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Sirius XM Radio Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 13-05693 PSG (GJS)

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

[DECLARATION OF CASSANDRA L. SETO FILED HEREWITH]

Hon. Philip S. Gutierrez

Final Pretrial Conference:
Oct. 31, 2016 at 2:30 p.m.

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

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

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I. INTRODUCTION

For the first time, plaintiffs are forced to confront their inability to comply with settled law requiring that compensatory damages be linked to the harm they suffered. As Michael Wallace's expert report demonstrates—and his recent deposition unequivocally confirms—plaintiffs have ***no*** evidence that Sirius XM's gross revenue is connected to the harm suffered. Plaintiffs' damages model seeks a windfall recovery that does not even attempt to value pre-1972 recordings. Mr. Wallace admits that he did not "value the playing of . . . a sound recording" and that his opinions do "not calculate[] plaintiff's losses." Ex. A at 5:9-13, 8:16-18.[1]

Despite this blanket disavowal of any value opinions, plaintiffs now try to argue that "the value of the pre-1972 recordings . . . can be determined by looking at how Sirius XM represented their collective market share to SoundExchange . . . ." Opp. at 15. But this says nothing to address the issue. Without evidence demonstrating if or how Sirius XM's radio broadcast revenue links to and measures plaintiffs' lost value or other detriment, plaintiffs have nothing to support their claimed damages. Mr. Wallace never opines that Sirius XM's gross revenue reflects, measures, or bears any relation to plaintiffs' losses; to the contrary, he admits that he has no opinion on such matters. Ex. B at 15:7-16:19.

Plaintiffs are in the current predicament because of their strategic decision to rely *solely* on a damages theory that seeks to disgorge Sirius XM's gross revenue, rather than measure the harm to plaintiffs, such as by the value of their misappropriated or converted property. Plaintiffs now realize they cannot proceed with disgorgement because there is no evidence that Sirius XM was a conscious wrongdoer. So plaintiffs resort to just calling their disgorgement model "compensatory damages" and trivializing the distinction between the two.[2] But they

[1] All exhibits are attached to the Declaration of Cassandra L. Seto in support.

[2] Doc. No. 234 at 44:14-17 (H. Geller, Class Counsel) ("[W]hether you characterize that as revenues or disgorgement, which is a disguised word for revenues, the result is the same.").

are vastly different in substance and effect because compensatory damages requires proof of harm suffered by plaintiffs—evidence that does not exist here.

To mask this fatal failing, plaintiffs advance several futile positions. First, they reiterate the same erroneous claim that the Court has conclusively accepted their damages model as the only appropriate measure of damages in this case. As detailed in its opening brief (Doc. 474) and in response to Motion *in Limine* No. 11 (Doc. 521), the Court never had occasion to examine the legal sufficiency of plaintiff's damages model as a compensatory metric for their remaining claims for relief. Second, plaintiffs raise issues regarding a constructive trust, California's Business and Professions Code § 17200, and remedies for willful trespass. None of these pertains to the damages issues that will be tried to the jury, which is the only subject of Sirius XM's Motion *in Limine* No. 1.

Finally, even accepting the faulty premise that Sirius XM's gross revenue could be analyzed in assessing any detriment plaintiffs suffered, Mr. Wallace employs a flawed methodology to attribute revenue to plaintiffs' sound recordings. His simplistic and overinclusive calculations fail to exclude recordings, non-music content, and revenue streams that plaintiffs do *not* claim to own and indisputably do *not* own, thereby inflating plaintiffs' damages far beyond an award actually attributable to the recordings they do own. Mr. Wallace's model and testimony related thereto should therefore be excluded.

