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

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

19 Plaintiff,

20 v.

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

23 Defendants.

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

**REPLY IN SUPPORT OF  
PLAINTIFF FLO & EDDIE, INC.’S  
MOTION IN LIMINE TO  
PRECLUDE TESTIMONY OF DR.  
KEITH R. UGONE**  
[MIL 11 of 13]

**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.**

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1 **I. INTRODUCTION**

2 Sirius XM, through the guise of its expert, refuses to accept the rulings of this  
3 Court and California law as to the appropriate damages methodology for the facts of  
4 this case and its own burden in establishing the affirmative defenses of licensed  
5 tracks. On this basis, the testimony of Dr. Ugone cannot stand.

6 In its opposition brief, Sirius XM argues there are four so-called “false  
7 constructs” in Motion in Limine 11. Dkt. 489. **First**, Sirius XM argues that the  
8 Court has never before rejected its alternative damages theories. However, Sirius  
9 XM’s submissions to the Court plainly demonstrate otherwise. *See, e.g.*, Dkts. 193  
10 at 20, 193-4 at ¶¶ 32, 46-47 (Sirius XM argues for a royalty-based damages model);  
11 Dkt. 225 at 21-22 (The Court found that “Sirius XM does not demonstrate that its  
12 alternative measures of damages are either available under the law or that they  
13 would enable greater class and class member recovery.”); Dkt. 335 at 4-5 (Sirius  
14 XM argues damages must be based on “lost royalties or foregone licensing  
15 opportunities”); Dkt. 411 at 6 (The Court rejected these arguments, holding that  
16 “Plaintiff’s damages model is appropriate in this case” and that “Plaintiff’s damages  
17 model has already been approved.”). These decisions are the law of the case;  
18 “[l]itigation is not a game of Whac-A-Mole, where a litigant gets to keep filing  
19 motions until she gets the results she wants[.]” *Dye v. Sachs (In re Flashcom, Inc.)*,  
20 2012 Bankr. LEXIS 4828, at \*29 (U.S. Bankr. C.D. Cal. Oct. 11, 2012) (affirming  
21 sanctions where party used motions in limine to re-litigate issues).

22 **Second**, Sirius XM argues that 37 C.F.R. § 382.11 permits it to deduct  
23 revenues attributable to *both* non-music content and pre-1972 recordings as part of  
24 its pre-1972 deduction. That is simply not true. Under 37 C.F.R 382.11, Sirius XM  
25 deducts the subscription revenue that it has determined is attributable to *pre*-1972  
26 recordings, not to its exploitation of non-music content which has nothing to do with  
27 its pre-1972 deduction. *This is beyond dispute* and has been affirmed in (1)  
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1 testimony in this and other litigation; (2) testimony and pleadings filed in the  
2 *Satellite I* and *Satellite II* proceedings before the Copyright Royalty Board (“CRB”);  
3 and (3) monthly certified Statements of Account to SoundExchange. (See MIL 11 at  
4 pp. 10-15). Even if somehow the entire history and methodology of Sirius XM’s  
5 pre-1972 deduction could be disregarded – and it cannot – the calculation of  
6 subscription revenue attributable to pre-1972 recordings in this case is based on  
7 Sirius XM’s sworn interrogatory responses, and Dr. Ugone has no basis for claiming  
8 that half of that revenue is attributable to non-music sources.

9 **Third**, Sirius XM faults Plaintiffs for allegedly ignoring arguments  
10 concerning the value of commercial free radio made in an 85-page report delivered  
11 to Plaintiff two days prior to the filing deadline. However, these arguments  
12 (concerning “benchmarking” Sirius XM’s services against those of “analogous”  
13 music providers) have no more basis in California law than any of Sirius XM’s other  
14 inadmissible opinions and change nothing. To demonstrate just how far Dr. Ugone  
15 has strayed from his expertise, in his Rebuttal Report he opines that “the value of  
16 commercial-free radio accounts for 42% of Sirius XM’s average monthly revenue  
17 per subscriber,” but in his Supplemental Report, he opines that “the value of  
18 commercial-free radio accounts for approximately 17% of Sirius XM’s average  
19 monthly per-subscriber revenue.” (Ugone Rebuttal Report, Dkt. 489-2 at pp. 6, 34-  
20 35; Ugone Supplemental Report at Dkt. 489-3 at pp. 7, 50-53.) These ad hoc  
21 numbers – pulled from nowhere – have no support in the law or any methodology.

