

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
NOTA MUSIC PUBLISHING, INC., *et al.* :

Plaintiffs, :

-against- :

SIRIUS SATELLITE RADIO INC., :

Defendant. :

07 CV 6307 (AKH)

-----X

STIPULATION AND AGREEMENT OF SETTLEMENT

WHEREAS, on July 10, 2007, Plaintiffs (defined in ¶25 below), individually and on behalf of all others similarly situated, commenced this action (the “Action”) against Defendant Sirius XM Radio Inc. (formerly named Sirius Satellite Radio Inc.) (“Sirius”);

WHEREAS, from on or about November 1, 2005 forward, Sirius has marketed, sold and/or licensed to be sold Sirius Recording Devices (defined in ¶36 below) that are, in varying degrees, capable of making recordings from the Sirius Service (defined in ¶37 below) of sound recordings embodying musical compositions, some of which sound recordings and musical compositions are owned and controlled, in whole or in part, by Plaintiffs and members of the Settlement Classes (defined in ¶32 below);

WHEREAS, Sirius has received, and continues to receive, subscription fees from its subscribers (“Sirius Subscribers”) certain of whom have purchased and activated Sirius Recording Devices;

WHEREAS, Plaintiffs allege and contend that Sirius, by virtue of its activities in connection with the Sirius Recording Devices, has infringed and violated the rights under federal and New York law of Plaintiffs and members of the Settlement Classes;

WHEREAS, Sirius contends that the Sirius Recording Devices and Sirius' activities and receipt of subscription fees in connection therewith are lawful in all respects, and expressly disclaims all liability;

WHEREAS, Sirius represents that it has settled claims asserted (without litigation) by the Major Music Labels (defined in ¶45(b) below) and Sirius has produced to Plaintiffs in response to document requests and under a protective order the terms and conditions of the foregoing agreements with the Major Music Labels, which agreements have been reviewed by Plaintiffs as part of their evaluation of this Action and certain of which contain most favored nations clauses;

WHEREAS, Sirius represents that it has settled claims asserted (without litigation) by the major music publishers and certain publisher–principals of The Harry Fox Agency (see ¶¶10 and 47(b) below), which agreement has been reviewed by Plaintiffs as part of their evaluation of this Action and which agreement contains a most favored nations clause;

WHEREAS, Sirius represents that the numbers of Discontinued Units (defined in ¶6 below) manufactured as of December 31, 2010 is shown in Exhibit B hereto;

WHEREAS, the Music and Entertainment Rights Licensing Independent Network B.V. (“Merlin,” defined in ¶15 below) is a non-profit organization which negotiated with Sirius with respect to a settlement with, and release from, certain of Merlin's members who are covered by the definition of the Sound Recording Settlement Class;

WHEREAS, Sirius has agreed to pay consideration to the Sound Recording Settlement Class based on the participation, among others, of potential class members who are members of Merlin;

WHEREAS, Mitchell, Silberberg & Knupp LLP has acted as outside counsel for Merlin and Charlie Lexton is a Merlin executive and Solicitor (admitted in the United Kingdom) who

negotiated directly, and also through other counsel, with Sirius to help obtain this Settlement for the benefit of the Sound Recording Settlement Class;

WHEREAS, counsel for Plaintiffs and counsel for Sirius have engaged in extensive arms-length negotiations to resolve the claims in the Action;

WHEREAS, Plaintiffs and Sirius have now mutually agreed to a final and complete resolution of the Released Claims of the Settlement Classes (defined in ¶19 and ¶42 below) by this Settlement for an exchange of consideration (see ¶48 below) including, among other things, Sirius' payment of \$2,244,133 (see ¶48(c) below), Sirius' agreement not to include the Disaggregation Function in any Sirius Recording Units (see ¶48(a) below), Sirius' consent to the jurisdiction of the Court to enforce this Agreement (see ¶48 below), and the mutual releases, discharge and covenant not to sue described in ¶¶49-50 below;

WHEREAS, Sirius is entering into this Agreement to avoid the burden and expense of further litigation and the distraction it would cause to Sirius executives and employees;

NOW, THEREFORE, this Stipulation and Agreement of Settlement dated as of April 29, 2011 is made and entered into pursuant to Rule 23 of the Federal Rules of Civil Procedure between and among Sirius, by its undersigned counsel and duly authorized executive below, and Plaintiffs, by and through their counsel, Lovell Stewart Halebian Jacobson LLP, Law Offices of Jeffrey L. Graubart, P.C., Law Offices of Joshua Graubart, P.C. and Steven J. D'Onofrio, Esq., on behalf of themselves and all members of the Settlement Classes.