II. PLAINTIFFS' DAMAGES MUST BE MEASURED BY THE VALUE OF THEIR PROPERTY, WHICH MR. WALLACE DID NOT ASSESS

Plaintiffs do not dispute the core principle that damages for their conversion and misappropriation/Civil Code § 980(a)(2) rights claims must be measured by the "detriment . . . caused thereby." In the case of conversion specifically, "the detriment caused by the wrongful conversion of personal property is presumed to be . . . *[t]he value of the property at the time of the conversion* . . . ." Cal. Civ. Code § 3336 (emphasis added); *see* Opp. at 10, 14. Plaintiffs also agree that the

only exception to this measure of damages is where special circumstances exist by which defendants knew or could predict that plaintiffs would suffer *greater* damages by reason of defendants' conduct. *See id.* at 15.

Plaintiffs rightfully disavow any intention to prove special circumstances because such circumstances do not exist in this case. Plaintiffs also disavow their intention to prove the value of their property at the time it was taken. They argue instead that the jury can look to Sirius XM's gross revenue without deduction of any costs as a proxy for the value of their property because "there is no relevant, comparable market" for determining the value of non-exclusive licenses to perform pre-1972 sound recordings. *Id.*

But, as plaintiffs' own expert agrees, generally accepted methodologies *do* exist for evaluating the fair market value of their property. Plaintiffs simply declined to have Mr. Wallace undertake such an analysis, and instead directed him to apply an artificial formula that would award them a windfall and require no proof linking their recovery to actual harm. Mr. Wallace agrees that there are "lots of different ways of measuring damages," including by estimating a fair market value or reasonable royalty.[3] Yet Mr. Wallace testified that he did not evaluate that value and that he was unfamiliar with going market rates for performances of pre-1972 recordings. *See* Ex. B at 22:3-8. No one has opined that it would have been impossible—or even challenging—to calculate a fair market value for the performance rights in question. He simply was not asked to do so. *See* Ex. A at 5:9-13 ("A. I haven't been asked in this case to value the playing of a -- of a sound recording."); *id.* at 8:16-18 ("A. I'm not calculating plaintiff's losses. I'm

[3] Ex. A at 6:21-7:5 ("[U]sually when I think of damage method or methodology, I think of all the different ways one might measure damages, lost profits, reasonable royalty, increased costs. There's lots of different ways of measuring damages. In this case, the damage method was provided to me. It was gross revenues, attributable to pre-'72 sound recordings without deduction of cost. It was an assumption I made. So that was provided by counsel.").

calculating gross revenues earned by the defendant."); Ex. B at 20:11-17 ("Q. Have you offered any opinions regarding what the fair market value of the performance right for the class members' pre-'72 recordings is? . . . A. Not a specific amount, no."). Mr. Wallace likewise has no idea whether plaintiffs have been harmed or, if so, what the value of such harm would be. *See* Ex. B at 15:7-17 ("Q. Do you believe that the plaintiffs have suffered any harm as a result of Sirius XM playing their pre-'72 music? . . . A. I haven't -- I don't -- I guess I don't have an opinion on that. . . . I haven't tried to prove that or calculate an amount other than the amount that Sirius XM earned by playing their music without permission."). There is no support for plaintiffs' naked assertion that fair market value cannot be calculated because no comparable market exists.

III. MR. WALLACE'S GROSS REVENUE WITHOUT DEDUCTION OF COSTS MODEL IS NOT A PERMISSIBLE MEASURE OF VALUE

Plaintiffs now concede, as they must, that "the focus" of damages is "the quantification of detriment suffered by a party," Opp. at 10, yet continue to assert the *ipse dixit* that value of the non-exclusive performance right of pre-1972 sound recordings must be "the revenue Sirius XM generated per play." *Id.* at 15. This erroneous assumption underlies all of Mr. Wallace's work. *See* Ex. B at 14:18-21 (Wallace told "to assume that the correct measure of damages in this case is the gross revenue attributable to pre-'72 recordings without a deduction for costs."). California law only permits damages to be measured by a defendant's gross revenue without deduction of costs when a plaintiff shows special circumstances ***and*** the defendant has inadequate books and records or otherwise fails to prove its costs.

