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FLO & EDDIE, INC. and the Class

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

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

Plaintiff,

v.

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

Defendants.

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

PLAINTIFF'S OPPOSITION TO DEFENDANT SIRIUS XM RADIO INC.'S MOTION IN *LIMINE* NO. 1 / *DAUBERT* TO EXCLUDE TESTIMONY OF EXPERT MICHAEL WALLACE AND ANY OTHER EVIDENCE THAT GROSS REVENUE ALONE IS AN APPROPRIATE MEASURE OF DAMAGES

Date: October 31, 2016
Time: 2:30 PM
Honorable Philip S. Gutierrez

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I. INTRODUCTION

Sirius XM takes yet another run at undoing the orders of this Court—this time by attacking Plaintiffs' expert for using the very methodology that was proposed to the Court on class certification, validated in the Court's orders on certification and reaffirmed in the Court's order denying summary judgment. Sirius XM's *Daubert* motion purporting to address methodological "flaws" with the Plaintiffs' damages expert Mike Wallace is a poorly disguised attempt to revisit the law of the case. Indeed, Sirius XM's primary gripe with Mr. Wallace is that he has *followed* the rulings of this Court in implementing the exact methodology he advised he would use at the time of class certification. For this, Sirius XM paints Mr. Wallace as unfit to present his opinions to a jury: "Since Mr. Wallace's entire report is based on the fundamentally flawed gross revenue model, his opinions should be stricken." Mot. at 2; "Mr. Wallace is knowledgeable about 'lots of different ways to measure damages,' but disregarded all of them in order to apply the gross revenue model 'that was provided by counsel." Mot at 2.; "Mr. Wallace's misunderstandings of the law and failure to undertake an appropriate damages analysis render his expert analysis, opinions, and any related evidence or argument inadmissible." Mot. at 5.

Completely absent from Sirius XM's Motion is reference to the prior rulings of this Court:

- In its order granting class certification, the Court approved Plaintiffs' damages model consisting of "Sirius XM's Gross Revenues as defined at 37 C.F.R. §382.11" multiplied by "[t]he percentage of performances of pre-1972 recordings on Sirius XM's service" multiplied by "[t]he percentage of Sirius XM's subscribers located in California." Dkt. 225 at 20-21.
- The Court held this measure, which accounted for "100% of Sirius XM's revenues attributable to pre-1972 recordings, without deduction for costs," was supported by both California and Ninth Circuit authority. *Id.* at 21.

> • Plaintiffs' proposed damages model consists of Defendant's gross proceeds attributable to pre-1972 recordings without deductions for costs. Opp. 19, Dkt. #185 ¶9. What Plaintiffs are calling a "gross proceeds measure of damages," Opp. 21, Defendant is calling "disgorgement," and maintains that "plaintiffs have mischaracterized their request for . . . revenues as 'legal damages.'" Mot. 20. [¶] The Court declines to entertain this distinction because it has already concluded that Plaintiffs' damages model is appropriate in this case. Dkt. 411.

Sirius XM's Motion pretends these orders do not exist and faults Mr. Wallace for using the exact model the Court has deemed appropriate here. Mr. Wallace—a respected expert with over 25 years of experience in forensic accounting and the preparation and analysis of claims for economic damages in a variety of business disputes—was engaged to: (1) determine whether damages are capable of measurement on a class-wide basis, (2) identify a reasonable method for calculating class damages, and (3) calculate the amount of those class damages. He did not invent a methodology to use as Sirius XM's motion implies.

To calculate class damages in accordance with the rulings of this Court, Mr. Wallace applied the same methodology and mathematical formula by which Sirius XM calculates, segregates, and then deducts all of the revenue that it has determined is attributable to its exploitation of pre-1972 recordings, in connection with calculating and paying royalties to SoundExchange. In doing so, Mr. Wallace calculated class damages—which are Sirius XM's gross revenues attributable to the use of pre-1972 recordings from California subscribers for class members not excluded by reason of opt-out or license—to total over $70 million.

Despite Mr. Wallace's precise application of Sirius XM's own methodology and mathematical formula, repeatedly approved by this Court, to determine the amount attributable to Sirius XM's exploitation of pre-1972 recordings, Sirius XM, under the guise of a *Daubert* motion, now complains that gross revenues alone is an

improper measure of damages and that any argument to that effect, including Mr. Wallace's testimony, ought to be excluded from trial. Sirius XM's assertions are baseless and merely seek to re-litigate issues that have already been decided by the Court. Mr. Wallace's expert testimony rests upon a reliable foundation and is relevant to the issues presented in this "damages only" case. Thus, Plaintiffs respectfully request the Court deny Sirius XM's motion in *limine*.