I. DEFINITIONS

1. "Additional Recordings Units" means those Sirius Recording Devices that comply with either General Recording A Functionality or General Recording B Functionality

(defined in ¶¶13-14 below), irrespective of the number of units of any such Device manufactured, sold or activated, and that are not Discontinued Units or FIFO Units.

2. “Administrator” means any persons or entities approved by the Court to perform the tasks necessary to provide notice and to otherwise administer and handle the claims of members of the Settlement Classes in accordance with the Final Approval Order (defined in ¶12 below).

3. “Class Counsel” means the law firms Lovell Stewart Halebian Jacobson LLP, Law Offices of Jeffrey L. Graubart, P.C., Law Offices of Joshua Graubart, P.C. and Steven J. D’Onofrio, Esq.

4. “Court” means the United States District Court for the Southern District of New York.

5. “Disaggregation Function” means the capability of a satellite radio receiver that allows a subscriber to save (lock), hide from view, move into playlists, or delete individual sound recordings embodying musical compositions recorded from a block recording session on such unit.

6. “Discontinued Units” means the S50, SL100 also SL2 satellite radio receiver units set out in Exhibit B. For purpose of clarification, Exhibit B includes the total number of Discontinued Units that have been manufactured, and nothing in this Settlement authorizes the manufacture of additional units of the S50, SL100 and SL2 radio receivers, or releases or prohibits any claims with respect to any such additional units.

7. “Effective Date” means the latest of the following dates: (a) if no appeal from the Final Order and Judgment is filed, the date of expiration of the time for the filing or noticing of any appeal from the Final Order and Judgment; or (b) if an appeal from the Final Order and

Judgment is filed and not voluntarily withdrawn, and the Court of Appeals affirms the Final Order and Judgment or dismisses the appeal, and (i) a petition for writ of certiorari review is filed and denied, the date such petition is denied, or (ii) if no petition for writ of certiorari review is filed and denied, the date of expiration of the time for the filing of such petition passes; or (c) if a petition for a writ of certiorari is filed and granted, the date of final affirmance of the Final Judgment and Order or final dismissal of the review proceeding initiated by the petition for a writ of certiorari. The Parties agree that neither the provisions of Rule 60 of the Federal Rules of Civil Procedure nor the All Writs Act, 28 U.S.C. § 1651 shall be taken into account in determining the above-stated times.

8. “Escrow Agent” shall mean the institution appointed by Class Counsel and approved by the Court to hold the Escrow Fund.

9. “Escrow Fund” refers to two (2) sub-funds maintained by the Escrow Agent on the terms and conditions approved by the Court, into which Sirius is to pay (i) the Sound Recording Settlement Payment; and (ii) the Musical Composition Settlement Payment.

10. “HFA Settlement Participants” refers to those persons and entities who are “publisher-principals” of The Harry Fox Agency (“HFA”) (*i.e.*, publisher-principals affiliated with HFA or foreign rights societies with valid reciprocal licensing agreements with HFA) who have accepted and opted into the Settlement Agreement and Limited Release among HFA, Sirius and others dated as of September 16, 2010 (“HFA Settlement”).

11. “FIFO Unit” means a basic Sirius radio that has functionality as described in Exhibit C.

12. “Final Approval Order and Judgment” or “Final Approval” means an order entered by the Court in all material respects in the form of the [Proposed] Final Order and Judgment attached hereto as Exhibit E.

13. “General Recording A Functionality” refers to those Additional Recording Units with the functionality described in Exhibit A hereto as General Recording A Functionality.

14. “General Recording B Functionality” refers to those Additional Recording Units with the functionality described in Exhibit A hereto as General Recording B Functionality.

15. “Merlin” refers to the Music and Entertainment Rights Licensing Independent Network B.V., an organization based in the Netherlands, which represents certain independent music companies who own or control rights in sound recordings and which is owned on a not for profit basis.

16. “Musical Composition Settlement Class” means the class defined in ¶¶46-47 below.

17. “Musical Composition Settlement Class Fund” consists of (a) the \$644,133 Musical Composition Settlement Payment; and (b) any interest thereon.

18. “Musical Composition Settlement Payment” means the one-time payment by Sirius to the Musical Composition Settlement Class of the sum of \$644,133.