22 **Fourth**, Sirius XM chides Plaintiffs for pointing out to the Court that its  
23 expert has been previously excluded from judicial proceedings for offering opinions  
24 that do not comport with the law. These past instances of exclusion are relevant  
25 because, then as now, Dr. Ugone’s methodology has been designed to ignore the  
26 law. More particularly, by flipping Sirius XM’s burden to identify which pre-1972  
27 recordings it has obtained authorization to exploit onto Plaintiffs, Dr. Ugone turns  
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1 the law of affirmative defenses on its head. This is entirely improper and forms yet  
2 another basis to exclude his testimony.

## 3 **II. ARGUMENT**

### 4 **A. The Court’s Multiple Rulings As To Damages Form The Law Of** 5 **The Case And Preclude Sirius XM’s Contrary Arguments**

6 “Under the ‘law of the case’ doctrine, a court [will not] reexamin[e] an issue  
7 previously decided by the same or higher court in the same case.” *United States v.*  
8 *Jingles*, 702 F.3d 494, 499 (9th Cir. 2012) (citation omitted), *cert. denied*, 133 S. Ct.  
9 1650 (2013). This includes issues decided as part of adjudicating pretrial motions,  
10 whether explicitly or by necessary implication. *Id.*; *United States v. Smith*, 389 F.3d  
11 944, 948 (9th Cir. 2004), *cert. denied*, 544 U.S. 956 (2005). The doctrine “serves to  
12 advance the principle that in order to maintain consistency during the course of a  
13 single lawsuit, reconsideration of legal questions previously decided should be  
14 avoided.” *Smith*, 389 F.3d at 948 (internal quotations and citations omitted). “An  
15 argument is rejected by necessary implication when the holding stated or result  
16 reached is inconsistent with the argument.” *Jingles*, 702 F.3d at 502 (quoting *United*  
17 *States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005)). Accordingly, “[a] decision  
18 on a factual or legal issue must be followed in all subsequent proceedings in the  
19 same case in the trial court or on a later appeal in the appellate court, unless the  
20 evidence on a subsequent trial was substantially different, controlling authority has  
21 since made a contrary decision of the law applicable to such issues, or the decision  
22 was clearly erroneous and would work a manifest injustice.” *Pit River Home and*  
23 *Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1096-97 (9th Cir. 1994) (internal  
24 quotation marks and citations omitted). The policies underlying the doctrine are to  
25 prevent parties from continually seeking to relitigate decided issues and allow  
26 parties to rely on rulings without concern they will change midstream.



1 Sirius XM argues that “[i]n ruling on plaintiffs’ motion for class certification,  
2 the Court only considered whether plaintiffs’ proposed damages model was  
3 satisfactory *for class certification purposes*.” Dkt. 521 (“Opp.”) at 3 (emphasis in  
4 original). This ignores that class certification touches both the manageability *and*  
5 *merits* of a case, with Sirius XM essentially arguing that the Court failed to conduct  
6 a “rigorous” enough analysis to avoid certifying a measure of damages unavailable  
7 under the law. *See Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct.  
8 1184, 1194 (2013); *Torrent v. Ollivier*, No. CV 15-02511 DDP (JPRx), 2016 U.S.  
9 Dist. LEXIS 132629, at \*4 (C.D. Cal. Sep. 27, 2016) (“Because the merits of the  
10 claims are ‘intimately involved’ with many class certification questions, the court’s  
11 rigorous Rule 23 analysis must overlap with merits issues to some extent.”).

