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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

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

13 Plaintiffs,

14 v.

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

16 Defendants.
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Case No. CV 13-05693 PSG (GJS)

Hon. Philip S. Gutierrez

**DEFENDANT SIRIUS XM RADIO
INC.'S OPPOSITION TO
PLAINTIFFS' MOTION IN *LIMINE*
NO. 11 TO PRECLUDE DR. KEITH
UGONE FROM TESTIFYING
CONCERNING (1) SIRIUS XM'S
COSTS, (2) ALTERNATIVE
DAMAGES MODELS, (3)
ALLOCATION OF PRE-1972
SUBSCRIPTION REVENUE TO
TALK CHANNELS, AND (4)
MATTERS PURPORTEDLY
BEYOND UGONE'S EXPERTISE**

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.

**REDACTED VERSION OF
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1 **I. INTRODUCTION**

2 In moving to preclude Dr. Ugone from testifying, plaintiffs seek to secure a
3 one-sided, windfall recovery of claimed damages that deprives the jury of the
4 ability to consider the actual value of the rights at issue or the actual harm suffered
5 by plaintiffs, if any. As Dr. Ugone’s opinions demonstrate, plaintiffs’ damages
6 model is flawed in material respects and yields a recovery that is not tethered to any
7 recognized measure of recovery under the applicable California Civil Code
8 Sections, the factual record in this case, or the Court’s prior rulings.¹ Contrary to
9 plaintiffs’ position, Sirius XM is entitled to present Dr. Ugone’s opinions and
10 testimony—and this Court has never ruled otherwise.

11 Under California law, plaintiffs’ damages must be measured by the alleged
12 detriment caused (or, in the case of their unfair competition claim, to restore the
13 amount wrongfully taken from plaintiffs). Sirius XM’s expert witness, Dr. Keith
14 Ugone, is a respected and experienced economist who has carefully quantified—in
15 accordance with California law and generally accepted valuation methodologies—
16 the value of public performance rights to plaintiffs’ recordings (the fair market
17 value) and the detriment suffered by plaintiffs (lost royalties). In stark contrast,
18 plaintiffs’ expert Michael Wallace presents no opinions regarding the “value” or the
19 “fair market value of the performance right” (Ex. C, 4/20/15 Wallace Dep. Tr. at
20 13:9-13²; Ex. D, 10/7/16 Wallace Dep. Tr. at 506:11-17), any “lost profits” (Ex. C,
21 4/20/15 Wallace Dep. Tr. at 312:7-15), the quantification of “plaintiff’s losses” (Ex.
22 C, 4/20/15 Wallace Dep. Tr. at 143:16-18) or even “[h]ow much less revenue would
23 Sirius XM have recognized or realized if they had not played the class members’
24

25 ¹ Sirius XM separately moves to exclude the opinions of Mr. Wallace in Doc. 474
26 because they are based on fundamentally flawed assumptions and an incorrect
methodology.

27 ² All exhibits cited herein are attached to the Declaration of Cassandra L. Seto in
28 Support of Sirius XM’s Oppositions to Plaintiffs’ Motions in *Limine* Nos. 1-3, 11,
12, & 13.

1 pre-1972 recordings” (Ex. D, 10/7/16 Wallace Dep. Tr. at 629:24-630:6). Most
2 stunningly, he does not even claim to have “perform[ed] the calculation to determine
3 how much of Sirius XM’s total revenue was attributable to sound recordings.” Ex.
4 C, 4/20/15Wallace Dep. Tr. at 108:13-109:9. He does not even claim to have
5 “perform[ed] the calculation to determine how much of Sirius XM’s total revenue
6 was attributable to sound recordings.” Ex. C, 4/20/15, Wallace Dep. Tr. at 108:13-
7 109:9. Dr. Ugone’s opinions hew to California law; Mr. Wallace’s do not.

8 In an effort to preclude the only damages testimony that is actually tailored to
9 the claims at issue, plaintiffs attack Dr. Ugone’s opinions regarding: (1) Sirius
10 XM’s costs; (2) the calculation of a reasonable royalty; and (3) adjustments that are
11 necessary to avoid a windfall by excluding revenue for works that plaintiffs do not
12 own. To justify these exclusions, plaintiffs proceed from four false constructs.
13 First, plaintiffs miscast the procedural status of this case, quoting the Court out of
14 context to suggest that Sirius XM previously has offered a damages model that the
15 Court considered and rejected. Second, plaintiffs inaccurately contend that “Gross
16 Revenues” reported by Sirius XM to the Copyright Revenue Board (“CRB”)
17 excludes all non-music content, a position that directly contravenes the governing
18 regulatory language and court opinions evaluating it. Third, plaintiffs ignore—
19 almost completely—the additional analysis provided in Dr. Ugone’s September 28,
20 2016 Report, relying instead only on his April 15, 2015 Report. Finally, plaintiffs
21 resort to acrid, *ad hominem* attacks on Dr. Ugone, misrepresenting his role in other
22 cases and his testimony here, and ignoring parallels between the methodologies
23 they challenge and those employed by their own expert. Dr. Ugone is an
24 established and well-qualified expert in economics and financial modeling, and his
25 opinions are reliable and will be essential to the jury in evaluating plaintiffs’
26 claimed damages at trial.

27
28

1 **II. DR. UGONE’S DAMAGES MODEL IS APPROPRIATE AND THE**
2 **COURT HAS NEVER RULED OTHERWISE**

3 **A. Sirius XM Has Never Before Offered, And The Court Has Never**
4 **Rejected, A Class-Wide Damages Model Based On Royalties**

5 The crux of plaintiffs’ motion is their erroneous claim that the Court has
6 conclusively accepted their proposed damages model as the *only* appropriate
7 measure of damages in this case. The Court has made no such finding.

8 Notwithstanding plaintiffs’ assertion that the Court has “twice rejected Sirius XM’s
9 attempt to put forward other damage models,” Mot. at 7, their selective quoting of
10 portions of the Court’s orders that merely recite plaintiffs’ arguments, and their
11 erroneous claim that the Court has already dismissed “license-based models,” *id.* at
12 1, the reality is that the parties have not yet briefed—and the Court has yet to weigh
13 in on—whether the specific manner in which plaintiffs propose to calculate their
14 damages is proper or whether alternative models are also available.

15 In ruling on plaintiffs’ motion for class certification, the Court only
16 considered whether plaintiffs’ proposed damages model was satisfactory *for class*
17 *certification purposes*. See Doc. 225 at 23. That is, the Court’s analysis of
18 plaintiffs’ model was limited to considerations inherent in evaluating certification—
19 *i.e.*, whether the “damages in this case are well-suited to streamlined determination
20 via application of a mechanical formula and will not require factual investigation
21 beyond reviewing Sirius XM’s records.” *Id.* These considerations, however, do
22 not bear on whether plaintiffs’ proposed execution of that model properly measures
23 the detriment suffered by plaintiffs under California law. And, while the Court has
24 acknowledged that *plaintiffs believe* “100% of Sirius XM’s revenues . . . is the
25 appropriate measure of damages in California,” the Court did not rule that 100% of
26 Sirius XM’s revenues is *the* appropriate measure of damages under California law,
27 let alone the *only* appropriate measure of damages.³ *Id.* at 21.