II. THE STANDARD OF ADMISSIBILITY

Federal Rule of Evidence 702 governs the admission of expert testimony. It states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case.

FRE 702.

In *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), the United States Supreme Court explained that expert testimony is admissible if both relevant and reliable. *Id.* at 597; *see Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 141 (1999). The Court held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* Thus, the trial court has broad discretion to admit expert evidence and any action taken in accordance with that discretion "is to be sustained unless manifestly erroneous." *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *accord United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988).

An opinion is relevant "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." *Daubert*, 509 U.S. at 589 (citing FRE 702). An opinion is reliable "if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline" and if the opinion has been reliably applied to the facts of the case. *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010) (citing *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)). The opinion may also be considered reliable if the expert's techniques are "generally accepted" as reliable in the relevant community, or the opinion is not based on a methodology that "diverges significantly from the procedures accepted by the recognized authorities in the field[,]" *Daubert*, 509 U.S. at 584 (citation omitted); *see* FRE 702.

Because trial courts are "charged . . . with the responsibility of acting as gatekeepers" to exclude unreliable expert testimony, they must engage in an inquiry that examines the expert's proposed testimony for both reliability and relevance. *Daubert*, 509 U.S. at 589; *see Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 841 (9th Cir. 2001). Notably, however, "[a] review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a seachange over federal evidence law, and the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702, *Advisory Committee Notes* (2000) (internal quotation marks and citations omitted). A party proffering expert testimony "does not have to demonstrate to the judge by a preponderance of evidence that their expert is correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable." *In re Paolli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

III. ARGUMENT

A. The Court has twice approved Plaintiff's damages model

Despite professing that it "does not seek to re-litigate issues," Sirius XM nevertheless seeks to bar Mr. Wallace's testimony, and any other evidence and

argument that gross revenue alone is an appropriate measure of damages. By doing so, Sirius XM hopes to surreptitiously upend the law of the case.

At bottom, Sirius XM argues that "the gross revenue model on which plaintiffs and Mr. Wallace rely does *not* apply here." Mot. at 4. Yet this Court has *twice* approved Plaintiffs' damages model based on Sirius XM's gross revenues attributable to pre-1972 recordings and held that the law does not permit deduction of costs. The Court also has twice *rejected* Sirius XM's attempt to put forward other damage models – including those which "cast[] the appropriate damages measure as 'lost royalties' or 'imputed license fees'" – as having no foothold in the law. Dkt. 225 at 21-22; Dkt. 411 at 6 ("Plaintiffs' damage model is appropriate in this case" and "Plaintiff's damages model has already been approved").

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

In its motion for partial summary judgment, Sirius XM once more argued that Plaintiffs' "gross revenues attributable to [Sirius XM's] use of [their pre-1972] recordings without deduction of costs" was an improper disgorgement remedy requiring wrongdoing, and argued that *Heilman* and *Lone Ranger* did not preclude deductions for costs. Dkt. 335 at 4, 21-22. Once again, relying on *Heilman* and *Lone Ranger*, the Court reaffirmed that "Plaintiff's damages model is appropriate in this case" and that "Plaintiff's damages model has already been approved." *See* Dkt. 411, Order Granting in Part and Denying in Part Defendant's Motion for Partial Summary Judgment, at 6. The Court rejected Sirius XM's arguments, holding:

> Plaintiffs' proposed damages model consists of Defendant's gross proceeds attributable to pre-1972 recordings without deductions for costs. *Opp.* 19, Dkt. #185 ¶9. What Plaintiffs are calling a "gross proceeds measure of damages," *Opp. 21*, Defendant is calling "disgorgement," and maintains that "plaintiffs have mischaracterized their request for . . . revenues as 'legal damages.'" *Mot.* 20. [¶] The Court declines to entertain this distinction because it has already concluded that Plaintiffs' damages model is appropriate in this case. *See* Dkt. #225, *Order Granting Motion for Class Certification* at 23 (determining that "damages in this case are well-suited to streamlined determination via application of a mechanical formula and will not require factual investigation beyond reviewing Sirius XM's records."); *see also A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 570 (1977) (upholding judgment "in an amount equal to the gross proceeds attributable to the sale of recorded performances which were the property of [plaintiff] .. . [without] deduct[ing] any of the costs of the transaction by which [defendant] accomplished his wrongful conduct"); *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718, 726 (9th Cir. 1984) (affirming district court's summary judgment of

damages for conversion under California law, noting that it "supports the gross proceeds measure chosen.").