A. Mr. Wallace's Gross Revenue Model Does Not Measure Damages for Conversion or Misappropriation

To recover damages in excess of the value of the property converted or misappropriated at the time it was taken, a plaintiff must "*plead and prove special circumstances* that require a measure of damages other than value." *Lueter v. State*

of California, 94 Cal. App. 4th 1285, 1302 (2002) (emphasis added). To prove special circumstances, a plaintiff must be able to show that he had the ability to make and would have made those same profits had the defendant not converted or misappropriated his property. *See Crofoot Lumber, Inc. v. Ford*, 191 Cal. App. 2d 238 (1961); *see also* Doc. 474 at 8-11. Plaintiffs have neither pled, nor can they prove, any such special circumstances.

In response to Sirius XM's Motion, plaintiffs attempt to justify Mr. Wallace's gross revenue model in two ways. Neither is availing. *First*, to sidestep the "special circumstances" test, plaintiffs argue that they are merely seeking the value of the property—which they claim is Sirius XM's gross revenue attributable to their pre-1972 sound recordings—and thus do not need to show special circumstances. Opp. at 14-15. This is a tautology; simply calling their gross revenue model a measure of their property's "value" does not make it so—especially here. Sirius XM owns and operates a satellite radio business and generates radio broadcast revenue. Plaintiffs neither own nor operate a radio business nor generate radio broadcast revenue. Even Mr. Wallace concedes that fair market value would be determined by a different calculation: the price at which an owner of a sound recording sells a non-exclusive performance license, not the money the licensee earns from playing it. *See* Ex. B at 20:6-10; *see also Williams v. Weisser*, 273 Cal. App. 2d 726, 743 (1969); *Integrated Sports Media, Inc. v. Mendez*, 2014 WL 3728594, at *5 (N.D. Cal. July 28, 2014).

Second, plaintiffs insist that *A&M Records, Inc. v. Heilman,* 75 Cal. App. 3d 554 (1977), and *Lone Ranger Television, Inc. v. Program Radio Corp.,* 740 F.2d 718 (9th Cir. 1984), allow them to circumvent Civil Code § 3336 by establishing an automatic entitlement to a defendant's gross revenues in cases of record piracy (which is not even at issue here). They are wrong. As set forth more fully in Sirius XM's opening brief (Doc. 474) at 1-2, 11-14 and Opposition to plaintiffs' Motion *in Limine* No. 11 (Doc. 521) at 7-9, neither case approves a damages model that

preemptively precludes consideration of costs. Initially, unlike plaintiffs here, the plaintiffs in both of those cases showed special circumstances entitling them to recover damages beyond the value of the misappropriated or converted property. In both, the defendants engaged in the same business as the plaintiffs. Because the defendants' pirated products deprived those plaintiffs of sales they could have made, it was appropriate for them to recover what the defendants had made. No similar circumstances exist in this case.[4]

Moreover, neither *Heilman* nor *Lone Ranger* held that a defendant's costs are not deductible. To the contrary, the trial court in *Heilman* considered evidence of the defendants' costs—but determined that the "defendants 'failed to carry their burden of proof with respect to [their] costs and expenses,'" because their "inaccurate and incomplete books [made] it . . . impossible to verify their alleged expenses." 75 Cal. App. 3d at 570 n.11. That evidentiary ruling resulted in damages being determined according to the defendants' gross revenues rather than their profits—but the *Heilman* court certainly did not say that costs were irrelevant. In *Lone Ranger*, the defendant simply conceded, without argument or analysis, that the method of calculating damages used in *Heilman* applied. 740 F.2d at 726.