28 ³ Specifically, in referencing plaintiffs’ assertion in their *reply papers* that
California law allowed recovery of gross revenues in this case, the court did not

1 Plaintiffs also misread statements in the Court’s September 8, 2016 order on
2 Sirius XM’s partial motion for summary judgment. There, the Court declined to
3 entertain the distinction between disgorgement (which Sirius XM argued was
4 unavailable) and legal remedies. *See* Doc. 411 at 6. In its ruling, the Court noted
5 that “it ha[d] already concluded that Plaintiffs’ damages model is appropriate in this
6 case” and that “Plaintiffs’ damages model has already been approved,” referring to
7 its May 27, 2015 class certification order. *Id.* at 6. Again, this does not mean that
8 the Court considered the legal adequacy of the *proof* that plaintiffs intend to put on
9 at trial. Nor does it mean that the Court has preemptively precluded Sirius XM
10 from presenting any alternative measure of class-wide damages.

11 To the contrary, the Court previously observed that plaintiffs were injured “*in*
12 *the form of license fees* that Sirius XM should have paid Flo & Eddie in order to
13 publicly perform its recordings.” Doc. 117 at 14; *see also id.* at 15 (stating that
14 damages for misappropriation claim would be “*in the form of foregone licensing or*
15 *royalty payments*”); *id.* at 13 (stating that § 17200 remedy should compensate for
16 “economic harm *in the form of foregone licensing or royalty payments*”) (emphasis
17 added in all citations). The Court also has not previously considered Sirius XM’s
18 damages models. Sirius XM should not be foreclosed from showing—through Dr.
19 Ugone or otherwise— that alternative damages measures and models are better
20 suited to the facts of this case, where they are consistent with the Court’s prior
21 rulings on class-wide relief and comport with the weight of authority under
22 California law.

23 **B. A Correct Damages Inquiry Must Focus On The Injury Plaintiff**
24 **Suffered Or The Value Of The Performance Right**

25 To comply with California law, the appropriate damages model in this case

26
27 purport to decide how damages would be measured or proved. *See* Doc. 200 at 12;
28 Doc. 225 at 21. At that early stage of these proceedings, there was no argument
presented as to whether this damages theory was being properly applied—or, more
importantly here, whether *other* damages measures might be appropriate at trial.

1 must attempt to measure the “detriment,” if any, caused by Sirius XM. The
2 California Civil Code provisions addressing damages for the conversion and
3 misappropriation/Section 980(a)(2) rights claims, Sections 3333 and 3336, measure
4 damages by the “detriment caused thereby” and, in the case of conversion
5 specifically, explain that “the detriment caused by the wrongful conversion of
6 personal property is presumed to be . . . [t]he *value of the property at the time of the*
7 *conversion . . .*” Cal. Civ. Code § 3336. Dr. Ugone and Mr. Wallace agree that
8 the fair market value of a good is determined by what a willing buyer and a willing
9 seller would agree to when both have full knowledge of the facts and neither is
10 under undue duress. Doc 510-2 ¶ 6(a)(i); Ex. D, 10/6/16 Wallace Dep. Tr. at 506:6-
11 10. Dr. Ugone opined that, under generally accepted valuation methodologies,
12 what a willing buyer and seller would have agreed to can be determined by
13 constructing a hypothetical negotiation framework in which there is no pressure on
14 either to buy or sell, and the buyer and seller know the potential uses of the pre-
15 1972 recordings. *See* Doc. 510-2 ¶¶ 97-99. Dr. Ugone performed a detailed
16 analysis and evaluated the following economic considerations and indicators of
17 value: 1) current class members’ licenses; 2) Sirius XM’s direct licenses to other
18 pre-1972 recordings; 3) statutory royalty rates that Sirius XM has paid for post-
19 1972 recordings; 4) commercial relationships between class members and Sirius
20 XM; and 5) the benefits to Sirius XM of obtaining a license to pre-1972
21 Recordings. *See id.* ¶100 *et seq.*

22 Based on his evaluation of these factors, Dr. Ugone has calculated the
23 performance value of the class members’ pre-1972 recordings. In stark contrast,
24 plaintiffs’ expert admits he completely ignores these factors. Specifically, he
25 concedes that he never even analyzed value. *See* Ex. C, 4/20/15 Wallace Dep. Tr.
26 at 13:9-13 (“I haven’t been asked in this case to value the playing of a -- of a sound
27 recording.”); Ex. D, 10/17/16 Wallace Dep. Tr. at 504:11-17 (“Have you offered
28 any opinions regarding what the fair market value of the performance right for the

1 class members’ pre-’72 recordings is? . . . Not a specific amount, no.”). In place of
2 performing an economic analysis, Mr. Wallace multiplies a “revenue” number from
3 Interrogatory No 19 (Exhibit G) by the “pre-1972 percentage” in Exhibit F, then
4 multiplies that by the California percentage (California performances/total
5 performances) and then attempts to exclude sound recordings that are licensed (or
6 owned by opt-outs).

7 The only “expert opinion” that he contributes to this issue is the following:
8 “it’s my opinion that that’s the way we should do it, because that’s the way the
9 judge has ruled.” Ex. D, 10/7/16 Wallace Dep. Tr. at 410:21-23. Of course, that is
10 not an expert opinion—it is just basic arithmetic based on what counsel said the
11 Court said. *See id.* at 362:17-21 (“Q. So it was the lawyers who hired you who
12 told you to assume that the correct measure of damages in this case is the gross
13 revenue attributable to pre-’72 recordings without a deduction for costs? A.
14 Correct”); *id.* at 370:18-23 (“Q. Do you have an opinion regarding the appropriate
15 measure of damages in this case? A. I don’t have an expert opinion about what the
16 appropriate measure of damages is in this case. I think that’s a legal question .”).

17 Stripped of their rhetoric, plaintiffs have no criticism of Dr. Ugone’s *method*
18 for calculating value—they simply challenge the propriety of determining value *at*
19 *all*. As discussed in the next section, this position ignores the requirements of
20 governing California damages statutes and case law.

21 C. **In Contrast to Dr. Ugone’s Model, Plaintiffs’ Gross Revenue**
22 **Model Makes No Effort To Measure Plaintiffs’ Injuries And Is**
23 **Unavailable Under California Law**

24 As set forth more fully in Sirius XM’s Motion in *Limine* No. 1 (Doc. 474),
25 plaintiffs’ damages model, which seeks Sirius XM’s gross revenue without
26 deduction of costs, demands a remedy that finds no support in California law with
27 regard to plaintiffs’ remaining causes of action. In order to depart from the
28 damages measurement based on the value of the property (here, the non-exclusive
right to perform pre-1972 recordings) at the time it was used, plaintiffs must make

1 an affirmative showing of “special circumstances” that would entitle them to
2 recover additional, proximately caused damages. *See, e.g., Newhart v. Pierce*, 254
3 Cal. App. 2d 783, 794 (1967); *Read v. Turner*, 239 Cal. App. 2d 504, 514-15
4 (1966). Plaintiffs have not made and cannot make this showing of special
5 circumstances because they cannot prove that they had the intent and the ability to
6 profit from their pre-1972 recordings other than by licensing.⁴ *See Read*, 239 Cal.
7 App. 2d at 514. Further, no logical reason exists to use Sirius XM’s gross revenue
8 (or even its net profits) as a measuring stick for damages because such radio
9 broadcasting revenue and profits are not remotely reasonable measures of value of
10 performing recordings owned by plaintiffs. Nor have plaintiffs attempted to
11 provide a link between the two.

