brucie asked that you give him a call when you can at 212-477-5885.

Hope all is well with you. Love the new Impressions set!

Thanks

Lou

# **EXHIBIT J**

**From:** Tom Frangione <beatletom@comcast.net>  
**Sent:** Friday, October 16, 2015 5:31 AM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Subject:** Re: coming back down to earth

---

Great ! Thanks ... Btw, the Lennon intro is very likely from "the songs of Lennon & McCartney to show in 1965. John intros the Cilla song, Paul introduced peter & Gordon (I don't want to see you again, if memory serves). These have been included on bootlegs over the years.

Please share that with Cary, in case they didn't know the source)

- Tom

On Oct 16, 2015, at 2:28 AM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Note from Cary.

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Friday, October 16, 2015 12:21 AM  
**To:** Simon, Lou  
**Subject:** Re: coming back down to earth

Hi Lou,

Glad to hear the wedding went well. Cilla Black and Billy J. Kramer are brand new collections. We just made them look retro. The masters were licensed from Rhino and they manufactured them. I would be happy to send the CDs to Tom. I will do it tomorrow. By the way listen to "It's For You" by Cilla Black. It has a special introduction by John Lennon. We found it when we got the masters from Rhino.

Do you want to try for lunch on Friday the 30th. I could meet you in the valley at Mel's. I work at home on Fridays so it will be easy for me to meet you there.

Let me know if that will work.

Best,

**Cary E. Mansfield**

*Vice President of A&R*  
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424-343-1652

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On Oct 15, 2015, at 8:37 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hi Cary

The wedding was wonderful...and, slowly, I'm getting back to normal. I leave for NYC on Monday and am back the week of 10/26. Let's get that lunch going soon. Thanks for your patience. It was a whirlwind, juggling home and office!!

The three CD's arrived and they are beautifully done. Are those actually old Parlophone

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**DX 643-001**

**EXHIBIT J**

**123**



packages? If not, you went to nice lengths to make them seem authentic. What's the Rhino connection, by the way?

I'll highlight all three on this week's Talk Talk show.

On that note, would you be good enough to send one of each to Tom Frangione (Beatletom)? He writes for Beatle Fan and contributed to an internationally syndicated Beatle radio show..and it would be good for him to know about the Cilla and Billy. And the Charlie... well..it's just a fine collection to have.

His address is:

Tom Frangione  
31 Wareham Court  
Scotch Plains, NJ 07076

Thanks much, Cary.

Speak soon.

Lou

**From:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Sent:** Sunday, April 5, 2015 9:25 PM  
**To:** Cary Mansfield <Cary@varesesarabande.com>  
**Subject:** RE: Husbands' and Wives

---

Yes. Moving in May to be closer to his children/grandchild.  
If he gets to town, I'll let you know.

I'm putting together a Town Hall with some of the Wrecking Crew guys later this month. As the details come together, I'll let you know, in case you'd like to attend and say hi to Hal, etc.

Thanks for the Brucie discs. I hope you are getting some value from the exposure.

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Sunday, April 05, 2015 9:23 PM  
**To:** Simon, Lou  
**Subject:** Re: Husbands' and Wives

Hi Lou,

I listen to the show every Sunday when I do my three mile walk. I will order some more CDs for Bruce this week. I understand that Pat St. John is moving to San Diego. If he ever comes up to LA It would be great to get together with him for lunch sometime.

Thanks,

**Cary E. Mansfield**

*Vice President of A&R*  
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On Apr 5, 2015, at 5:40 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hi Cary

First of all, thanks for listening.

I skipped over Sonny & Cher because I was specifically looking for a husband and a wife with simultaneous top 40 solo hits, no duets.

I was hoping that Laugh At Me would be in the top 40 the same time as Cher's Where Do You Go but they missed each other by 2 weeks in October of 1965.

The examples you offered up go with the "solo same time as group" question from a few weeks back.....Can't Take My Eyes Off You same time as C'Mon Marianne.....Caroline, No same time as Sloop John B....etc.

Bruce asked that you call him. I think he's ready for some more CD's to give away. He loves your stuff!