12 Regardless, Plaintiffs’ measure of damages was reapproved by the Court’s  
13 denial of Sirius XM’s motion for summary judgment as to damages. Dkt. 411 at 6  
14 (“Plaintiffs’ damages model is appropriate in this case” and “Plaintiff’s damages  
15 model has already been approved”). Moreover, the Court has twice rejected Sirius  
16 XM’s attempt to “cast[] the appropriate damages measure as ‘lost royalties’ or  
17 ‘imputed license fees’” as unavailable under the law. Dkt. 225 at 21-22; Dkt. 411 at  
18 6. As such, these rulings establish the law of the case. *See, e.g., In re Flashcom, Inc.*  
19 *v. Communs Ventures III, LP (In re Flashcom, Inc.)*, 503 B.R. 99, 129 (C.D. Cal.  
20 2013) (“That [an] issue was decided in the context of a denial of a motion for  
21 summary judgment does not mean that the law of the case doctrine is  
22 inapplicable.”). In *Flashcom*, the defendant filed a motion in *limine* requesting  
23 reconsideration of the same issue the court ruled on in connection with a previously-  
24 denied motion for summary judgment. *Id.* at 131. “The motion [in *limine*] raised no  
25 new evidentiary issues ... and pointed to no change in controlling law.” *Id.* As such,  
26 the court ruled that it was improper for the defendant to raise the issue as part of a  
27 motion in *limine*. *Id.*

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1 Similarly, after losing its challenges to Plaintiffs’ damages model on class  
2 certification, summary judgment, *and* decertification, Sirius XM has moved by way  
3 of motions in *limine* to accomplish what it was unable to as part of regular pre-trial  
4 motion practice: attempt to convince the Court of any error in Plaintiffs’ model or  
5 any propriety under the law for its own. Its latest challenges point to no new  
6 evidence or law undermining the Court’s prior rulings, merely rearguing that the  
7 Court misinterpreted the authorities it previously relied upon. *See* Dkts. 474 at 5-13,  
8 521 at 4-9 (arguing for a royalty-based damages model and attempting to distinguish  
9 *A&M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554 (1977) and *Lone Ranger*  
10 *Television, Inc. v. Program Radio Corp.*, 740 F.2d 718 (9th Cir. 1984)); *compare*  
11 Dkts. 193 at 20, Dkt. 335 at 4-5 and 17-22, 370-2 at 9-10 (same). As in *Flashcom*,  
12 “[Sirius XM’s] remedy [is an] appeal, not a fifth attempt to relitigate the [same]  
13 issue, albeit in the form of a motion in limine.” *In re Flashcom*, 503 B.R. at 131.

14 Sirius XM’s remaining arguments are spurious. It claims that “the legal  
15 adequacy of the proof that plaintiffs intend to put on at trial” was never briefed, but  
16 cites no authority for the distinction. *Opp.* at 4. The fact that the Court did not  
17 articulate its reasoning to Sirius XM’s liking is not a proper basis for its redundant  
18 motion practice. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817  
19 (1988) (“[T]he law of the case [doctrine] turns on whether a court previously  
20 ‘decide[d] upon a rule of law’ ... not on whether, or how well, it explained the  
21 decision.”) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Sirius XM  
22 argues that its royalty-based model has a foothold in *dicta* from the Court’s  
23 summary judgment ruling as to liability, but ignores that damages were not the  
24 subject of that briefing. *Opp.* at 4. Finally, what Sirius XM could have paid had it  
25 wished to exploit pre-1972 recordings with authorization from the outset and what it  
26 must now pay in damages are entirely separate inquiries. *See Bruce v. Weekly World*  
27 *News*, 310 F.3d 25, 29 (1st Cir. 2002) (“[An infringer] cannot expect to pay the  
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1 same price in damages as it might have paid after freely negotiated bargaining, or  
2 there would be no reason scrupulously to obey the copyright law.”) (quoting *Iowa*  
3 *State Univ. Research Foundation, Inc. v. American Broadcasting Cos.*, 475 F.Supp.  
4 78, 83 (S.D.N.Y. 1979)); *cf. Ward v. Taggart*, 51 Cal. 2d 736 (1959).