12 Plaintiffs base their damages model and their efforts to foreclose alternative
13 valuation methods—including an alternative measure that attempts to evaluate the
14 detriment to plaintiffs, as required by the California Civil Code—entirely on a
15 misreading of two cases, *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554
16 (1977), and *Lone Ranger Television, Inc. v. Program Radio Corp.*, 740 F.2d 718
17 (9th Cir. 1984). Neither case approves a damages model that preemptively
18 precludes consideration of costs. Both cases presented the special circumstances
19 required by Section 3336 that would entitle a plaintiff to seek proximately caused
20 damages beyond the value of the property at the time it was converted or
21 misappropriated. In *Heilman*, the defendant took recordings owned by others
22 (including the plaintiff, A&M Records), created commercial “mix tapes” by
23 copying the recordings to physical phonograph records or magnetic tapes, and then
24 sold those records and tapes. 75 Cal. App. 3d at 560. In *Lone Ranger*, the

25 ⁴ Plaintiffs similarly cannot recover Sirius XM’s gross revenue under their Cal.
26 Bus. & Prof. Code §§ 17200 and 17203 claims. Because no part of Sirius XM’s
27 revenues once belonged to plaintiffs, the proposed recovery “would not replace any
28 money or property that [Sirius XM] took directly from plaintiff[s],” and they have
“no vested interest” in the money they seek to recover. *Korea Supply Co. v.*
Lockheed Martin Corp., 29 Cal. 4th 1134, 1148-29 (2003).

1 defendant bought old recordings of a radio series, copied and re-mixed those
2 recordings onto broadcast cartridges for radio play, and then leased them to radio
3 stations. 740 F.2d at 719-20. Thus, in both cases, the defendant was selling a
4 product that directly competed with the plaintiff's product (tangible copies of sound
5 recordings in *Heilman* and cassettes for use in radio broadcasts in *Lone Ranger*).
6 Because the defendant was depriving the plaintiff of sales that it otherwise would
7 have been able to realize by selling the same finished product (records and tapes), it
8 was appropriate to allow the plaintiffs there to recover what the defendants had
9 made by wrongfully selling the directly competing goods.

10 Moreover, *Heilman* did not hold that costs cannot be deducted in calculating
11 damages. There, the trial court *considered* evidence of the defendant's costs—but
12 determined that the “defendants ‘failed to carry their burden of proof with respect to
13 [their] costs and expenses,’” because their “inaccurate and incomplete books
14 [made] it . . . impossible to verify their alleged expenses.” 75 Cal. App. 3d at 560
15 n.11. This evidentiary ruling resulted in damages being determined by reference to
16 the defendant's gross revenues rather than its profits. The proposition advanced by
17 plaintiffs here—that *Heilman* held costs cannot be considered—is plainly wrong.⁵
18 *Lone Ranger* says nothing different. There, the defendant simply conceded,
19 without argument or analysis, that the method of calculating damages used in
20 *Heilman* applied. 740 F.2d at 726.

21 In contrast to *Heilman* and *Lone Ranger*, plaintiffs here cannot show that
22 they lost any sales (*i.e.*, licensing opportunities or anything else) due to Sirius XM's

23
24 ⁵ Plaintiffs similarly take out of context the *Heilman* court's statement that “[o]ne
25 who misappropriates the property of another is not entitled to deduct any of the
26 costs of the transaction by which he accomplished his wrongful conduct.” 75 Cal.
27 App. 3d at 570. In the case *Heilman* cites for this proposition, the California
28 Supreme Court makes clear that normal business costs are deductible (providing
that they are established by appropriate evidence), and only costs that relate to
objectively wrongful conduct (like fraud) are excludable. *See* Doc. 474 at 12-13
n.5 (discussing *Ward v. Taggart*, 51 Cal. 2d 736 (1959)).

1 use of their property, let alone that they could have generated subscription revenues
2 like Sirius XM. *See, e.g.*, Ex. D, 10/7/16 Wallace Dep. Tr. at 441:9-16. As
3 explained in Sirius XM’s Motion in *Limine* No. 1, nothing that Sirius XM did
4 prevented plaintiffs from granting other non-exclusive licenses (if they had been
5 able to do so). To the contrary, plaintiffs had no intent or ability to generate profits
6 as a satellite radio operator. The record demonstrates that Sirius XM’s use of their
7 recordings *enhanced* plaintiffs’ ability to profit from their recordings. *See* Doc. 474
8 at 11, 13. Consequently, plaintiffs can make no showing that they are entitled to
9 seek even Sirius XM’s net profits—much less gross revenue without deduction of
10 costs. *See Tyrone Pac. Int’l v. MV Eurychili*, 658 F.2d 664, 666-67 (9th Cir. 1981).

11 The remedy that measures the value of plaintiffs’ property right at the time it
12 was converted or misappropriated is the amount that a willing buyer would have
13 paid to obtain a non-exclusive right to publically perform their recordings. *See*
14 *Circuito Cerrado, Inc. v. Garcia*, 2011 WL 4529740, at *4 (N.D. Cal. Sept. 29,
15 2011) (“Under California law, a prevailing party is entitled to the amount it would
16 have received had the defendant paid for the [property].”). Such a payment would
17 be a reasonable license fee—which is exactly what the typical plaintiff asserting
18 claims for common law copyright, conversion, and misappropriation of an
19 intangible right receives. *See, e.g., Williams v. Weisser*, 273 Cal. App. 2d 726, 743
20 (1969) (awarding reasonable value of license for appropriation of literary property
21 in violation of common law copyright); *Integrated Sports Media, Inc. v. Mendez*,
22 2014 WL 3728594, at *5 (N.D. Cal. July 28, 2014) (damages for conversion and
23 misappropriation of plaintiff’s exclusive “ownership over the nationwide
24 distribution rights” for sporting event is measured by “denial of the license fee to
25 which [plaintiff] would otherwise have been entitled”).