Thanks for all,

Lou

---

**From:** Cary Mansfield [<mailto:Cary@varesesarabande.com>]  
**Sent:** Sunday, April 05, 2015 7:57 PM  
**To:** Simon, Lou  
**Subject:** Husbands' and Wives

Hi Lou,

I was listening to last Sunday's show this morning and the question of husbands' and wives peaked my curiosity. As it turns out, Sonny & Cher did have songs on the chart at the same time. In fact, it goes beyond each having one song on the chart at the same time. Cher had "All I Really Want To Do," which charted on 7/3/65, while Sonny & Cher had "I Got You Babe," which charted on 7/10/65. In addition, Sonny & Cher also had two other songs on the charts at that time, "Baby Don't Go," which charted on 8/21/65 and "Just You," which charted on 8/28/65. Cher's song was on the chart for 12 weeks during the time that all three of Sonny & Cher hits were also on the chart. But there is more, because they did it again in 1966. Cher was on the chart with "Bang Bang" at the same time Sonny & Cher had "What Now My Love." But wait, there is even more because they did it again in the 70s. Cher had "Gypsys, Tramps and Thieves" on the chart, while Sonny and Cher had "All I Ever Need Is You."

It was a great question.

Best,

**Cary E. Mansfield**

*Vice President of A&R*  
Varèse Sarabande Records, LLC  
9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

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# **EXHIBIT K**

**From:** Cary Mansfield <Cary@varesesarabande.com>  
**Sent:** Tuesday, July 5, 2016 5:30 PM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Cc:** Younger, Briana <Briana.Younger@siriusxm.com>  
**Subject:** Re: mono Mitch!

---

Thanks Lou.

From Cary Mansfield

On Jul 5, 2016, at 4:45 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Thank you. Enjoy the time away!

---

**From:** Cary Mansfield [<mailto:Cary@varesesarabande.com>]  
**Sent:** Tuesday, July 5, 2016 4:12 PM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Cc:** Younger, Briana <Briana.Younger@siriusxm.com>  
**Subject:** Re: mono Mitch!

Hi Lou,

No problem, as soon as I return from vacation next Monday I will send it out.

From Cary Mansfield

On Jul 5, 2016, at 3:37 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hi Cary  
Can you please send a Mitch Ryder CD to our DC office?  
It should go to :

Briana Younger  
Sirius XM Radio  
1500 Eckington Place, NE  
Washington, D.C. 20002  
202-380-4363

Bri, upon receipt, please call me to discuss which songs get ingested from that CD.

It, then, goes to the hard disc library, a la Jamie.

Thanks, all!

Lou

**From:** Cary Mansfield <Cary@varesesarabande.com>  
**Sent:** Wednesday, October 7, 2015 6:17 PM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Subject:** Re: Billy J. Kramer and Cilla Black

---

Hi Lou,

I'm sending you a set today along with the new Charlie Rich 25 All-Time Greatest Hits CD.

Thanks so much for mentioning them on the air.

Best,

**Cary E. Mansfield**  
*Vice President of A&R*  
Varèse Sarabande Records, LLC  
9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

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On Oct 7, 2015, at 3:11 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hey Cary  
One of each to me would be great. Love to talk about them on air, as you know.  
Lou

---

**From:** Cary Mansfield [<mailto:Cary@varesesarabande.com>]  
**Sent:** Wednesday, October 07, 2015 6:06 PM  
**To:** Bruce Morrow  
**Cc:** Simon, Lou  
**Subject:** Billy J. Kramer and Cilla Black

Hi Bruce,

I hope everything is going well. Varese just released two new greatest hits albums by Billy J. Kramer and Cilla Black, so wanted to let you know that I'm sending you 30 copies of each to give away on your show.

If you need anything else from me please let me know.

Thanks,

**Cary E. Mansfield**  
*Vice President of A&R*  
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# **EXHIBIT L**

**From:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Sent:** Wednesday, October 7, 2015 6:28 PM  
**To:** Cary Mansfield <Cary@varesesarabande.com>  
**Subject:** RE: Billy J. Kramer and Cilla Black

---

Cool.  
Thanks!!

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Wednesday, October 07, 2015 6:17 PM  
**To:** Simon, Lou  
**Subject:** Re: Billy J. Kramer and Cilla Black

Hi Lou,

I'm sending you a set today along with the new Charlie Rich 25 All-Time Greatest Hits CD.

Thanks so much for mentioning them on the air.

