

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case 1:13-CV-23182 (Moore)

-----X
FLO & EDDIE, INC., individually and on behalf of
all others similarly situated,

Plaintiff,

-against-

SIRIUS XM RADIO INC., and DOES 1 through
10,

Defendants.
-----X

**DEFENDANT SIRIUS XM RADIO INC.'S ANSWER TO THE
AMENDED CLASS ACTION COMPLAINT**

Defendant Sirius XM Radio Inc. (“Sirius XM” or “Defendant”), by its attorneys, Weil, Gotshal & Manges LLP and Kramer Levin Naftalis & Frankel LLP, for its Answer to the Amended Class Action Complaint (the “Amended Complaint”) of plaintiff Flo & Eddie, Inc. (“Plaintiff”) states as follows:

INTRODUCTION

By this action, Plaintiff, the owner of sound recordings made nearly fifty years ago and publicly performed widely ever since by myriad broadcast and other outlets, asks this Court to radically transform the scope of protection accorded to sound recordings under Florida law. Plaintiff asks the Court to recognize an exclusive right of public performance under Florida law for sound recordings created before February 15, 1972, as well as an exclusive right to create pre-broadcast server copies to facilitate such performances, in the absence of any authority recognizing such a right. The result Plaintiff seeks would dramatically expand Florida law and unravel a century of contrary understandings between the music and broadcasting industries. Worse, it would immediately turn each radio and television broadcaster, webcaster, nightclub, retail establishment, fitness center, and the like that performs such recordings in Florida into a serial copyright infringer. Because no Florida court has ever recognized the claim Plaintiff seeks to plead, the Amended Complaint fails to state a claim upon which relief may be granted and should be dismissed in its entirety.

Each numbered response in this Answer to Plaintiff’s Amended Complaint (the “Answer”) is made subject to the following limitations as if fully set forth therein. *First*, except as expressly admitted or otherwise responded to below, Sirius XM denies all of the allegations in the numbered paragraphs of the Amended Complaint. *Second*, any responses in this Answer do not constitute Sirius XM’s acknowledgement or admission of the validity or relevance of such

allegations. *Third*, Sirius XM denies any and all of Plaintiff's characterizations of fact or law in the Amended Complaint. *Fourth*, any responses in this Answer as to documents or communications referenced in the Amended Complaint do not constitute Sirius XM's acknowledgement or admission of the admissibility or relevance of such documents or communications. Further, Sirius XM hereby expressly denies that Plaintiff has accurately, completely, or in context cited from such documents or communications; rather, such documents and communications speak for themselves. *Fifth*, to the extent a response is deemed required to any of the section headings in the Amended Complaint, Sirius XM denies any and all allegations in such headings. The section headings in this Answer exist for the purpose of convenience only and shall not be deemed admissions. *Sixth*, as to the prayer for relief, Sirius XM denies any liability or obligation, in any form or amount, to Plaintiff or any putative class members. *Seventh*, Sirius XM files this Answer without waiving and expressly reserving its arguments in its Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) and Supporting Memorandum of Law [D.E. 15] and Motion to Stay Proceedings Pending Resolution of Its Motion to Transfer This Action to the Southern District of New York and Supporting Memorandum of Law [D.E. 16].

Sirius XM further reserves its right under the Federal Rules of Civil Procedure to amend its pleading to add additional or other affirmative defenses or to delete and withdraw affirmative defenses as may become necessary after additional discovery, investigation, or subsequent developments relating to this case and expressly reserves its right to amend this Answer to assert such additional affirmative defenses in the future.

RESPONSES TO SPECIFIC ALLEGATIONS

1. The allegations contained in paragraph 1 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

2. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 2 of the Amended Complaint.

3. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 3 of the Amended Complaint.

4. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 4 of the Amended Complaint, except it admits that music users have enjoyed music on CDs in digital format since at least the 1980s and have accessed music via digital streaming since at least the mid-1990s.

5. Sirius XM denies the allegations of paragraph 5 of the Amended Complaint, except it admits that Sirius XM (a) has over 25 million subscribers to its satellite radio service; (b) operates the sole national satellite radio service in the United States, which makes digital audio transmissions via satellite technology; and (c) offers certain digital streaming services via the Internet.

6. Sirius XM denies the allegations of paragraph 6 of the Amended Complaint, except it admits that Sirius XM's nationwide broadcasts can be received in Florida: (a) via satellite radio by subscribers who receive the satellite broadcast on authorized Sirius XM receivers; (b) via the Internet by subscribers who receive the transmission on computers (at www.siriusxm.com), smart phones and tablets (via the Sirius XM mobile applications), and/or home audio devices/systems, such as Roku and Sonos; and (c) via satellite television channels on

Dish Network. Sirius XM further admits that its Internet radio service has features identified as “MySXM” and “On Demand” and that certain devices capable of receiving the Sirius XM satellite service offer a feature identified as “Replay”; users of the “Replay” and “My SXM” features are provided with limited pause, rewind and replay functionality depending upon the device, channel and delivery method.