26 **D. The “Law of the Case” Doctrine Does Not Preclude Dr. Ugone’s**
27 **Testimony Regarding Costs Or Reasonable Royalty Rates**

28 Based on their misreading of the Court’s orders and California case law,
plaintiffs claim Dr. Ugone should be barred under the “law of the case” doctrine

1 from offering an opinion in which he deducts costs from Sirius XM’s revenue or in
2 which he applies a royalty or licensee fee measure to calculate plaintiffs’ class-wide
3 damages. Mot. at 9-10. The “law of the case” doctrine is a “judicial invention
4 designed to aid in the efficient operation of court affairs” that seeks to maintain
5 internal consistency among a court’s rulings within the same case. *Milgard*
6 *Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). “For the
7 doctrine to apply, the issue in question must have been decided *explicitly* or *by*
8 *necessary implication* in the previous” decision. *Id.* (emphasis added); *see also*
9 Alan Wright & Arthur R. Miller, 18B Fed. Prac. & Proc. Juris. § 4478 (“Actual
10 decision of an issue is required to establish the law of the case. Law of the case
11 does not reach a matter that was not decided.”). As discussed above, however, the
12 matters on which plaintiffs seek to foreclose all discussion have *not* been decided,
13 either explicitly or by implication.

14 Plaintiffs try to bolster their argument by citing a myriad of cases that stand
15 for the unremarkable proposition that a party should not be permitted to offer
16 evidence at trial that runs contrary to a court’s prior order or to the law. These cases,
17 however, do not alter the fundamental rule that “law of the case” applies only to
18 issues that have been decided. For instance, in *Fahmy v. Jay Z*, 2015 WL 5680299,
19 at *10 (C.D. Cal. Sept. 24, 2015), defendants moved in *limine* to preclude plaintiff
20 from offering evidence regarding issues “already addressed . . . and determined” by
21 the court. While the court agreed with the defendants that the plaintiff should be
22 precluded from introducing evidence to the extent it would be used to “re-litigate”
23 decided issues, the Court *denied* the motion in *limine* on the ground that “a
24 wholesale exclusion of evidence regarding these issues” would be overbroad. *Id.* at
25 *11. In *AngioScore, Inc. v. TriReme Med., Inc.*, 2015 WL 5258786, at *1 (N.D. Cal.
26 Sept. 8, 2015), the plaintiff moved in *limine* to exclude the defendant’s expert from
27 offering testimony contrary to the court’s prior claim construction orders. While the
28 court granted the motion to the extent it had already “rejected [a] specific argument”

1 raised by the defendant’s expert, the court *denied* the motion to the extent plaintiff
2 “misconstrue[d]” the court’s prior orders, which in fact were not inconsistent with
3 the defendant’s expert’s opinions. *Id.* at *1, 2. And in *Oracle Am., Inc. v. Google*
4 *Inc.*, 2012 WL 877125, at *4 (N.D. Cal. Mar. 15, 2012), the court struck an expert’s
5 opinion simply because it advanced a position that was “contrary to law.” Again,
6 the Court has not decided—expressly or impliedly—the issue of what measure of
7 damages is legally proper for each of plaintiffs’ causes of action, nor has it ruled that
8 Sirius XM’s damages measures are improper, so the “law of the case” doctrine does
9 not apply. *See Milgard*, 902 F.2d at 715 (finding “the law of the case doctrine
10 inapplicable” where the court did not “specifically address[]” the issue in question
11 and rejecting plaintiff’s attempt to “stretch” the court’s language.)

12 Finally, the “law of the case” doctrine is “not an inexorable command, nor is
13 it a limit to a court’s power. Rather, application of the doctrine is discretionary.”
14 *U.S. v. Smith*, 389 F.3d 944, 949 (9th Cir. 2004); *see also id.* (“When a court
15 applies the law of the case doctrine to its own prior decisions . . . the traditional
16 formulations of the doctrine must be conceived as rules of thumb and not as
17 straightjackets on the informed discretion and sound practical judgment of the
18 judge.”) (quoting Moore’s Federal Practice § 134.21[1]). Even if Dr. Ugone’s
19 testimony were inconsistent with the Court’s prior rulings, that alone would not be
20 a sufficient basis for exclusion when Dr. Ugone’s opinions are consistent with
21 California law and bear on central issues that have not yet been decided. It is well
22 within the Court’s discretion to admit his opinions.

23 **E. Dr. Ugone’s Legally Permissible Damages Models Should Be**
24 **Presented To The Jury**

25 As the trier of fact, the jury must decide what damages award, if any, will
26 adequately compensate plaintiffs for their claimed injuries. Accordingly, if a
27 damages model is legally available and otherwise admissible, it should be presented
28 to the jury for consideration. *Open Text S.A. v. Box, Inc.*, 2015 WL 466815, at *2
(N.D. Cal. Jan. 28, 2015) (“The parties are free to make their best case to the jury,

1 within the bounds of admissible evidence” that one of two available damages
2 measurements are correct); *see also GHK Associates v. Mayer Group, Inc.*, 224 Cal.
3 App. 3d 856, 874 (1990) (“The selection of which measure of damages to apply is
4 within the sound discretion of the trier of fact.”). As shown in Sirius XM’s Motion
5 in *Limine* No. 1, plaintiffs’ damages model is not available given the record in this
6 case and should be precluded, and Sirius XM has demonstrated why a reasonable
7 royalty rate is not only allowable, but *required* under applicable California damages
8 statutes. Because Dr. Ugone’s model is permissible under the law and his
9 methodology is sound, there is no basis to exclude it.

10 **III. PLAINTIFFS BLATANTLY INFLATE THEIR CLAIMED DAMAGES**
11 **BY INCLUDING REVENUE FOR NON-MUSIC CONTENT**

12 Mr. Wallace admits he has done *nothing* to determine how much of Sirius
13 XM’s gross revenue is attributable to non-music content—he simply assumes it is
14 *all* attributable to music content. At the same time, plaintiffs seek to block Dr.
15 Ugone from presenting to the jury his calculation of the non-music contribution to
16 the revenue. *See* Ex. D, 10/7/16 Wallace Dep. Tr. at R137:25-138:8 (“Q. But you
17 didn’t do anything to determine what portion of the revenue was attributable to the
18 non-music content, correct? A. I didn’t do anything to calculate that amount,
19 because it’s not relevant to my analysis. But I did a lot of things to understand it,
20 and I’ve read a lot of arguments about it, first brought in by SoundExchange and
21 then now brought in by Sirius XM. But I haven’t performed any separate
22 calculations of any amounts attributable to non-music content.”).

23 **A. “Gross Revenues” Under C.F.R. § 382.11 Includes Revenue**
24 **Attributable To Non-Music Content**

25 The starting point for plaintiffs’ damages model is the post-1972 compulsory
26 federal licensing scheme governed by the CRB and administered by
27 SoundExchange. *See* Ex. B, 9/21/16 Wallace Report ¶¶ 16-22. Specifically,
28 plaintiffs contend that they can use calculations of “Gross Revenue” and “Pre-1972
Recording Share,” as defined by the CRB and memorialized in the Code of Federal

1 Regulations, to identify Sirius XM’s revenue attributable to the performance of their
2 recordings. Putting aside the analytical mismatch between plaintiffs’ injuries from
3 performance of their *pre-1972* music and a federal royalty regime set up for *post-*
4 *1972* sound recordings,⁶ plaintiffs and their expert misread the regulation.