Best,

**Cary E. Mansfield**

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On Oct 7, 2015, at 3:11 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hey Cary  
One of each to me would be great. Love to talk about them on air, as you know.  
Lou

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Wednesday, October 07, 2015 6:06 PM  
**To:** Bruce Morrow  
**Cc:** Simon, Lou  
**Subject:** Billy J. Kramer and Cilla Black

Hi Bruce,

I hope everything is going well. Varese just released two new greatest hits albums by Billy J. Kramer and Cilla Black, so wanted to let you know that I'm sending you 30 copies of each to give away on your show.

If you need anything else from me please let me know.

Thanks,

**Cary E. Mansfield**  
*Vice President of A&R*



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**From:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Sent:** Thursday, September 17, 2015 1:46 PM  
**To:** Cary Mansfield (Cary@varesesarabande.com)  
**Cc:** Phelps, Phlash <Phlash.Phelps@siriusxm.com>  
**Subject:** ??

---

Cary

Since you've offered.....do you have Leave My Woman Alone by The Kingston Trio from the String Along LP?

Lou

# **EXHIBIT M**

**From:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Sent:** Wednesday, September 2, 2015 4:01 PM  
**To:** Cary Mansfield <Cary@varesesarabande.com>  
**Subject:** RE: Lunch

---

Sounds good. Just check with me that morning, if you don't mind...since, sometimes, days get surprisingly cluttered by the time I wake up out here and catch up the the NY chatter!

Looks like you're back in the comp biz, where you belong. Exciting to see.

Do you know Ed Osborne? He does work for Real Gone. Wondered if your paths have crossed.

---

**From:** Cary Mansfield [mailto:Cary@varesesarabande.com]  
**Sent:** Wednesday, September 02, 2015 3:59 PM  
**To:** Simon, Lou  
**Subject:** Re: Lunch

Hi Lou,

Thanks for the Margo Smith and Conway Twitty plug on your show. I'm mailing you today a copy of the new Buckingham's greatest hits that will be released next week. It has the official radio-edit of "Susan."

How does Tuesday the 15th look for lunch? I'm thinking that since I live in Santa Clarita and you are in Simi Valley, maybe I could meet you in Sherman Oaks. Mel's would be a good place to meet. I could have lunch with you on the way into the office.

Let me know if that will work.

Best,

**Cary E. Mansfield**  
*Vice President of A&R*  
Varese Sarabande Records, LLC  
9100 Wilshire Blvd., Suite 455 East  
Beverly Hills, CA 90212  
424-343-1652

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On Sep 2, 2015, at 8:49 AM, Simon, Lou <[Lou.Simon@siriusxm.com](mailto:Lou.Simon@siriusxm.com)> wrote:

Talked about Margo Smith and Conway Twitty on this past Sunday's show, too!  
Can't beat free advertising, I always say.

Would love to see you for lunch. Trying to figure out best spot between BH and Simi Valley.....

Tuesdays would be best for me of those two days.

Let's look at calendars....

Thanks

Lou

---

**From:** Cary Mansfield [<mailto:Cary@varesesarabande.com>]  
**Sent:** Wednesday, September 02, 2015 11:11 AM  
**To:** Simon, Lou  
**Subject:** Lunch

Hi Lou,

I was wondering if you have any time this month to do lunch? It has been awhile. Tuesdays or Thursdays are best for me. By the way, thanks for the Nicolette Larson mention a few weeks ago on Talk Talk.

Best,

**Cary E. Mansfield**

*Vice President of A&R*  
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9100 Wilshire Blvd., Suite 455 East  
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424-343-1652

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**From:** Cary Mansfield <Cary@varesesarabande.com>  
**Sent:** Friday, June 12, 2015 4:42 PM  
**To:** Simon, Lou <Lou.Simon@siriusxm.com>  
**Subject:** Re: Hello. How are you? And about Doris Day....

---

Hi Lou,

I will check to see if I can find a copy of the Doris Day CD. What is your new address? I have the Tokens CD we released with all of the B.T. Puppy recordings, including "Life Is Groovy." I would like to send it to you.

How did the move go? July would be great to get together.

Best,

**Cary E. Mansfield**

*Vice President of A&R*  
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On Jun 12, 2015, at 1:30 PM, Simon, Lou <Lou.Simon@siriusxm.com> wrote:

Hi Cary

How are you?