Dkt. 411 at 6.

Notwithstanding the foregoing, Sirius XM has filed a motion in *limine* to argue *again* that "damages based on Sirius XM's gross revenue without any deductions" is an improper measure of damages, that *Heilman* and *Lone Ranger* are inapplicable, and that the appropriate measure of damages is a reasonable royalty. Dkt. 477. While Sirius XM may hope that the third time is the charm, its latest efforts to propose the same alternative measure of damages should again be rejected.

B. Issues that have been decided in prior orders cannot be revisited at trial

This Court has repeatedly upheld Plaintiffs' damages model, which is based on Sirius XM's gross proceeds, and rejected the alternative measures of "lost royalties" or "imputed license fees" offered by Sirius XM. Dkt. 225 at 20-21; Dkt. 411 at 6. Undeterred, Sirius XM has once again challenged Plaintiffs' damages model and offered the Court arguments as to why it prefers a "reasonably royalty rate" model. The Court, however, has already held a "reasonably royalty rate" to be completely irrelevant, as it has no support in California law applicable to these proceedings.

Sirius XM's use of a motion in *limine* to reargue the law of the case is totally improper, requiring the Court to re-hear and Plaintiffs to re-brief needlessly the same issues that have been litigated and decided before. *In re Flashcom, Inc.*, 503 B.R. 99, 131 (C.D. Cal. 2013) (affirming sanctions imposed on a litigant for refusing to abide by the law of the case by using motions in *limine* to re-litigate issues it had already lost). Evidence that runs contrary to prior decisions of the Court is irrelevant and should be excluded. *See Fahmy v. Jay Z*, 2015 U.S. Dist. LEXIS 129446, at *31 (C.D. Cal. Sept. 24, 2015) ("To the extent defendants argue that plaintiff should be precluded from introducing evidence or argument intended to re-litigate [various issues], the Court agrees with defendants that these issues have already been resolved

and that plaintiff may not submit evidence which contradicts the Court's rulings."); *Cont'l Cas. Co. v. Great Am. Ins. Co.*, 1990 U.S. Dist. LEXIS 12807, at *6 (N.D. Ill. Sept. 27, 1990) ("Great American is correct that there should be no evidence introduced that would contradict this court's ruling" as to the proper formula for calculation of interest). Given that the Court has already ruled Sirius XM is liable for its gross revenues attributable to pre-1972 recordings, there is no reasonable basis to re-visit the use of gross revenue as an appropriate measure of damages.

C. Mr. Wallace's expert testimony on gross revenues is reliable

Pursuant to FRE 702, expert testimony is admissible if it is: (1) based on sufficient facts and data; (2) the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the case.

Contrary to Sirius XM's claim that his testimony relies on "unsupported assumptions," Mot. at 4, Mr. Wallace's testimony is reliable and founded on the methodology that Sirius XM uses for calculating and paying royalties to SoundExchange—a performance rights organization that collects and distributes royalties on behalf of copyright owners—for post-1972 sound recordings.

As Mr. Wallace has opined, Sirius XM's methodology is appropriate because it includes a specific carve-out for the revenues that Sirius XM itself has calculated are attributable to pre-1972 recordings. Dkt. 185 at 3. By taking Sirius XM's data for the deduction it made for pre-1972 recordings before making owed royalty payments to SoundExchange and combining it with the revenue base against which Sirius XM applied the deduction for pre-1972 recordings, Mr. Wallace reliably calculates the gross revenues which Sirius XM attributes to performances of pre-1972 recordings nationwide. Dkt. 185 at 6. Thus, the gross revenues calculated by Mr. Wallace are a defined term that specifically relate to the revenues attributable to the pre-1972

recordings, and do not touch on unrelated revenues.[1] To then identify the percentage of gross revenue that Sirius XM received from its exploitation of pre-1972 recordings in California, according to Sirius XM's own methodology, Mr. Wallace need only multiply Sirius XM's national revenue by a fraction: the numerator is the total number of subscribers in California annually, and the denominator is the total number of subscribers annually nationwide. Dkt. 185 at 6. Accordingly, as Mr. Wallace has opined, a reasonable method for determining the gross revenues that Sirius XM has received during the damages period from its exploitation of pre-1972 recordings in California is to multiply the national revenue that Sirius XM attributes to its performances of pre-1972 recordings by a fraction—the numerator of which is the total number of subscribers in California and the denominator of which is the total number of subscribers nationwide. Dkt. 185 at 7.