5 No one disputes that, as part of the statutory royalty process, Sirius XM
6 reports to SoundExchange a figure defined by applicable regulations as “Gross
7 Revenues” or that Sirius XM deducts from that amount another figure defined as a
8 “Pre-1972 Recording Share.” 37 C.F.R. §§ 382.11-382.12. Those numbers,
9 however, do not represent the revenue received by Sirius XM for playing pre-1972
10 recordings. Under the plain language of the regulation, the “Gross Revenues”
11 figure includes revenue attributable to *non-music content*—and the statutorily-
12 authorized deductions are then calculated as *percentages* of that figure. *Id.*
13 Therefore, because the “Gross Revenues” figure includes non-music content, the
14 “Pre-1972 Recording Share” deduction being calculated as a percentage thereof
15 necessarily includes non-music content as well. *See id.* Plaintiffs’ contrary
16 assertion—that amounts deducted from “Gross Revenues” reflect only music
17 content—is belied by the regulation itself and the cases interpreting it.

18 The code defines “Gross Revenue” as U.S. subscription revenue plus certain
19 advertising revenue. *Id.* § 382.11(1). The definition excludes other enumerated
20 categories of revenue,⁷ including a carve-out for revenue from non-music content

21
22 ⁶ Even the CRB recognizes that its rate formulas—and, by extension, their
23 components—are “proxies for a usage metric at best.” Determination of Rates and
24 Terms for Preexisting Subscription Services and Satellite Digital Audio Radio
25 Services, 73 Fed. Reg. 4080, 4080–81 (Jan. 24, 2008) (“*Satellite I*”).

26 ⁷ The definition excludes: (i) money attributable to the sale or lease of technology
27 or equipment; (ii) royalties paid to Sirius XM for intellectual property rights; (iii)
28 money obtained from the sale of phonorecords; (iv) “[s]ales and use taxes, shipping
and handling, credit card, invoice, and fulfillment service fees”; (v) bad debt; and
(vi) revenue recognized from four separate categories of service: “(A) separately
charged data services; (B) non-music channels or services that are “offered for a
separate charge;” (C) non-U.S. channels or programming; and (D) channels or

1 *when that content is offered for a separate charge. Id.* § 382.11(3)(vi)(B). No
2 carve-out exists for non-music content when *both* music and non-music are part of a
3 standard subscription package. As a result, “Gross Revenues” ends up including
4 revenue from both music and non-music content.

5 Because the CRB is aware that revenue attributable to non-music content
6 exists in the “Gross Revenues” figure, it addresses that issue *by setting a lower*
7 *royalty rate than would otherwise apply.* Stated differently, rather than removing
8 proceeds associated with non-music content from the pool of “Gross Revenues”
9 number on the front end, the CRB promulgated a lower royalty rate to ensure that
10 licensors were not overcompensated. The D.C. Circuit acknowledges and endorses
11 this approach, and explicitly recognizes that “Gross Revenues,” as defined by
12 Sections 382.11-12, includes a significant component attributable to non-music
13 content. *See Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000 (D.C. Cir.
14 2014). In that case, SoundExchange, like plaintiffs here, claimed that the upfront
15 exclusion for revenue attributable to non-music premium packages and non-music
16 advertising revenue was sufficient to account for the totality of non-music content.
17 *Id.* at 1010. The CRB and the D.C. Circuit disagreed, highlighting a distinction
18 between “revenue solely attributable to non-music programming,” which is the
19 subject of an exclusion, and revenue from non-music content broadcast in “Sirius
20 XM’s bundled ‘music and talk’ packages.” *Id.* The former was addressed on the
21 front end with an exclusion, and the latter was addressed through benchmarking and
22 modeling a lower royalty rate. *Id.* Plaintiffs here confuse the two concepts, as is
23 readily evident from their efforts to include revenue from “non-music *channels*,” as
24 opposed to the relevant revenue stream which would be from non-music *content*.

25 Simply put, plaintiffs cannot estimate Sirius XM’s revenue attributable to
26 pre-1972 recordings by looking at only *part* of the CRB’s calculation. Because the
27 _____
28 programming that are exempt from a license requirement or are separately licensed.
Id. § 382.11(3).

1 “Pre-1972 Recording Share” is merely a percentage of a “Gross Revenues” figure
2 that includes bundled non-music content, it has to be discounted by the same
3 adjustment for music to non-music content used by the CRB in setting the
4 applicable royalty rate for post-1972 recordings. As Dr. Ugone explains, the “Pre-
5 1972 Recording Share” should be proportionally reduced to exclude non-music
6 content to which plaintiffs claim no right. Doc. 510-2 ¶¶ 74-78. These opinions are
7 well supported by the facts and are consistent with the regulations, prior CRB
8 proceedings, and Sirius XM’s practices. Absent such an adjustment, the portion of
9 Sirius XM’s revenue attributable to pre-1972 music content will be overstated and
10 plaintiffs will receive an undeserved windfall.

11 **B. Substantial Evidence Supports Dr. Ugone’s Opinion That The**
12 **“Pre-1972 Recording Share” Must Be Reduced By 50% To**
13 **Estimate Revenue Attributable To Music Content**

14 Dr. Ugone’s opinion that a 50% reduction is necessary and reasonable is
15 supported by evidence that revenue attributable to non-music content in Sirius
16 XM’s bundled packages is roughly equal to revenue attributable to music content.
Specifically, Dr. Ugone’s opinion is based on:

- 17 • Channel lineup includes “include[s] a mix of music channels and non-
18 music channels, with music channels accounting for less than half of
19 the total included channels” (*id.* ¶ 75);
- 20 • The fact that “music and non-music content command roughly
21 equivalent subscription values in the marketplace” (*id.*);
- 22 • CRB statement: “experts for both SoundExchange and Sirius XM
23 proposed royalty rates that ‘reflect that *roughly half*’ of the [content-
24 related] value of Sirius XM’s ... service is derived from its music
25 programming and roughly half from its non-music programming” (*id.*
26 ¶ 76);
- 27 • Dr. Roger Noll’s weighted channel analysis presented to the CRB,
28 which concluded that “channels based primarily on sound recordings,

1 weighted by the number of subscribers to each Sirius XM package,
2 account for 55.1 percent of satellite radio service” (*id.*); and

- 3 • Written testimony by SoundExchange’s economist that a “hypothetical
4 music-only satellite radio service” would command a retail price of
5 50% of the price of Sirius XM’s bundled package (*id.*).

6 Plaintiffs’ characterization of the 50% deduction as “absurd and unfounded”
7 is contradicted by the independent and diverse nature of the evidence on which Dr.
8 Ugone relies. *See also Satellite II*, 78 FR 23054-01 (“[T]he rates proposed by Dr.
9 Ordover on behalf of SoundExchange and Dr. Noll on behalf of Sirius XM reflect
10 that roughly half of the value of SiriusXM’s SDARS service is derived from its
11 music programming and roughly half from its non-music programming.”).
12 Plaintiffs have put forward no conflicting testimony or evidence. And the claim
13 that “Dr. Ugone did nothing at all to confirm an equal allocation of subscription
14 revenue, or any allocation at all” (Mot. at 13) is flatly refuted by the 9/28/16 Ugone
15 Report in which he offers a channel-by-channel breakdown of music and non-music
16 content and a separate analysis of package pricing. Doc. 510-2 ¶ 75 & nn.101-102.
17 As a result, Dr. Ugone’s opinion is rooted in an economic analysis and is the
18 product of reliable principles and methods reliably applied.