The remaining cases cited by plaintiffs stand for the proposition that gross revenue may be recoverable if the tortious conduct is *willful*. None of these cases is applicable because, as the Court has ruled in dismissing plaintiffs' punitive damages claim, Sirius XM could not have engaged in willful misconduct given that the Court's recognition of a performance right was one of first impression. *See*

[4] Plaintiffs now argue for the first time based on *Heilman* that the Court should impose a constructive trust. Opp. at 13. Because the *Heilman* defendants profited by selling records and tapes the plaintiff could have sold, the court opined that "[w]hen one acquires proceeds from the sale of property belonging to another the imposition of a constructive trust on the proceeds is a proper remedy." 75 Cal. App. 3d at 570. Here, however, Sirius XM has not sold plaintiffs' pre-1972 recordings in competition with plaintiffs such that Sirius XM deprived plaintiffs of any sales (*i.e.*, licensing opportunities). As a result, a constructive trust is inappropriate.

Doc. 411 at 2 ("Prior to this [Court's 9/22/14 Order], no court had ever expressly recognized [a public performance right under Civil Code § 980]."). In *Whittaker v. Otto*, 248 Cal. App. 2d 666, 675 (1967), for example, the court explained that costs *can* be deducted if "by honest mistake and inadvertent" trespass, a defendant removes ore from a mine; costs are not deductible *only when* trespass is "willful," "intentional and in bad faith with knowledge of plaintiff's rights." In *Isom v. Book*, 142 Cal. 666, 666-68 (1904), a defendant was denied the ability to deduct costs from oil he extracted, where he fraudulently induced the plaintiff to lease him land, knowing that the land contained oil and that the plaintiff was ignorant of that fact. Finally, *Swim v. Wilson*, 90 Cal. 126, 127-29 (1891), is simply off-point. That 19th century opinion does not analyze or address whether costs should be deducted; the question there was whether an innocent converter should be held liable as agent to a wrongful converter for the proceeds of a stock sale. These cases do not support a gross revenue model; if anything, they show that Sirius XM, as an innocent converter, should be allowed to deduct costs if plaintiffs are allowed to seek damages beyond the value of their converted or misappropriated property.

B. Mr. Wallace's Gross Revenue Model Does Not Measure Damages for Misappropriation of Section 980(a)(2) Rights

To the extent that damages for plaintiffs' claim for misappropriation of rights conferred by Civil Code § 980(a)(2) would be governed by Civil Code § 3333 rather than § 3336, the result would still be the same—plaintiffs may not recover Sirius XM's gross revenue. In the copyright context, California courts consider specific factors in assessing damages under § 3333, including loss in value due to infringement, "value of the work of the owner thereof in creating such," value of use by another, and the owner's lost profits. *Read v. Turner*, 239 Cal. App. 2d 504, 514 (1966).

Plaintiffs seek to sidestep § 3333 by relegating it to a single footnote in their Opposition—and ignore completely the key § 980(a)(2) decision in *Read*, 239 Cal.

App. 2d at 504. As set forth in Sirius XM's opening brief (Doc. 474 at 10-11), *Read* holds that a defendants' profits are only relevant to assessing damages if plaintiffs could have been expected to earn those profits absent the misappropriation. In *Read*, the plaintiffs were not allowed to look to the defendants' profits as a measure of their copyright damages because plaintiffs had no evidence (1) they were engaged in the business of selling their intellectual property (floor plans); (2) they had been restrained from using the plans themselves; or (3) they had the financial means or ability to construct additional houses based on the plans. *Id.* at 514-15. Because the *Read* plaintiffs could not have exploited their property in the same way defendants did, any award based on defendants' profits was speculative—and improper. *Id.*

Plaintiffs' damages, as calculated by Mr. Wallace, clearly fail to comply with *Read*. Plaintiffs do not claim—and cannot show—that there has been a "loss in value" of their public performance rights due to Sirius XM's broadcasts.[5] Nor has Mr. Wallace attempted to establish the value of plaintiffs' efforts in creating the copyrighted works or the value of those works to others (*i.e.*, a reasonable royalty). *See* Ex. B at 23:9-13. And Mr. Wallace's gross revenue model certainly does not establish the loss of any profit to plaintiffs due to claimed infringement. *See id.* at 18:25-19:4 ("Q. But you have not calculated the amount of money that the class would have made if Sirius XM had not performed their pre-'72 recordings, correct? . . . A. That's correct."). Just as in *Read*, no link exists between Sirius XM's revenue and plaintiffs' harm, so it would be error to award damages based on that revenue.