7. Sirius XM denies the allegations of paragraph 7 of the Amended Complaint, except it admits that Sirius XM (a) has a variety of packages it offers to subscribers at various prices, including the “Premier” and “Select” packages; and (b) has approximately 70 channels that are, at times, referred to as “Commercial-Free Music” channels, although the number of such channels may vary across time and subscriber platform.

8. Sirius XM denies the allegations of paragraph 8 of the Amended Complaint, except it admits that Sirius XM’s service includes some channels that play sound recordings of musical performances that initially were “fixed” (*i.e.*, recorded) prior to February 15, 1972 (“Pre-1972 Recordings”).

9. Sirius XM denies the allegations of paragraph 9 of the Amended Complaint, except it admits (a) that some Sirius XM servers located in New York state contain copies of certain Pre-1972 Recordings, including certain recordings by the Turtles, to facilitate broadcasts of those recordings; and (b) that recordings by the Turtles are among the thousands of recordings transmitted as part of Sirius XM’s nationwide broadcasts, which are available to subscribers in Florida.

10. Sirius XM denies the allegations of paragraph 10 of the Amended Complaint, except it admits that Sirius XM (a) pays royalties for digital audio transmissions of sound recordings created on or after February 15, 1972 as required by federal copyright law; and (b)

does not pay royalties for performances of Pre-1972 Recordings because no such royalties are required by law.

11. Sirius XM denies the allegations in the first sentence of paragraph 11 of the Amended Complaint. The allegations contained in the second sentence call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

12. The allegations contained in paragraph 12 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

13. The allegations contained in paragraph 13 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

14. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 14 of the Amended Complaint, except that Sirius XM admits that consumers enjoy music via satellite radio and Sirius XM Internet radio.

15. The allegations contained in paragraph 15 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM refers to the Digital Performing Rights in Sound Recordings Act and its legislative history for the true contents of that act and Congress's intent in passing it and otherwise denies the allegations.

16. The allegations contained in paragraph 16 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

17. Sirius XM denies the allegations of paragraph 17 of the Amended Complaint, except it admits that Sirius XM (a) pays royalties for digital audio transmissions of sound recordings created on or after February 15, 1972 as required by federal copyright law; and (b) does not pay royalties for performances of Pre-1972 Recordings because no such royalties are required by law.

18. The allegations contained in paragraph 18 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

19. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 19 of the Amended Complaint.

20. Sirius XM denies knowledge or information sufficient to respond to the allegations in the first sentence of paragraph 20 of the Amended Complaint. The remaining allegations of paragraph 20 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

21. Sirius XM denies the allegations of paragraph 21 of the Amended Complaint, except it admits that Sirius XM is a Delaware corporation with its principal place of business in New York City, Sirius XM has certain offices in Florida, and this Court has personal jurisdiction over Sirius XM.

22. Sirius XM denies knowledge or information sufficient to respond to the allegations in paragraph 22 of the Amended Complaint, except it admits that this Court has

subject matter jurisdiction over the subject matter of this purported class action pursuant to 28 U.S.C. § 1332(d).

23. The allegations contained in paragraph 23 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. Sirius XM admits, however, that venue is proper in this District.

24. Sirius XM does not respond to paragraph 24 of the Amended Complaint, which contains no factual allegations about Sirius XM.

25. The allegations contained in paragraph 25 of the Amended Complaint are not factual in nature; they merely characterize the basis on which Plaintiff purports to bring this action and purport to reserve certain rights to the Plaintiff. Accordingly, no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

26. The allegations contained in paragraph 26 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

27. The allegations contained in paragraph 27 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

28. The allegations contained in paragraph 28 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

29. The allegations contained in the first and last sentences of paragraph 29 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations in those sentences and also denies knowledge or information sufficient to respond to the allegations in the second sentence of paragraph 29. Sirius XM denies the allegations in the third sentence of paragraph 29, and does not respond to the fourth and fifth sentences, which are not factual in nature.

30. The allegations contained in paragraph 30 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

31. The allegations contained in paragraph 31 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations in the last sentence of paragraph 31 and denies the remaining allegations in paragraph 31.