19 **C. Sirius XM Has Not Represented a Different Revenue Amount,**
20 **And Even If It Had, That Representation Would Not Be Binding**
21 **Here**

22 Invoking the doctrine of judicial estoppel, plaintiffs contend that Sirius XM’s
23 testimony in a prior CRB proceeding somehow bars Dr. Ugone from offering an
24 opinion as to the appropriate calculation of damages in this action. Mot. at 15. But
25 plaintiffs misapprehend the function, purpose, and application of judicial estoppel.

26 “Judicial estoppel precludes a party from asserting a position in a current
27 legal proceeding which is contrary to the position that party previously asserted in
28 another.” *Stevens Tech. Servs., Inc. v. S.S. Brooklyn*, 885 F.2d 584, 588 (9th Cir.
1989). The Ninth Circuit has set an exceptionally high bar for application of the

1 doctrine. Judicial estoppel “applies when a party’s position is tantamount to a
2 knowing misrepresentation to or even fraud on the court,” *Wylar Summit P’ship v.*
3 *Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1190 (9th Cir. 2000), and is applied to
4 preclude parties from playing “fast and loose” with the courts, such as a plaintiff
5 who seeks double recovery by first claiming she is unable to work in order to
6 recover worker’s compensation and subsequently claiming she is performing her
7 job adequately to recover under FEHA, as in one of the case relied on by plaintiffs,
8 *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601-02 (9th Cir. 1996).

9 Judicial estoppel is an equitable doctrine whose application, like that of the
10 law of the case doctrine, rests within the discretion of the court. *Id.* at 601. Factors
11 considered include whether a party’s subsequent position is “clearly inconsistent
12 with its earlier position,” and whether the party would “derive an unfair advantage or
13 impose an unfair detriment on the opposing party if not estopped.” *Zedner v. U.S.*,
14 547 U.S. 489, 504 (2006). These factors do not exist here.

15 Plaintiffs fail to show how Dr. Ugone’s opinion is “clearly inconsistent”
16 with testimony offered by Sirius XM in the *Satellite II* proceedings before the CRB.
17 Simply because Sirius XM at one point “request[ed] continuance of the current
18 definition” of “gross revenues” under Section 382.11, Mot. at 12, does not render
19 inconsistent Dr. Ugone’s opinion regarding the proper allocation of Sirius XM’s
20 non-music content for purposes of calculating damages in this action. As explained
21 in Section III.A., above, the CRB’s overall methodology for calculating royalties
22 payable for post-1972 music makes appropriate adjustments elsewhere for the non-
23 music content included in that definition. Nor can plaintiffs show how Dr. Ugone’s
24 opinion would cause them an “unfair detriment.” Other than stating a bald
25 conclusion invoking judicially estoppel plaintiffs offer no explanation as to how
26 Sirius XM’s three-year-old testimony in an unrelated CRB proceeding to which
27 they were not a party *unfairly* disadvantages plaintiffs here. *Id.* at 15. Sirius XM
28 has not played “fast and loose” with the judicial system, *Rissetto*, 94 F.3d at 601, or

1 committed a fraud on any court, *Wylter Summit*, 235 F.3d at 1190. There is no
2 basis for invoking judicial estoppel.

3 **IV. PLAINTIFFS' DAMAGES MODEL IS OVER-INCLUSIVE IN**
4 **OTHER WAYS, NECESSITATING ADDITIONAL DEDUCTIONS**

5 Plaintiffs launch similarly groundless attacks on Dr. Ugone's other opinions
6 regarding deductions necessary to correct substantial problems with the scope of
7 plaintiffs' damages model. Each is addressed in turn below.⁸

8 **A. Dr. Ugone's Opinions Regarding The Value Of Sirius XM's**
9 **Commercial-Free Experience Is Admissible**

10 Dr. Ugone offers an opinion about the subscription revenue attributable to a
11 commercial-free listening experience. Plaintiffs attack this opinion, claiming that it
12 is offered "without a shred of expertise." Mot. at 16. As an initial matter,
13 plaintiffs' own expert testified that "it's well recognized that commercial-free
14 content—people are willing to pay more money for commercial-free content than
15 content with advertising." Ex. C, 4/20/15 Wallace Dep. Tr. at 212:23-213:1. It is a
16 non-starter to suggest that no amount can properly be attributed to this experience.

17 Moreover, plaintiffs simply ignore the additional factual bases and analyses
18 set forth in Dr. Ugone's Supplemental Rebuttal Report for his proffered attribution.
19 Like other portions of plaintiffs' motion, it appears that this section does not
20 consider any of Dr. Ugone's opinions from his latest report. As explained therein,
21 he attributes [REDACTED]

22 [REDACTED] Doc. 510-2 ¶ 83. He bases this opinion on benchmarking analogous
23 providers, including Pandora One, SoundCloud Go, Spotify Premium, and TuneIn
24 Premium, and attributing revenue according to the subscription rates and services

25 ⁸ Plaintiffs devote three pages to arguing against an opinion previously articulated
26 by Dr. Ugone that does not appear in his Supplemental Rebuttal Report. *See* Mot.
27 at 15-18. Although Sirius XM reserves all rights, Dr. Ugone's work on the relative
28 value of musical recordings is not relevant to the upcoming trial given the Court's
class certification ruling. As a result, the Court need not evaluate the admissibility
of his opinions on that subject.

1 offered. *Id.* Yet plaintiffs’ motion puzzlingly maintains that Dr. Ugone will testify
2 to a \$4.99 per month allocation of subscription revenue to commercial-free
3 listening, going so far as to call that testimony “nonsensical” and “not . . . based on
4 sufficient facts and data.” Mot. at 19-20. In over four pages of detailed and
5 footnoted analysis, Dr. Ugone opines that, accounting for all other differences, there
6 is a price premium for ad-free content on almost all commercial music platforms.
7 Sirius XM offers music and some talk on ad-free stations, and he reasonably
8 concludes that consumers are willing to pay about two dollars per month for that
9 benefit. Doc. 510-2 ¶ 84.

10 **B. As Shown By Dr. Ugone, Plaintiffs’ Revenue Calculation Is Wrong**
11 **Because It Does Not Exclude Sound Recordings Owned By Others**

12 Plaintiffs also challenge Dr. Ugone’s sampling methodologies, which he
13 employs to address and correct the over-inclusive nature of the playlists plaintiffs
14 rely on to calculate their claimed damages (the “Combined Playlists”). The
15 Combined Playlists indisputably include recordings that no named plaintiff or class
16 member owns. Yet plaintiffs argue that (1) it is Sirius XM’s burden to prove which
17 recordings plaintiffs do not own; and (2) Dr. Ugone’s sampling methodologies are
18 insufficient to meet that burden. Plaintiffs are wrong on both counts.