[5] Just the opposite; as Flo & Eddie's Kaylan affirmed on a Sirius XM show, "I know that for us as the Turtles we see more money now from BMI and reporting agencies than we have in the last 20 years of trying to sell hard copies of our music. Now downloads are common, uh satellite radio has helped a great deal." Interview of Howard Kaylan on Sirius XM's *Freewheelin'*. SXM-F&E_00016578.

C. Mr. Wallace's Gross Revenue Model Does Not Measure Damages for Violation of the UCL

Sirius XM's gross revenue is also not a proper basis for an award under Bus. & Prof. Code § 17200 (the "UCL"), which will not be tried to the jury in any event. Plaintiffs concede, as they must, that any claim to Sirius XM's gross revenue under the UCL is available only "to the extent that it constitutes restitution." Opp. at 17. But plaintiffs are seeking more than restitution. California law is clear that "the amount of restitutionary disgorgement cannot simply be the profit that a defendant earns by [its misconduct toward] a plaintiff, instead it must represent the amount the plaintiff lost as a result of the defendant's deceptive practices." *Chowning v. Kohl's Dep't Stores, Inc.*, 2016 WL 1072129, at *8 (C.D. Cal. Mar. 15, 2016).[6] Plaintiffs are asking for more than a specific fund that they lost—which could only be a reasonable license fee they would have received for public performances of pre-1972 recordings. Mr. Wallace's gross revenue model ignores this point.

In an effort to circumvent this limitation, plaintiffs selectively quote from the Restatement on Restitution and Unjust Enrichment (the "Restatement"). Opp. at 17. When read in context, however, the Restatement affirms the principle that a defendant's gains are not recoverable absent a showing of conscious wrongdoing:

> [A] conscious wrongdoer will be stripped of gains from unauthorized interference with another's property (§§ 3, 51(4)) . . . . In consequence, a conscious wrongdoer may be liable to disgorge more than the value of what was taken or obtained in the first instance. *By contrast, innocent trespassers and converters are liable in restitution for the value of what they have acquired—usually measured by the cost of a license—but not for consequential gains*.

[6] Despite plaintiffs' baseless contention to the contrary, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), delineates when disgorgement is restitutionary and when it is not under the UCL. *See* Doc. 474 at 15-18. What plaintiffs seek in this case is impermissible nonrestitutionary disgorgement. *See id.*

Restatement § 40 cmt. b (emphasis added).[7] Sirius XM could not have engaged in conscious wrongdoing, as the Court recognized when it ruled that Sirius XM is not be liable for punitive damages for violating previously unrecognized rights. *See* Doc. 411 at 4, 6. The Restatement underscores that under such circumstances, Sirius XM would at most be "liable in restitution for the value of what [it has] acquired—usually *measured by the cost of a license*." Restatement § 40 cmt. b (emphasis added). And even if plaintiffs could ask for Sirius XM's revenue, which they cannot, that award must deduct costs in order to calculate "gains."

Plaintiffs' reliance on *Adobe Sys. Inc. v. Alghazzy*, 2015 WL 9478230 (N.D. Cal. Dec. 29, 2015), which concerned the counterfeiting of computer software, does not compel a different outcome here. *See* Doc. 474 at 18. Plaintiffs' claim that the "only difference between *Adobe* and this case is that Sirius XM sold a *subscription* to Plaintiffs' pre-1972 recordings" is without merit. Opp. at 18. Rather, in *Adobe*, the defendant competed with the plaintiff by willfully selling bootlegged copies of plaintiff's software, thereby displacing sales plaintiff would otherwise have made. In contrast, Sirius XM neither sells nor licenses plaintiffs' recordings and neither diverts nor diminishes plaintiffs' ability to exploit their recordings.