32. The allegations contained in paragraph 32 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

33. The allegations contained in paragraph 33 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

With Respect to the First Claim for Relief

34. Sirius XM repeats and incorporates by reference its responses to paragraphs 1-33 of the Amended Complaint.

35. The allegations contained in paragraph 35 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

36. The allegations contained in paragraph 36 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

37. The allegations contained in paragraph 37 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

38. The allegations contained in the first sentence of paragraph 38 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM. Sirius XM denies knowledge or information sufficient to respond to the allegations in the second sentence of paragraph 38 of the Amended Complaint.

39. The allegations contained in the first sentence of paragraph 39 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM. Sirius XM denies the allegations contained in the remaining sentences of paragraph 39 of the Amended Complaint, except it admits that (a) some

Sirius XM servers located in New York state contain copies made by Sirius XM of certain Pre-1972 Recordings, including certain recordings by the Turtles, to facilitate broadcasts of those recordings; and (b) recordings by the Turtles and certain other Pre-1972 Recordings are among the many thousands of recordings transmitted as part of Sirius XM's nationwide broadcasts, which are available to subscribers in Florida.

40. The allegations contained in paragraph 40 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

41. The allegations contained in paragraph 41 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

42. The allegations contained in paragraph 42 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

With Respect to the Second Claim for Relief

43. Sirius XM repeats and incorporates by reference its responses to paragraphs 1-42 of the Amended Complaint.

44. The allegations contained in paragraph 44 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is

required, Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 44 of the Amended Complaint.

45. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 45 of the Amended Complaint.

46. The allegations contained in paragraph 46 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

47. Sirius XM denies the allegations contained in paragraph 47 of the Amended Complaint, except it admits that (a) some Sirius XM servers located in New York contain copies made by Sirius XM of certain Pre-1972 Recordings in order to facilitate broadcast of such recordings; (b) certain Pre-1972 Recordings are among the many thousands of recordings transmitted as part of Sirius XM's nationwide broadcasts and online digital audio transmissions, which are available to subscribers in Florida; (c) users of the "Replay" and "My SXM" features are provided with limited skip functionality depending upon the device, channel and delivery method. Sirius XM further admits that its Internet radio product has features identified as "MySXM" and "On Demand" and that certain devices capable of receiving the Sirius XM satellite service offer a feature identified as "Replay."

48. The allegations contained in paragraph 48 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

49. Sirius XM denies knowledge or information sufficient to respond to the allegations in the first sentence of paragraph 49 of the Amended Complaint. The remaining allegations of paragraph 49 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM admits that it does not pay royalties for Pre-1972 Recordings because no such royalties are required by law, but otherwise denies all allegations of wrongdoing by Sirius XM.

50. The allegations contained in paragraph 50 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

51. The allegations contained in paragraph 51 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

52. The allegations contained in paragraph 52 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

53. The allegations contained in paragraph 53 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

With Respect to the Third Claim for Relief

54. Sirius XM repeats and incorporates by reference its responses to paragraphs 1-53 of the Amended Complaint.

55. The allegations contained in paragraph 55 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations.

56. The allegations contained in paragraph 56 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations in the first sentence of paragraph 56 and denies the allegations in the second sentence of paragraph 56.

57. Sirius XM denies knowledge or information sufficient to respond to the allegations of paragraph 57 of the Amended Complaint.

58. The allegations contained in paragraph 58 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

59. The allegations contained in paragraph 59 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

60. The allegations contained in paragraph 60 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is

required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

61. The allegations contained in paragraph 61 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

With Respect to the Fourth Claim for Relief

62. Sirius XM repeats and incorporates by reference its responses to paragraphs 1-61 of the Amended Complaint.

63. The allegations contained in paragraph 63 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations.

64. The allegations contained in paragraph 64 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

65. The allegations contained in paragraph 65 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

66. The allegations contained in paragraph 66 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is

required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

67. The allegations contained in paragraph 67 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

68. The allegations contained in paragraph 68 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

69. The allegations contained in paragraph 69 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations except admits that it received the letter attached to the Amended Complaint as Exhibit B more than 30 days before filing of the Amended Complaint.

With Respect to the Fifth Claim for Relief

70. Sirius XM repeats and incorporates by reference its responses to paragraphs 1-69 of the Amended Complaint.

71. The allegations contained in paragraph 71 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies knowledge or information sufficient to respond to the allegations.

72. The allegations contained in paragraph 72 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

73. The allegations contained in paragraph 73 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

74. The allegations contained in paragraph 74 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

75. The allegations contained in paragraph 75 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations and, without limitation, expressly denies all allegations of wrongdoing by Sirius XM.