19 **1. Plaintiffs Misapprehend Their Burden Of Proof**

20 Plaintiffs bear the burden of proving that they owned property and did not
21 consent to interference with that property, *see Lee v. Hanley*, 61 Cal. 4th 1225,
22 1240 (2015), yet, in attacking Dr. Ugone’s sampling methodologies, plaintiffs
23 repeatedly—and wrongly—assert that Sirius XM bears the burden of proving which
24 recordings on the Combined Playlists plaintiffs *do not own*. This approach lacks
25 judicial endorsement and flips the conventional burden of proof on its head.
26 *Reinsdorf v. Skechers U.S.A.*, 922 F. Supp. 2d 866, 879 (C.D. Cal. 2013) (plaintiff
27 must “identify a particular revenue stream that bears a ‘legally sufficient
28 relationship’ to the infringement”). As the Ninth Circuit stated in the federal
copyright context: “a copyright owner is required to do more initially than toss up

1 an undifferentiated gross revenue number” and then demand that the defendant sort
2 out which funds are attributable to its work. *Polar Bear Prods., Inc. v. Timex*
3 *Corp.*, 384 F.3d 700, 711 (9th Cir. 2004). It is plaintiffs’ obligation to do the same.

4 **2. Dr. Ugone’s Sampling Methodologies Are Scientific And**
5 **Relevant To Damages**

6 In order to explain why plaintiffs’ superficial attempt to eliminate non-class
7 recordings from the Combined Playlists fails in its task, Dr. Ugone offers a
8 statistical analysis of a representative sample. A brief explanation of the data
9 available is necessary to shed light on plaintiffs’ distortions of Dr. Ugone’s work.
10 Two key data sets are at issue here: (1) the Combined Playlists, which list the
11 known pre-1972 recordings (and some post-1972 recordings) broadcast by Sirius
12 XM from August 2009 through May 2016;⁹ and (2) the “Major Label Spreadsheet”
13 (as plaintiffs call it), which is a data file derived from a random “snapshot” of Sirius
14 XM’s scheduling system and contains lists of recordings played on certain
15 channels. Recordings are added and/or removed from Sirius XM’s scheduling
16 system on a regular basis. In other words, the Major Label Spreadsheet captures a
17 number of recordings included in Sirius XM’s scheduling system on a particular
18 date, while the Combined Playlists seek to represent the full population of pre-1972
19 recordings broadcast by Sirius XM. Unsurprisingly, there are recordings in the
20 Combined Playlists (the larger population) that are not found in the Major Label
21 Spreadsheet (the list of predominantly pre-1972 recordings existing in the
22 scheduling program on a randomly selected date). During this suit, the majors
23 (who are not class members) identified which recordings they own on the Major
24 Label Spreadsheet *only*; they did not analyze the remaining tens of thousands of
25 pre-1972 recordings (and some post-1972 recordings) in the full population,
26 meaning that there are many recordings listed on the Combined Playlists that are

27 ⁹ In an effort to accommodate Flo & Eddie’s request, Sirius XM expended
28 significant time and resources to create these Combined Playlists from the available
data it maintained in its ordinary course of business.

1 not captured by the Major Label Spreadsheet (the “unmatched recordings”). As
2 opposed to beginning his analysis with the “unmatched recordings” and trying to
3 determine which were owned by the class, or even trying to exclude post-1972
4 music and other recordings owned by the major labels, Mr. Wallace preferred to
5 just assume that every single recording on the unmatched recordings list belonged
6 to the class. Ex. D, 10/7/16 Wallace Dep. Tr. at 556:13-20 (“Q. But just to finally
7 get the final point on this, you only exclude from the combined monthly playlist if
8 Sirius XM has a license or authorization or the sound recording owner has opted
9 out, and everything else is assumed to be part of the class for purposes of your
10 damages calculation; is that fair? A. Yeah, I think that’s fair.”).

11 Mr. Wallace does not even express the opinion that the unmatched recordings
12 belong to the class—he simply assumes, without testing the proposition, that all of
13 the recordings are owned by the class. *Id.* at 589:4-14 (“Q. So you’re not
14 expressing any opinion on whether the remaining sound recordings are licensed or
15 not. You’re simply saying they weren’t on the list that Sirius XM provided that
16 affirmatively stated that these are licensed for authorized; is that correct? A.
17 Yeah, I think -- I think that’s fair to say. I’m trying to take everything out of the
18 class damages that Sirius XM indicates they have a license for. And if they don’t
19 indicate that to me, I have no basis for taking it out of the damages.”). So for the
20 list of sound recordings that Mr. Wallace uses as his damages base, he has not
21 verified that a single recording is owned by a class member except the pre-1972
22 recordings owned by the Turtles. *Id.* at 595:12-22 (“Q. So aside from the Turtle
23 [sic] sound recordings, which you say you verified are owned by the class
24 members, are there any other sound recordings on the remaining sound recordings
25 list that you have verified are owned by the class members? A. No. My -- my
26 methodology didn't attempt to identify ownership. I attempted to identify claims of
27 license and authorization or accepted the claims of ownership for opt-outs.”).

28

1 No evidentiary or logical basis exists for this assumption. To demonstrate
2 the falsity of the assumption, Dr. Ugone utilizes well-recognized statistical
3 techniques to analyze the “unmatched” population to test whether it includes only
4 recordings owned by the class. Specifically, Dr. Ugone tested—and confirmed—
5 that the recordings listed on the Major Label Spreadsheet are a representative
6 sample of the full population of recordings on the Combined Playlists. Thus, in
7 order to estimate the portion of the unmatched recordings owned by the class, the
8 share of recordings owned by the Major Labels from that sample should be
9 extrapolated to the unmatched population. The jury is entitled to determine whether
10 it agrees with this analysis—or with plaintiffs’ assumption that no analysis is
11 necessary and everything belongs to the class.

12 Dr. Ugone’s methodology also is based on generally accepted statistical
13 methods. As fully laid out in his report, Dr. Ugone relies on available information to
14 provide a reasonable estimate of recordings on the Combined Playlists that are not
15 owned by the class. Doc. 510-2 ¶¶ 57-65. His methodology is premised on the
16 uncontroversial premise that the ratio of recordings owned by the Major Labels at a
17 particular point in time can be extrapolated for the full damages period. Indeed,
18 plaintiffs’ expert himself makes a similar assumption in his calculation of damages
19 for the July to October 2016 period.

20 Plaintiffs’ sole critique of this methodology is to assert that Dr. Ugone’s
21 sample has no meaning because it is not “representative.” Citing no case, expert
22 opinion, or academic literature addressing Dr. Ugone’s methodology, plaintiffs
23 resort to calling it “absurd” and “junk science.” Mot. at 23-24. They are wrong. A
24 “representative sample” is one that “exhibits characteristics typical of those
25 possessed by the target population.” See McClave, James, and Sincich, *Statistics* at
26 11 (9th ed. 2003). Here, the data underlying the Major Label Spreadsheet are a
27 snapshot of recordings on Sirius XM’s scheduling system on a *random* date and are
28

1 part of the full population of recordings on the Combined Playlists.¹⁰ The date
2 chosen is unrelated to any factors that could affect the share of recordings owned by
3 the Major Labels. Put differently, there is no reason to believe that the percentage of
4 recordings in Sirius XM’s scheduling system belonging to the major labels on one
5 day would be different from those on another day. This is especially true here
6 because the Major Label Spreadsheet consists of tens of thousands of recordings and
7 represents close to two-thirds of the full population of recordings in the Combined
8 Playlists. *See id.* ¶ 59.