5 **B. Dr. Ugone’s Damages Model Has No Basis in California Law**

6 As explained most recently in Plaintiffs’ opposition to Sirius XM’s *Daubert*  
7 motion, California law permits a measure of damages based on an infringer’s gross  
8 revenues attributable to its infringement without deduction for costs. *See, e.g.*, Dkt.  
9 512 at 10-13. Sirius XM’s argument that this measure of damages requires a finding  
10 of “special circumstances” (Opp. at 6-9) has no basis in any of the law establishing  
11 this measure of damages. Dkt. 512 at 14-17. Sirius XM complains that Plaintiffs’  
12 expert does not opine as to the same complex “valuation methodologies” as Dr.  
13 Ugone (Opp. at 1-2, 5-6), but nowhere does it explain why such speculative  
14 measures are necessary when black-letter California law provides the correct  
15 valuation in this case. Moreover, contrary to Sirius XM’s claims, Dr. Ugone’s  
16 methodology does *not* value Plaintiffs’ property at the time of conversion (as  
17 required by Civ. Code § 3336) – rather, it measures the value of a theoretical royalty  
18 rate to exploit that property. Opp. at 4-6. The actual value of the property, however,  
19 is the revenue realized by its sale to the public. *See, e.g., Yukon River S.B. Co. v.*  
20 *Gratto*, 136 Cal. 538 (1902) (value under § 3336 evidenced by price at which  
21 converted property was sold for at public auction). As applied to the facts of  
22 *Heilman*, for example, Dr. Ugone’s methodology would have led to the defendant  
23 bootlegger paying a royalty to manufacture the tapes for resale, rather than the gross  
24 revenues realized by its sale of the infringing records. Needless to say, that is not  
25 what *Heilman* held.<sup>1</sup>

26 \_\_\_\_\_  
27 <sup>1</sup> Sirius XM’s authority in support of its royalty model is entirely inapposite. Opp at.

1 When viewed from this perspective, it is only *Plaintiffs'* expert whose  
2 methods are rooted in the law, applying the principles of *Heilman* and *Lone Ranger*  
3 to the specific business model of Sirius XM. While Sirius XM may deride this as  
4 "basic arithmetic" (Opp. at 6), it is arithmetic upheld by both California and the  
5 Ninth Circuit. *See Heilman*, 75 Cal. App. 3d at 570; *Lone Ranger*, 740 F.2d at 725

6 **C. Sirius XM's Deductions For Pre-1972 Recordings Under 37 C.F.R. §**  
7 **382.11 Have Never Included Non-Music Content**

8 Dr. Ugone's claim that half of Sirius XM's pre-1972 deduction under 37  
9 C.F.R. § 382.11 was not for music is simply false. As explained in Plaintiffs'  
10 Motion in Limine 11 at pages 11-15, as well as in Plaintiff's Motion for Class  
11 Certification and associated pleadings (*see* Dkts. 180, 200 and 203), Sirius XM is  
12 entitled under 37 C.F.R. 382.11 to deduct "[r]evenues recognized by the Licensee  
13 for the provision of...sound recordings ...exempt from any license requirement."  
14 (Emphasis added.) In other words, Sirius XM may only deduct the subscription  
15 revenue that *it* has recognized is attributable to *pre*-1972 recordings, not from its  
16 exploitation of non-music content. As David Frear, Sirius XM's CFO testified in  
17 this case, this deduction "*account[s] for the proportion of our subscription fees*  
18 *attributable to the performance of Pre-1972 Recordings.*" Dkt 89, Decl. of David J.  
19 Frear in Opposition to Plaintiff's Motion for Summary Judgment, at ¶ 7 (emphasis