Mr. Wallace's methodology is therefore nothing like the "junk science" that Rule 702 is designed to keep out of the courtroom. Rather, Mr. Wallace reliably applied a method—based on Sirius XM's own methodology for calculating its revenues attributable to pre-1972 recordings—to the facts of this case using data provided by Sirius XM.[2] Mr. Wallace's methodology is sufficiently reliable to form the basis of his opinion. Sirius XM may disagree with Mr. Wallace's conclusions, but that does not suffice under the Federal Rules to exclude his testimony.

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[1] In connection with two Copyright Royalty Board proceedings—known as *Satellite I* and *Satellite II*—which set rates for Satellite Digital Audio Radio Services ("SDARS"), the actual payable royalty rate was determined by multiplying the applicable royalty rate against "gross revenues," defined at 37 C.F.R. §382.11 to mean "revenue recognized by the Licensee in accordance with GAAP from the operation of an SDARS," but excluding revenue from "non-music sources" and revenue attributable to performances of pre-1972 recordings.

[2] For these same reasons, Plaintiffs reject Sirius XM's alternative grounds for excluding Mr. Wallace's opinions and any other evidence or argument related to the gross revenue model under Rule 403.

D. Mr. Wallace's expert testimony on gross revenues is relevant

1. Plaintiffs are entitled to seek damages based on Sirius XM's gross revenues without deduction for costs.

Sirius XM claims, as it has in multiple prior rounds of briefing to the Court, that Plaintiffs should not be permitted to seek damages based on gross revenues attributable to the pre-1972 recordings without a deduction for costs. Sirius XM's argument is without merit and directly counters the Court's rulings in this case, which properly found that such damages should apply.

Under California law, "[e]very person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." Cal. Civ. Code §3281. Damages are a remedy at law, the focus of which is the quantification of detriment suffered by a party. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 835 (1990). This measure is determined, in part, by the nature of the act that caused the detriment. In business cases, damages are typically based on net profits, as opposed to gross revenues. *Parlour Enters., Inc. v. Kirin Group, Inc.*, 152 Cal. App. 4th 281, 287 (2007). Yet, the same is not true in cases of tortious interference with property, which often find the defendant liable for the full value of the property. *See, e.g.*, *Whittaker v. Otto*, 248 Cal. App. 2d 666, 675-76 (1967) (damages in willful trespass case are "value of the [property] converted without deduction for defendant's cost"); *Isom v. Book*, 142 Cal. 666, 668 (1904) (noting that "under the rules of law in relation to damages for trespass and waste, the defendants must pay the plaintiff for all the [property] they obtained, with no offset for expenses"); *Swim v. Wilson*, 90 Cal. 126, 27 P. 33 (1891) (defendant who sold converted stock found liable for entire gross proceeds of sale).

As previously held by this Court, owners of pre-1972 sound recordings have a property interest in those recordings, which includes an exclusive right of public performance under Cal. Civ. Code §980(a)(2). Dkt. 117. Sirius XM committed

conversion, misappropriation, and unfair competition by violating those property rights. *Id.* Conversion, misappropriation, and unfair competition are all torts under California law. *Hartford Fin. Corp. v. Burns*, 96 Cal. App. 3d 591, 598 (1979) (conversion); *Lebas Fashion Imps. of United States v. Itt Hartford Ins. Grp.*, 50 Cal. App. 4th 548, 564 (1996) (misappropriation); *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (unfair competition). Courts have found that, in such cases, California law provides for damages in an amount equaling the gross proceeds generated by the defendant's conversion, misappropriation, or unfair competition. *See Heilman*, 75 Cal. App. 3d 554; *Lone Ranger*, 740 F.2d 718.[3]