76. The allegations contained in paragraph 76 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

77. The allegations contained in paragraph 77 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

78. The allegations contained in paragraph 78 of the Amended Complaint call for legal conclusions to which no responsive pleading is required. To the extent a response is required, Sirius XM denies the allegations.

With Respect to the Prayer for Relief

79. In response to the prayer for relief, Sirius XM denies that Plaintiff is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

80. Without assuming the burden of proof where such burden properly rests with Plaintiff, and expressly reserving and not waiving the right to assert any and all such defenses at such time and to such extent as discovery and factual developments establish a basis therefor, Sirius XM hereby asserts the following defenses to the claims asserted in the Amended Complaint.

First Affirmative Defense

(Failure to State a Claim)

81. The Amended Complaint fails to state any claim upon which relief can be granted.

Second Affirmative Defense

(Laches)

82. Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

Third Affirmative Defense

(Waiver)

83. Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

Fourth Affirmative Defense

(Estoppel)

84. Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

(License)

85. Plaintiff's claims are barred, in whole or in part, by an implied license conveyed by Plaintiff to Sirius XM or because Plaintiff otherwise licensed, authorized, or consented to Sirius XM's alleged conduct.

Sixth Affirmative Defense

(Fair Use)

86. Plaintiff's claims are barred, in whole or in part, by the doctrine of fair use.

Seventh Affirmative Defense

(Statute of Limitations)

87. Plaintiff's claims are barred, in whole or in part, by applicable statutes of limitations.

Eighth Affirmative Defense

(Lack of Harm)

88. Plaintiff's claims are barred, in whole or in part, because Plaintiff has not suffered any harm from Sirius XM's alleged conduct.

Ninth Affirmative Defense

(Failure to Mitigate Damages)

89. Plaintiff's claims are barred, in whole or in part, because Plaintiff has failed to take appropriate and necessary steps to mitigate its alleged damages, if any.

Tenth Affirmative Defense

(Lack of Ownership/Rights)

90. Plaintiff's claims are barred, in whole or in part, because Plaintiff does not own the purported works or rights at issue and/or lost such rights upon publication of the works.

Eleventh Affirmative Defense

(Improper Demand)

91. Plaintiff's Civil Theft claim is barred for failure to comply with the requirements of Fla. Stat. § 772.11(1).

Twelfth Affirmative Defense

(Adequate Remedy at Law)

92. The injunctive relief sought by Plaintiff is barred, in whole or in part, because Plaintiff has available an adequate remedy at law.

PRAYER FOR RELIEF

For the reasons set forth above, Sirius XM respectfully requests that the Court:

1. Dismiss Plaintiff's Amended Complaint in its entirety with prejudice;
2. Enter judgment in favor of Defendant Sirius XM and against Plaintiff on each and every cause of action set forth in the Amended Complaint;
3. Award attorneys' fees and costs in favor of Defendant Sirius XM against Plaintiff as permitted by applicable law; and
4. Award such other and further relief as the Court deems just and proper.

Dated: December 23, 2013

Respectfully submitted,

/s/ Edward Soto

Edward Soto (Fla. Bar No. 0265144)

edward.soto@weil.com

Weil, Gotshal & Manges LLP

1395 Brickell Ave, Suite 1200

Miami, FL 33131

(305) 577-3100

R. Bruce Rich (*pro hac vice* pending)

Benjamin E. Marks (*pro hac vice* pending)

Todd Larson (*pro hac vice* pending)

John R. Gerba (*pro hac vice* pending)

Weil, Gotshal & Manges LLP

767 Fifth Avenue

New York, New York 10153

Tel: 212-310-8000

Michael S. Oberman (*pro hac vice* pending)

Kramer Levin Naftalis & Frankel LLP

1177 Avenue of the Americas

New York, New York 10036

Tel: 212-715-9294

Attorneys for Defendant Sirius XM Radio Inc.

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of Florida by using the CM/ECF system, which sent notification of such filing to all CM/ECF participants. All other counsel shall be served by United States mail.

Plaintiff Flo & Eddie, Inc.'s Counsel:

Glen H. Waldman
Eleanor T. Barnett
Jason Gordon
Heller Waldman, P.L.
3250 Mary Street, Suite 102
Coconut Grove, Florida 33133

Henry Gradstein
Maryann R. Marzano
Robert E. Allen
Gradstein & Marzano, P.C.
6310 San Vincente Blvd., Suite 510
Los Angeles, California 90048

/s/ Edward Soto
Edward Soto (Fla. Bar No. 0265144)
edward.soto@weil.com
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave, Suite 1200
Miami, FL 33131
(305) 577-3100

*Attorneys for Defendant Sirius XM Radio
Inc.*