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21 9. *In Circuito Cerrado, Inc. v. Garcia*, 2011 U.S. Dist. LEXIS 116686 (N.D. Cal.  
22 Sep. 29, 2011) and *Integrated Sports Media, Inc. v. Mendez*, 2014 WL 3728594  
23 (N.D. Cal. July 28, 2014) involved unlawful interception of sporting event  
24 broadcasts by a bar and restaurant, respectively. In both cases, the defendants did  
25 not "sell" the broadcast to their patrons, rendering a license fee the only way to  
26 calculate damages. In *Williams v. Weisser*, 273 Cal. App. 2d 726 (1969), a  
27 university professor sued a student for publishing notes from the professor's  
28 lectures. The case both predates *Heilman* and includes a warning against "equating  
university lectures with other products of the mind." 273 Cal. App. 2d at 735.

1 added). The definition of Gross Revenues in 37 C.F.R. § 382.11 was carefully vetted  
2 by the CRB and Sirius XM so that it would “unambiguously relate the fee charged  
3 for a service that an SDARS provided to the value of the sound recording  
4 performance rights covered by the statutory license.” Satellite II, 78 Federal  
5 Register, No. 74 at p. 23072. Sirius XM “argu[ed] that it properly identifies only  
6 those revenues that are related to the provision of statutorily licensed sound  
7 recordings.” *Id* at 23071. Frear further testified that “[t]he regulations define ‘Gross  
8 Revenue’ through a variety of exclusions in order to ‘more clearly delineate the  
9 revenues related to the value of the sound recording performance rights at issue.’”  
10 (Dkt. 203-1).

11       Indeed, Sirius XM has flatly denied that it takes a generalized deduction  
12 under 37 C.F.R. § 382.11 for exempt revenues without specific exclusions, but  
13 rather “prescribes a specific methodology for [its] royalty calculation” to  
14 specifically account for revenues attributable to its use of pre-1972 recordings.  
15 *SoundExchange, Inc. v. Sirius XM Radio, Inc.*, 65 F. Supp. 3d 150, 155 (D.D.C.  
16 2014). Only now, faced with the prospect of its calculations being used against it,  
17 does Sirius XM suddenly disavow the precision of its formula, despite the fact that  
18 its own cited authority establishes that the pre-1972 share is deducted from a  
19 revenue base calculated after all other deductions have been made from its Gross  
20 Revenues. *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1006-07 (2014).  
21 Sirius XM’s assertion *post hoc* that its pre-1972 deduction has been quietly for years  
22 accounting for non-music subscription fees, despite every other explanation of the  
23 formula to date being to the contrary, reflects nothing more than a lack of principle.

24       But even if somehow the entire history and methodology of Sirius XM’s pre-  
25 1972 deduction could be disregarded, which Plaintiffs contend it absolutely cannot,  
26 the calculation of subscription revenues attributable to pre-1972 recordings is based  
27 on Sirius XM’s sworn interrogatory responses as to the amount of subscription  
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1 revenue attributable to pre-1972 recordings, *in this case*. See Dkts. 185 and 185-5  
2 (Declaration of Michael Wallace In Support of Flo & Eddie, Inc.’s Motion for Class  
3 Certification and Ex. “E” (Interrogatory Responses).) Sirius XM’s failure to identify  
4 non-music subscription revenue in the figures it provided to Plaintiff during  
5 discovery estops it from suddenly asserting a new pre-trial position, as Sirius XM  
6 was under a duty prescribed by the Federal Rules to advise Plaintiffs of the so-called  
7 “facts” now being alleged. *See United States v. Ga.-Pac. Co.*, 421 F.2d 92, 97 (9th  
8 Cir. 1970) (“A party's silence, for example, will work an estoppel if, under the  
9 circumstances, he has a duty to speak.”). Because it is clear that Sirius XM is either  
10 misrepresenting now its pre-1972 revenues or did so during discovery or other  
11 proceedings, estoppel is warranted. *See Zedner v. United States*, 547 U.S. 489, 504  
12 (2006) (“[W]here a party assumes a certain position in a legal proceeding, and  
13 succeeds in maintaining that position, he may not thereafter, simply because his  
14 interests have changed, assume a contrary position, especially if it be to the  
15 prejudice of the party who has acquiesced in the position formerly taken by him”)  
16 (quotes and internal citations omitted). *See also* MIL 11 at pp. 14-15.