In *Heilman*, the defendant was sued for selling unauthorized copies of sound recordings that it duplicated from legitimate copies manufactured by the plaintiff without making payments to the plaintiff or to any of the musicians involved in creating the recordings. *Heilman*, 75 Cal. App. 3d at 560-61. "The [trial] court correctly found that such misappropriation and sale of the intangible property of another without authority from the owner is conversion." *Id.* at 570 (upholding plaintiff's conversion claim on appeal). The appellate court also upheld the trial court's award of damages "in an amount equal to the gross proceeds attributable to the sale of recorded performances which were the property of [the plaintiff]." *Id.* In doing so, *Heilman* articulated the prevailing rule that "[o]ne who misappropriates the

[3] Sirius XM relies upon *Newhart v. Pierce*, 254 Cal. App. 2d 783 (1967) to argue that the appropriate value for a public performance right is a reasonable royalty. In *Newhart*, the defendants removed more cattle from the plaintiffs' ranch than the contract permitted. When the plaintiffs sued for conversion of the additional cattle, they sought to recover the defendants' profits from re-selling the entire herd. The Court rejected this claim for damages because "there was no evidence . . . showing what proportion of these alleged profits were attributable to the resale of the 154 head actually converted." *Id.* at 794. *Newhart* is inapposite because Plaintiffs' expert has identified the gross revenues attributable to the pre-1972 recordings.

property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct." *Id.*

Despite *Heilman*'s clear language, Sirius XM relies on a footnote in the opinion to assert that the *Heilman* court actually applied a profits analysis measure of damages, not a gross revenue analysis measure of damages. Specifically, Sirius XM claims that the plaintiff in *Heilman* obtained a judgment based on gross revenues only after the trial court determined that the defendants failed to carry their burden of proof with respect to their costs and expenses. The *Heilman* court, however, merely notes in footnote 11 that the speculative nature of the costs in that case was an *additional* reason why it would be inequitable to deduct to costs. Sirius XM's focus on this *dicta* does not change the fact that the *Heilman* court's operative ruling to preclude deduction of costs is based upon the general rule that one who misappropriates the property of another may not deduct any costs of the transactions by which he accomplished his wrongful conduct. *See Heilman*, 75 Cal. App. 3d at 570 n. 11 ("Since the court found that defendants 'failed to carry their burden of proof with respect to such costs and expenses,' such costs and expenses would be entirely speculative. It would therefore be inequitable *on this basis as well* to permit Heilman to deduct them from A&M Records' recovery."). Contrary to Sirius XM's assertions, *Heilman* fully supports a gross revenue measure of damages.

Lone Ranger, decided after *Heilman*, also permits a gross proceeds measure of damages. The *Lone Ranger* defendant was sued for leasing copies of radio play tapes (which it had no licenses for) to radio stations for commercial broadcast. 740 F.2d at 719-20. The district court granted summary judgment against the defendant for conversion and awarded damages. *Id.* at 720. On review, the Ninth Circuit affirmed the defendant's liability for conversion of the plaintiff's intangible property constituted unfair competition, and held that the defendant's gross proceeds were the proper measure of damages. *Id.* at 726 (citing *Heilman* and *Swim v. Wilson*, 90 Cal. 126, 128, 27 P. 33, 34 (1891)).

California law supports not only the gross proceeds measure of damages utilized in *Heilman*, but also the constructive trust remedy used by the *Heilman* court to award it. Under Cal. Civ. Code §2224, anyone who gains property through a wrongful act becomes "an involuntary trustee of the thing gained," holding it "for the benefit of the person who would otherwise have had it." In such a scenario, "the imposition of a constructive trust on the proceeds is a proper remedy" to preserve and transfer the monies in question to the plaintiff. *Heilman*, 75 Cal. App. 3d at 570. The equitable nature of the constructive trust remedy does not change the nature of the underlying legal relief sought. "The fact that equitable principles are applied in the action does not necessarily identify the resultant relief as equitable." *Jogani v. Superior Court.*, 165 Cal. App. 4th 901, 909 (2008). Where liability is definite and damages may be calculated without an accounting, the action is legal. *Id.* at 909-910; *see Martin v. County of Los Angeles*, 51 Cal. App. 4th 688, 694 (1996) ("The law courts now recognize and apply many equitable principles and grant relief based thereon where . . . legal relief is sought in the form of a judgment for a specific amount") (quoting *Mortimer v. Loynes*, 74 Cal. App. 2d 160, 168 (1946)).