Me?

Funny you should ask. JAMMED!

Never been so busy. Haven't even done a survey show in three weeks! That's how busy.

Hey...our 40s programmer is filling in the Doris Day collection. Do you still have that Les Brown/radio transcription collection? Lost Treasures, I believe.

If so, can you send one to him in NY?

Thanks so much...and let's see each other in July!

Lou

He is at:

Human Numan  
Sirius XM Radio  
1221 Avenue of the Americas  
37<sup>th</sup> floor  
New York, NY 10020

## Nikki Kustok

---

**From:** cacd\_ecfmail@cacd.uscourts.gov  
**Sent:** Friday, October 14, 2016 11:46 PM  
**To:** ecfnef@cacd.uscourts.gov  
**Subject:** Activity in Case 2:13-cv-05693-PSG-GJS Flo & Eddie Inc v. Sirius XM Radio Inc et al Declaration

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

#### Notice of Electronic Filing

The following transaction was entered by Seto, Cassandra on 10/14/2016 at 11:46 PM PDT and filed on 10/14/2016

**Case Name:** Flo & Eddie Inc v. Sirius XM Radio Inc et al  
**Case Number:** [2:13-cv-05693-PSG-GJS](#)  
**Filer:** Sirius XM Radio Inc  
**Document Number:** [522](#)

#### Docket Text:

**DECLARATION of Cassandra L. Seto re Objection/Opposition (Motion related)[520], Objection/Opposition (Motion related), [521], Objection/Opposition (Motion related), [519], Objection/Opposition (Motion related)[517] (Redacted) filed by Defendant Sirius XM Radio Inc. (Seto, Cassandra)**

#### 2:13-cv-05693-PSG-GJS Notice has been electronically mailed to:

Brandon C Butler [bbutler@wcl.american.edu](mailto:bbutler@wcl.american.edu)

Brian R Hogue [bhogue@susmangodfrey.com](mailto:bhogue@susmangodfrey.com)

Bruce S Meyer [bruce.meyer@weil.com](mailto:bruce.meyer@weil.com)

Cassandra L Seto [cseto@omm.com](mailto:cseto@omm.com), [sbrown@omm.com](mailto:sbrown@omm.com), [shwilliams@omm.com](mailto:shwilliams@omm.com), [swatson@omm.com](mailto:swatson@omm.com)

Christopher J Cox [chris.cox@weil.com](mailto:chris.cox@weil.com), [benjamin.marks@weil.com](mailto:benjamin.marks@weil.com), [bruce.rich@weil.com](mailto:bruce.rich@weil.com), [john.gerba@weil.com](mailto:john.gerba@weil.com), [Todd.Larson@weil.com](mailto:Todd.Larson@weil.com), [tricia-dresel-2470@ecf.pacerpro.com](mailto:tricia-dresel-2470@ecf.pacerpro.com)

Daniel A Kohler [dxk@msk.com](mailto:dxk@msk.com), [daniel-kohler-2119@ecf.pacerpro.com](mailto:daniel-kohler-2119@ecf.pacerpro.com), [sgd@msk.com](mailto:sgd@msk.com), [sunni-donmoyer-6213@ecf.pacerpro.com](mailto:sunni-donmoyer-6213@ecf.pacerpro.com)

Daniel M Petrocelli [dpetrocelli@omm.com](mailto:dpetrocelli@omm.com), [cseto@omm.com](mailto:cseto@omm.com), [lrakow@omm.com](mailto:lrakow@omm.com), [mpocha@omm.com](mailto:mpocha@omm.com), [pmcnally@omm.com](mailto:pmcnally@omm.com)

David Marroso [dmarroso@omm.com](mailto:dmarroso@omm.com), [megansmith@omm.com](mailto:megansmith@omm.com)

Drew E Breuder [dbreuder@omm.com](mailto:dbreuder@omm.com)

Evan Seth Cohen [esc@manifesto.com](mailto:esc@manifesto.com)

Henry D Gradstein [hgradstein@gradstein.com](mailto:hgradstein@gradstein.com), [dlifschitz@gradstein.com](mailto:dlifschitz@gradstein.com), [ssummers@gradstein.com](mailto:ssummers@gradstein.com)

John R Gerba [john.gerba@weil.com](mailto:john.gerba@weil.com)

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