17 Finally, Dr. Ugone has not articulated any substantive foundation for his  
18 opinion that 50% of the pre-1972 Gross Revenues that Sirius XM deducted under 37  
19 C.F.R 382.11 consists of subscription revenue from non-music channels. He has no  
20 basis whatsoever for making that assertion. His opinion was developed for this  
21 litigation based on what he was ambiguously told by Sirius XM executives and from  
22 a misreading of the work of other experts in Satellite II. His only applied expertise  
23 was to divide pre-1972 subscription revenue sworn to in this case in half, and his  
24 opinion should therefore be precluded under *Daubert*.

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1           **D. Sirius XM Has the Burden of Proving Which Pre-72 Recordings Are**  
2           **Licensed; Dr. Ugone’s Sampling Methodology to Extrapolate What is**  
3           **Licensed Does Not Meet This Burden**

4           Because Sirius XM has admitted that it does not own any of the pre-1972  
5 recordings it exploits, and because Sirius XM has also admitted that it never  
6 obtained any licenses for those recordings until prompted to by this Court’s rulings,  
7 the putative class at the outset of this case consisted of *all* owners of pre-1972  
8 recordings exploited by Sirius XM. *See* Dkt. 180 at 2-5. To the extent Sirius XM has  
9 now obtained express licenses from various class members, it has an affirmative  
10 defense to infringement. *Worldwide Church of God v. Philadelphia Church of God,*  
11 *Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000) (express license is an affirmative defense  
12 to copyright infringement); *Corbello v. Devito*, 777 F.3d 1058, 1066 (9th Cir. 2015)  
13 (same); *Oracle Am., Inc. v. Terix Comput. Co.*, No. 5:13-cv-03385-PSG, 2015 U.S.  
14 Dist. LEXIS 59495, at \*5 (N.D. Cal. May 5, 2015) (“A defendant asserting a license  
15 defense has the initial burden of identifying any license provision that puts it in the  
16 clear.”); *Oracle USA, Inc. v. Rimini St., Inc.*, 6 F. Supp. 3d 1108, 1120 (D. Nev.  
17 2014) (“As part of its affirmative defense, Rimini has the burden of identifying a  
18 relevant ... license excusing its infringement of Oracle's copyrighted Oracle  
19 Database software.”). As the party alleging the affirmative defense, Sirius XM has  
20 the initial burden to establish this defense. *Michaels v. Internet Entm't Group, Inc.*, 5  
21 F. Supp. 2d 823, 831 (C.D. Cal. 1998).

22           Instead of affirmatively identifying the recordings it believes it has licensed,  
23 however, Sirius XM has attempted to carry its entire initial burden by paying Dr.  
24 Ugone to “extrapolate” the percentage of its catalog it believes to have licensed to  
25 date, then apply that percentage across an entire swath of recordings which they  
26 cannot associate with any license. *Opp.* at 20-24. Specifically, Dr. Ugone was  
27 unable to match 36% of the pre-1972 recordings played by Sirius XM to the so-