IV. THE COURT HAS NOT RULED THAT GROSS REVENUE IS THE ONLY APPROPRIATE MEASURE OF DAMAGES

As plaintiffs argued in their Motion *in Limine* Nos. 11-13 (Docs. 464, 468, 469), the Opposition again speciously claims that the Court has conclusively accepted plaintiffs' proposed damages model as the *only* appropriate measure of damages in this case. Opp. at 1-2, 4-7. The Court has made no such finding. Sirius

[7] Plaintiffs' argument about discouraging bargaining, Opp. at 17, is similarly misplaced and stripped of requisite context, which relates to conscious wrongdoing: "A conscious wrongdoer will not be left on a parity with a person who—pursuing the same objectives—respects the legally protected rights of the property owner. 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." Restatement § 40 cmt. b.

XM has briefed this issue extensively[8] and will not repeat those arguments here, except to note that, in ruling on plaintiffs' motion for class certification, the Court only considered whether plaintiffs' proposed damages model was satisfactory *for class certification purposes*. *See* Doc. 225 at 23. That is, the Court's analysis of plaintiffs' model was limited to considerations inherent in evaluating certification—*i.e.*, whether the "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." *Id.* These considerations, however, do not bear on whether plaintiffs' proposed execution of that model properly measures the detriment suffered by plaintiffs under California law. And, while the Court has acknowledged that *plaintiffs believe* "100% of Sirius XM's revenues . . . is the appropriate measure of damages in California," the Court did not rule that 100% of Sirius XM's revenues is *the* appropriate measure of damages under California law, let alone the *only* appropriate measure of damages.[9] *Id.* at 21. Moreover, when the court considered Mr. Wallace's declaration at the class certification stage, the opinions expressed therein were not subject to the rigorous *Daubert* standard, as they are now.

V. MR. WALLACE EMPLOYS A FLAWED METHODOLOGY

Even assuming that plaintiffs' damages model is permitted under California law, Mr. Wallace's exert opinion runs afoul of Rule 702 and *Daubert* for an additional and independent reason: the methodologies he employs are fundamentally flawed and therefore unreliable. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 318 F. Supp. 2d 879, 890 (C.D. Cal. 2004). In place

[8] *See, e.g.,* Doc. 521 at 3-4, 9-11.

[9] Specifically, in referencing plaintiffs' assertion in their *reply papers* that California law allowed recovery of gross revenues in this case, the court did not purport to decide how damages would be measured or proved. *See* Doc. 200 at 12; 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.

of performing an economic analysis, Mr. Wallace simply takes data that Sirius XM outlined in its interrogatory responses and multiplies (1) a "Gross Revenues" number by (2) a "percentage of performances" of pre-1972 recordings and a "percentage of Sirius XM's subscribers located in California," and (3) excludes from that result certain sound recordings that are licensed (or belong to opt-outs). *See* Doc. 524-4 at Ex. C ¶¶ 10, 19-22, 24.

As set forth more fully in Sirius XM's Opposition to plaintiffs' Motion *in Limine* No. 11 (Doc. 521 at 20-24), Mr. Wallace's oversimplified calculation fails to exclude recordings that *no* named plaintiff or class member owns. Mr. Wallace does not even express the opinion that all recordings included in his calculations belong to the class—he simply assumes, without testing the proposition, that all of the recordings are owned by the class. *See* Ex. B at 24:4-14, 25:12-22. Thus, Mr. Wallace's overinclusive and indiscriminate methodology necessarily yields a recovery for recording owners who are not part of the class. Because Mr. Wallace's opinions do not pass muster under Rule 702 and *Daubert*, they and any evidence or argument based on them should be excluded at trial.

VI. CONCLUSION

For the foregoing reasons, Sirius XM respectfully requests that the Court grant Sirius XM's Motion *in Limine* No. 1.

Dated: October 21, 2016

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