As the foregoing demonstrates, Sirius XM's labeling of Plaintiffs' compensatory damages claim as a request for disgorgement and an equitable remedy does not provide any basis for rejecting the damages claim as a matter of law. California law provides for a gross revenues model of damages in cases of tortious conduct such as Sirius XM's, and has further provided that the use of equitable concepts as part of that model does not *change* the fundamental legal character of the underlying relief. Moreover, there is nothing punitive about the model employed here, which returns Sirius XM to the economic position it would have been in without the unauthorized performances that generated the gross revenues.

2. Sirius XM wrongly asserts that "special circumstances" are required to seek gross revenues.

For well over 150 years, the rule in California has been that the measure of damages in a case involving conversion of property is the value of the property so converted, with legal interest from the time of the conversion. *Douglass v. Kraft*, 94 Cal. App. 4th 1285, 1301-02 (2002); *Chase Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs.*, 748 F. Supp. 2d 1145, 1181 (C.D. Cal. 2010); Cal. Civ. Code §3336 (conversion damages presumed to be "[t]he value of the property at the time of the conversion, with the interest from that time"). Although originally developed as a remedy for the dispossession or other loss of chattel, the California courts have applied this measure of damage to intangible property as well. *Fremont Indem. Co.v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 124-25 (2007); *Kremen v. Cohen*, 325 F.3d 1035, 1041 (9th Cir. 2003). And, of course, this measure of damages has been applied to the misappropriation and conversion of sound recordings. *Heilman*, 75 Cal. App. 3d at 570; *Lone Ranger*, 740 F.2d at 725.

Relying upon *Lueter v. State of California*, 94 Cal. App. 4th 1285 (2009) and *Krueger v. Bank of America*, 145 Cal. App. 3d 204 (1983), Sirius XM argues that to depart from the rule that conversion or misappropriation damages are calculated by the value of the property at the time of the wrong, a plaintiff must plead and prove "special circumstances." Sirius XM's analysis is irrelevant, as Plaintiffs have never sought any such alternative measure of damages.

Under Civ. Code §3336, there are two measures of damages for conversion:

> First – the value of the property at the time of the conversion, with interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

> Second – A fair compensation for the time and money properly expended in pursuit of the property.

Civ. Code. §3336.

As explained in *Lueter*, "the value of the converted property is the appropriate measure of damages" and "a person claiming damages under the alternative provision must plead and prove special circumstances that require a measure of damages other than value, and the jury must determine whether it was reasonably foreseeable that special injury or damage would result from the conversion." *Lueter*, 94 Cal. App. 4th at 1302 (emphasis added). In order to determine the value of converted property, courts will often look to how the property is exploited by the defendant in the market. *See, e.g., Yukon River S.B. Co. v. Gratto*, 136 Cal. 538 (1902) (value under §3336 evidenced by the price at which the converted property was sold for at public auction). In this case, the value of the pre-1972 recordings owned by members of the class can be determined by looking to how Sirius XM represented their collective market value to SoundExchange and the gross revenues Sirius XM realized accordingly. *See SCI Cal. Funeral Servs., Inc. v. Five Bridges Found.*, 203 Cal. App. 4th 549, 566 (2012) ("[W]here, as here, the trial court must value an asset for which there is no relevant, comparable market, it may consider any valuation methodology that is just, equitable, and not inconsistent with California law."). In this case, each and every time Sirius XM played a particular pre-1972 sound recording constituted an independent conversion under California law, the value of which is the revenue Sirius XM generated per play. This measure of damages under Cal. Civ. Code §3336 is therefore entirely consistent with the gross proceeds measure of damages used by *Heilman* and *Lone Ranger*.

Sirius XM's fatal error in advancing its line of "special circumstances" cases is that Plaintiffs have not sought "special damages," but rather "[t]he value of the

property at the time of the conversion, with the interest from that time . . .” Cal. Civ. Code §3336.[4] In *Lueter*, an investigating agency disposed of tire tread from the scene of an accident caused by an oil tanker, and the owner and operator of the tanker brought an action for conversion against the investigating agency, seeking spoliation of evidence damages because he hoped to use the tire tread in his defense during the personal injury cases filed against him. The jury’s award of conversion damages in the amount of $1.50 for the value of the tire tread was affirmed on appeal as the appropriate measure, since the injury caused by the disposal of the tire tread was “irreducibly uncertain,” given that its use as evidence was “speculative,” and a spoliation measure of damages was not appropriate. *Id.* at 1303.