1 called Major Label Spreadsheet or to any license whatsoever. (Ugone Supplemental  
2 Report, Dkt. 489-3 at ¶58, fn. 80) Dr. Ugone refers to these 36% as the “Unmatched  
3 Recordings.” These are pre-1972 recordings played by Sirius XM for which, by  
4 definition, Sirius XM has not produced any information to indicate that any of those  
5 recordings are licensed. Rather than accept the conclusion that 36% of the pre-1972  
6 recordings played by Sirius XM remain unlicensed, Dr. Ugone purports to use  
7 statistical theory to opine that 84% of the plays of the Unmatched Recordings must  
8 be licensed because 84% of the plays of pre-1972 recordings on the Major Label  
9 Spreadsheet are licensed, which he says is “effectively a sample” of the monthly  
10 playlists (the lists of what was actually played). (Ugone Supplemental Report Dkt  
11 489-3 at ¶59-60). However, by Sirius XM’s own admission, the Major Label  
12 Spreadsheet is not a “random sample” or a “representative sample” of the monthly  
13 playlists, but rather a completely different data set which cannot be compared. As  
14 Sirius XM’s counsel has represented:

15 [T]hese are different sets of data and cover different time periods. The  
16 monthly playlists show what was actually broadcast each month. The  
17 Prophet/Dalet databases are snapshots of what existed in those databases at  
18 the time they were generated. Those databases are constantly changing as  
19 programmers add recordings and update or revise metadata based on  
20 information received from direct licensors. For these reasons, it is  
21 inappropriate to compare the monthly playlists with the Prophet/Dalet  
22 databases, or to compare either set of data with metadata from direct licensors  
23 (which we receive and incorporate on a rolling basis). These differences go  
24 to the nature of the underlying data, not simply the time periods covered by  
25 that data.

26 (Decl. of Kalpana Srinivasan, Ex. “A” (email dated August 31, 2016 from  
27 Sirius XM Counsel Jennifer LaGrange))  
28



1 The Major Label Spreadsheet and the Combined Playlists are two separate  
2 sets of data, derived from different sources, and neither is a “random sample” or a  
3 “representative sample” of the other. Therefore, the statistical analysis does not  
4 withstand *Daubert* scrutiny. The absurdity Dr. Ugone’s conclusion that 84% of the  
5 plays of Unmatched Recordings (*i.e.* pre-1972 recordings which cannot which  
6 cannot be matched to a license) must nevertheless be licensed, is demonstrated by  
7 Sirius XM’s inability to identify which 84% are licensed, or by whom, not even as  
8 to a single “Unmatched Recording.”

9 Regardless, Sirius XM does not cite any authority for the proposition that it is  
10 allowed to assert an affirmative defense (particularly one dependent on agreements  
11 between itself and class members regarding individual recordings) as to the entire  
12 class of “Unmatched Recordings” on a statistical basis. Indeed, Sirius XM’s sole  
13 authority on this point involves the use of a “statistical sampling and extrapolation  
14 plan” regarding a purely factual matter – to “(1) estimate the number of claims  
15 submitted by 82 Life Care facilities that were for non-covered services; and (2)  
16 estimate the amount of loss to the Government associated with those claims.” *U.S.*  
17 *ex rel. Martin v. Life Care Centers of Am., Inc.*, No. 1:08-CV-251, 2014 WL  
18 4816006, at \*14 (E.D. Tenn. Sept. 29, 2014) (Opp. at 23). That case does not  
19 absolve Sirius XM of its affirmative obligation to identify licensed recordings.

20 As Plaintiff’s expert, Michael Wallace has declared, Plaintiffs’ damages  
21 model is perfectly equipped to account for any evidence Sirius XM can put forward  
22 of actual licenses or authorization of any sound recordings. Dkt. 203, ¶15. But it  
23 remains Sirius XM’s burden to identify those recordings. Admitting that 36% of  
24 pre-1972 recordings Sirius XM has played cannot be matched to any licenses, but  
25 using statistical hocus pocus to carve out 84%, is neither admissible under *Daubert*  
26 nor satisfies Sirius XM’s burden of proving that it licensed the recordings.

1 **III. CONCLUSION**

2 For all the foregoing reasons, the Court should grant Plaintiffs' MIL 11  
3 precluding the testimony of Dr. Ugone.

4  
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