9 Thus, there is a sufficient basis to use the Major Label Spreadsheet to analyze
10 the “unmatched” population in the Combined Playlists, and plaintiffs present no
11 evidence to the contrary. Applying the ratio of recordings owned by the major
12 labels on the Major Label Spreadsheet to the Combined Playlists results in
13 extrapolating ownership data from a particular point in time to longer periods. This
14 is a well-accepted statistical methodology. *See id.* ¶¶ 57-65.

15 Indeed, even according to plaintiffs’ authorities, “inferential statistics have
16 been considered ‘an acceptable due process solution’ in litigation.” U.S. ex. rel.
17 *Martin v. Life Care Ctrs. of Am., Inc.*, 2014 WL 4816006, at *15 (E.D. Tenn. Sept.
18 29, 2014) (“Thus, not only have the statistical principles [the expert] relies on been
19 established in the mathematical field, they have also been tested and reviewed by
20 the federal court system.”). Plaintiffs’ expert, Mr. Wallace, performs a similar
21 analysis throughout his report. Mr. Wallace assumes that the percentage of carve-
22 outs he calculated using the Combined Playlists (which only cover the periods of
23 August 2009 through May 2016) is the same for the months in which no data is
24 available (June 2016 through October 2016, and beyond). Ex. B, 9/21/16 Wallace
25 Report ¶ 38. In other words, Mr. Wallace uses percentages from data for a given
26 period and assumes that it “produce[s] a reasonable estimate” for a different period

27
28 ¹⁰ Dr. Ugone made slight necessary adjustments to the sample to ensure that it is
representative of the Combined Playlists. 9/28/16 Ugone Report ¶ 61.

1 for which no data is available. *Id.* No relevant distinction exists between Mr.
2 Wallace’s methodology and the statistical sampling method used by Dr. Ugone.

3 Dr. Ugone’s sampling is not only scientifically sound, but necessary in the
4 context of plaintiffs’ damages model. Mr. Wallace assumes that the “unmatched”
5 recordings should not be analyzed and, instead, attributes them entirely to class
6 damages. This unfounded assumption results in inflating damages by capturing
7 recordings that are not owned by any class members. For example, there are over
8 2,000 unique recordings associated with “Sony” (a non-class member) in the
9 “unmatched” population that Mr. Wallace attributes to the class. Yet, in the
10 Combined Playlists, [REDACTED]

11 [REDACTED] Failing to
12 analyze whether recordings like the “Sony” recordings are properly part of the class
13 virtually guarantees that many licensed recordings will be considered part of the
14 class. And given the size of the “unmatched” population, statistical sampling is the
15 only reliable method to analyze that data.

16 Dr. Ugone’s methodologies easily satisfy *Daubert*. “The *Daubert* standard
17 does not exist to ensure that only the most ideal scientific evidence is admissible in
18 court proceedings, but instead to ensure that expert testimony is derived by the
19 scientific method.” *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.*, 984
20 F. Supp. 2d 1021, 1036 (C.D. Cal. 2013). Plaintiffs’ “aggressive interpretation of
21 the Court’s gatekeeping requirement” should be rejected. *Id.* at 1035. It is only
22 necessary that the “Court assure itself that, at each point in the process, the experts
23 have properly used accepted statistical techniques and formulas to achieve a reliable
24 result.” *Id.* That is what Dr. Ugone has done here.

25 **C. Plaintiffs’ Personal Attacks Against Dr. Ugone Should Be Ignored**

26 Calling Dr. Ugone’s analysis “intellectually and academically dishonest”
27 based on little more than an undated and unproduced statistics textbook adds
28 nothing to their arguments. Statistical sampling has been used in litigation for

1 decades. *Martin*, 2014 WL 4816006, at *15. Mr. Wallace himself explains in his
2 CV that he employs a “variety of statistical analysis techniques” in his cases
3 including “random sampling, estimation, extrapolation, stratification,
4 simple and multiple regression, and analysis of variance.” Doc. 185-1 at 2.

5 Plainly, random sampling is not the only accepted statistical analysis technique.

6 Unlike plaintiffs’ expert Mr. Wallace, Dr. Ugone has testified in hundreds of
7 cases. Despite the increased opportunity for scrutiny and the likelihood of
8 criticism, his record is unassailable. So plaintiffs stoop to grossly misrepresenting
9 cases in which the scope of his testimony was limited for reasons unrelated to the
10 academic integrity of his methodologies. *See Tex. Advanced Optoelectronic*
11 *Solutions, Inc. v Intersil Corp.*, 2015 WL 602284, at *1-2 (E.D. Tex. Feb. 11, 2015)
12 (allowing testimony not foreclosed by intervening summary judgment order);
13 *Ultratec, Inc. v. Sorenson Comms., Inc.*, 2014 WL 5361940, at *4 (W.D. Wis. Oct.
14 21, 2014) (permitting Dr. Ugone to testify as rebuttal expert); *I/P Engine, Inc. v.*
15 *AOL Inc.*, 2012 WL 12068846, at *3 (E.D. Va. Oct. 12, 2012) (permitting “Dr.
16 Ugone to present expert opinion using established methods of calculating damages,
17 including the hypothetical negotiation approach.”). Indeed, plaintiffs’ most
18 vehement attacks become *non sequiturs* once their misreading of the CRB
19 regulations is exposed, and when it becomes clear that they have chosen to attack
20 phantom issues by focusing only on Dr. Ugone’s 4/15/15 Report and ignoring his
21 more recent 9/28/16 Report.

22 **V. CONCLUSION**

23 For the foregoing reasons, Sirius XM respectfully requests that the Court
24 deny plaintiffs’ Motion in *Limine* No. 11 in its entirety.

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Dated: October 14, 2016

Respectfully Submitted,
O'MELVENY & MYERS LLP

By: /s/ DRAFT
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Objection/Opposition (Motion related)

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Case Number: [2:13-cv-05693-PSG-GJS](#)
Filer: Sirius XM Radio Inc
Document Number: [521](#)

Docket Text:

OPPOSITION re: MOTION IN LIMINE (#11) to Preclude DR. KEITH R. UGONE FROM TESTIFYING CONCERNING (1) SIRIUS XMs COSTS (2) ALTERNATIVE DAMAGE MODELS (3) ALLOCATION OF PRE-1972 SUBSCRIPTION REVENUE TO TALK CHANNELS AND (4) UNFOUNDED MATTERS BEYOND UGONES EXPERTI[464] (Redacted) filed by Defendant Sirius XM Radio Inc. (Petrocelli, Daniel)

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

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