Likewise, in *Krueger*, a bank sold stock pledged to guarantee loans made to a corporation for property development, without notice to the guarantors as provided in the loan agreements. The trial court awarded the guarantors the value of the pledged stock on the date of conversion, plus interest. On appeal, the guarantors argued that the converted shares must be valued at the *highest* market value between the date of conversion and the date of judgment. The Court rejected this approach, stating that the Kruegers failed to plead “special circumstances” that would award them this alternative measure of damages. 145 Cal. App. 3d at 215-16.

In this case, Plaintiffs’ valuation is not speculative (as it is based on Sirius XMs’s own data and methodology), nor does it deviate from the traditional measure of damages supported under California’s Civil Code and case law. Moreover, there is no basis for Sirius XM’s statement that the damages in *Heilman* were awarded based on “special circumstances.” Mot. at 11-12. As the *Heilman* court wrote, “one who

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[4] To the extent that damages for Plaintiffs’ claim is governed by Civil Code §3333 rather than §3336, the result would be the same. *See* Cal. Civ. Code §3333 (“[T]he measure of damages is . . . the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.”).

misappropriates the property of another is not entitled to deduct any of the costs of the transactions by which he accomplished his wrongful conduct." 75 Cal. App. 3d at 570. At no point did the *Heilman* court cabin this general rule to "special circumstances" or suggest that "special circumstances" were otherwise at issue.

3. Sirius XM wrongly asserts that a gross revenues model is not appropriate for Plaintiffs' UCL claim.

Sirius XM argues that an unfair competition claim brought under California Business and Professions Code §17200 ("UCL") is equitable and thus damages cannot be recovered thereunder. As previously explained, Plaintiffs agree that restitution is the appropriate remedy under its UCL claim. However, disgorgement of the benefits derived from wrongfully exploiting plaintiffs' property is an available remedy under the UCL to the extent that it constitutes restitution.

Contrary to Sirius XM's claim, the "gross revenues" measure of damages is not punitive, but rather reflects the storied principle that a tortious actor such as Sirius XM "will be stripped of gains from unauthorized interference with another's property," even where the resultant restitution is "more than the value of what was taken or obtained in the first instance." Restatements of the Law 3d, Restitution and Unjust Enrichment, § 40, Comment b (3rd 2011). This applies even where the defendant has a "colorable or even plausible justification" for its conduct. *Id*. § 3, Comment e. The reason for this is simple: "If liability in restitution were limited to the price that would have been paid in a voluntary exchange, the calculating wrongdoer would have no incentive to bargain." *Id.* § 40, Comment b.

In *Adobe Sys. Inc. v. Alghazzy*, No. 15-CV-01443-BLF, 2015 WL 9478230, at *2 (N.D. Cal. Dec. 29, 2015), the Court denied a motion to dismiss a claim for restitutionary disgorgement under the UCL for profits from the sale of products that infringed the plaintiff's trademark rights. The court allowed the UCL claim to proceed because Adobe "alleged a vested interest in the products the defendants sold because the claim essentially alleged that the defendant was selling the plaintiff's

property." *Id.* at *2; *see Innovation Ventures, LLC v. Pittsburg Wholesale Grocers, Inc.*, No. C 12-05523, 2013 WL 1007666, at *8 (N.D. Cal. Mar. 13, 2013) (denying a motion to dismiss a claim for restitutionary disgorgement of profits from a company selling counterfeit products because the counterfeiter was "profit[ing] from the 'work' performed by the trademark owner's property"). Here, as in *Adobe*, Plaintiffs have a vested interest in the pre-1972 recordings that Sirius XM performs, and "each challenged [performance of Plaintiffs' pre-1972 recordings] involves a product embodying Plaintiffs' intellectual property." *Id.* at 2. Sirius XM attempts to distinguish *Adobe* on the grounds that Sirius XM allegedly "did not sell plaintiffs' property," and therefore that Plaintiffs have no vested interest in Sirius XM's gross revenues. Mot. at 18. It is only by Sirius XM's say-so, however, that it did not sell Plaintiffs' property. The only difference between *Adobe* and this case is that Sirius XM sold a *subscription* to Plaintiffs' pre-1972 recordings. This is an insubstantial distinction for the purposes of Plaintiffs' UCL claim for gross revenues attributable to its pre-1972 recordings as a restitutionary measure.[5]

Sirius XM wrongly relies upon a line of cases discussing non-restitutionary disgorgement to argue that Plaintiffs are not entitled to disgorgement. For example, in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,1145 (2003), cited by Sirius XM, two manufacturers were in a competitive bidding process for a contract, and one company (Loral) allegedly used bribes and favors to win the contract over the other company (Macdonald Dettwiler). The agent (Korea Supply Co.) representing Macdonald Dettwiler, which would have won a $30 million commission if Macdonald Dettwiler's bid had been accepted, brought a suit alleging

[5] Indeed, had the defendant in *Adobe* sold online subscriptions to access the plaintiff's software, the plaintiff would have had no less of a vested interest in the defendant's sales, with its intellectual property no less embodied therein.

unfair competition and seeking disgorgement of profits. The Court considered whether disgorgement of profits *that is not restitutionary* is an available remedy under the UCL. In its consideration, the Court explained that "disgorgement of money obtained through an unfair business practice is an available remedy . . . to the extent that it constitutes restitution." *Id.* at 944-45. The Court stated that "[u]nder the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Id.* at 1148; *see In re First Alliance Morg. Co.*, 471 F.3d 977, 997 (9th Cir. 2006) ("[R]estitution means the return of money to those persons from whom it was taken or who had an ownership interest in it."). Sirius XM is generating revenues by unlawfully exploiting pre-1972 sound recordings owned by the Plaintiffs—in other words, property embodying their intellectual property. Sirius XM is therefore wrong to suggest that Plaintiffs do not seek to restitution of funds in which they have an ownership interest or in which they have a vested interest.

4. Mr. Wallace's testimony includes the appropriate deduction of costs should the Court deem costs an appropriate consideration.

As explained hereinabove, Sirius XM's gross revenues attributable to its unauthorized exploitation of pre-1972 recordings is an appropriate measure of damages under both California law and the law of this case. In the event that the Court decides that costs are an appropriate consideration, however, the appropriate deduction is for the incremental costs associated with the unauthorized performances of pre-1972 recordings owned by members of the Class.

[redacted] Plaintiffs disagree that costs are

an appropriate deduction but, in any event, [redacted]

From an economic point of view, if one compares Sirius XM's costs in the current state where it uses pre-1972 recordings to an alternative state where it does not, Sirius XM's fixed costs (such as satellite costs and general operating expenses) are unavoidable. In other words, Sirius XM could not avoid these costs even if it had never used pre-1972 sound recordings.[6] [redacted]

[6] David Frear, the chief financial officer of Sirius XM, made the following declaration in this case while explaining the prejudice that Sirius XM allegedly suffered because owners of pre-1972 recordings allegedly failed to object to the unlicensed use of their recordings: "[B]etween 2009 and 2014 Sirius XM has spent over $2 million per year (and more than $13 million in total) solely on operating expenses related to five channels that feature Pre-1972 Recordings either exclusively . . . or predominantly . . ." Dkt. 89 at 7, Declaration of David J. Frear In Support of Sirius XM's Opposition to Plaintiffs Motion for Summary Judgment. These incremental costs are the only incremental costs that Sirius XM has identified. [redacted]

IV. CONCLUSION

Plaintiff respectfully requests the Court deny Sirius XM's motion in *limine* to exclude the expert testimony of Michael Wallace and any other evidence and argument that gross revenue alone is an appropriate measure of damages.

DATED: October 14, 2016

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Case Name: Flo & Eddie Inc v. Sirius XM Radio Inc et al
Case Number: 2:13-cv-05693-PSG-GJS
Filer: Flo & Eddie Inc
Document Number: 512

Docket Text:
Opposition opposition re: MOTION IN LIMINE NO.1 to Exclude Testimony of Expert Michael Wallace and any other Evidence and Argument that Gross Revenue alone is an Appropriate Measure of Damages [474] *(Redacted)* filed by Plaintiff Flo & Eddie Inc. (Attachments: # (1) Declaration Kalpana Srinivasan, # (2) Exhibit 1 (Redacted), # (3) Proposed Order)(Srinivasan, Kalpana)

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

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Original filename:C:\Users\mwilliam\Desktop\MIL 1 Redacted\2016-10-14 Flo Eddie Proposed Order re Opposition to Motion in Limine No. 1.pdf
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