19. “Musical Composition Settlement Class Released Claims” means any and all claims, rights, demands, obligations, controversies, debts, damages, losses, suits, causes of action, damages whenever incurred or liabilities of any kind or nature whatsoever, including costs, expenses, penalties and attorneys’ fees, whether known or unknown, suspected or unsuspected, in law or equity as against any of the Released Persons that, from the beginning of time through the date of the Final Approval Order, arise from, or are related in any way to

the claims asserted in this Action, including any and all claims (i) brought or which could have been brought in this Action by Plaintiffs or by one or more members of the Musical Composition Settlement Class in connection with the recording or other exploitation capabilities and related functionality of the Sirius Recording Devices including without limitation Discontinued Units and FIFO Units; (ii) alleging that Sirius is liable to any Plaintiff or any member of the Musical Composition Settlement Class with regard to any musical composition (or a sound recording embodying it) transmitted by the Sirius Service under one or more theories of copyright infringement or any other wrongdoing alleged in this Action; (iii) arising from, or related to, the recording of any musical composition (or a sound recording embodying it) transmitted by Sirius' Service on Sirius Recording Devices including without limitation Discontinued Units and FIFO Units; (iv) arising from, or related to the sales, marketing and promotion of Sirius Recording Devices including without limitation Discontinued Units and FIFO Units, and/or (v) arising from, or related to, ephemeral reproductions of musical compositions (or sound recordings embodying them) on computers and other transmission equipment owned or controlled or otherwise utilized by Sirius for making transmissions as part of the Sirius Service. Nothing in this Paragraph 19 shall be construed to release claims of any person or entity who is not a Plaintiff or a member of the Musical Composition Settlement Class.

20. "Net Musical Composition Settlement Fund" means the Musical Composition Settlement Fund less all payments for fees (including attorneys' fees and Plaintiff incentive awards), costs, taxes, administration expenses, and reversions (if any) approved (to the extent provided for herein) by the Court.

21. “Net Sound Recording Settlement Fund” means the Sound Recording Settlement Fund less all payments for fees, costs, taxes, administration expenses and reversions (if any) approved (to the extent provided for herein) by the Court.

22. “Net Settlement Funds” means both the (a) Net Musical Composition Settlement Fund and (b) Net Sound Recording Settlement Fund.

23. “Opt Out” means any member of the Settlement Classes that timely and validly exercises its right to opt out of the respective settlement class pursuant to the procedures specified in the Settlement Notice and ordered by the Court.

24. “Parties” refers to Plaintiffs and Defendant Sirius.

25. “Plaintiffs” refers to Cartagena Enterprises, Inc., also doing business as Cartagena Publishing; David Grisman and Craig Miller, individually and collectively, and doing business as Dawg Music, and also doing business as Acoustic Disc; HMS Distributors, Inc., also doing business as J & N Records and doing business as J & N Publishing; JVN Music, Inc., also doing business as JVN Records; The Music Force LLC, also doing business as Full Force Music; Musical Productions, Inc.; On Top Records Corp., also doing business as Still On Top Publishing and doing business as Real Smooth Publishing; Platano Records Corp.; and RICO Records Distributing, Inc.

26. “Plan of Allocation” means an order entered by the Court approving a plan, in a form substantially similar to the [Proposed] Plan of Allocation attached hereto as Exhibit H, that sets out the basis upon which the Net Settlement Funds shall be allocated among the members of the Settlement Classes and that provides the procedures for filing and reviewing Proofs of Claims.

27. “Preliminary Order” means an order entered by the Court in a form substantially similar to the [Proposed] Order attached hereto as Exhibit D requiring, among other things, that notice of the Settlement be provided to the Settlement Classes.

28. “Released Claims” means both the Sound Recording Settlement Class Released Claims and the Musical Composition Settlement Class Released Claims but does not include any claims for breach of this Settlement Agreement. As used herein and as a separately bargained for element of the Settlement, Released Claims shall be deemed to include an express waiver of any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common or international law which is similar, comparable, or equivalent to Cal. Civ. Code §1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

29. “Released Persons” means Sirius, its predecessors or successors, and any of its present or former principals, officers, executives, directors, employees, agents, attorneys, shareholders, Subscribers, retail sellers, designers, manufacturers and distributors of Sirius Recording Devices, advisors, parents, subsidiaries or affiliates and associates and each of their assigns, representatives, heirs, executors and administrators. Notwithstanding any provision of this Agreement, the Released Claims in favor of the Released Persons shall not include any claims arising from or related to any recording devices used by subscribers to the XM satellite radio service (as opposed to subscribers to the Sirius Service), including without limitation the models known as the Inno, Helix, Nexus and SkyFi3, which claims were the subject of the action *Nota Music Publishing, Inc. et al., v. XM Satellite Radio Inc., 07-cv-4682 (LAK)* (S.D.N.Y.).

30. “Releasers” means the Plaintiffs, the members of the Sound Recording Settlement Class, the members of the Musical Composition Settlement Class and the present or former principals, officers, executives, directors, employees, agents, attorneys, shareholders, advisors, parents, subsidiaries or affiliates and associates of the any of the foregoing persons or entities and each of their assigns, predecessors, successors, representatives, heirs, executors and administrators.

31. “Settlement Agreement” or “Agreement” or “Settlement” refers to this “Stipulation and Agreement of Settlement” and any and all exhibits attached hereto.

32. “Settlement Classes” refers to the Sound Recording Settlement Class and the Musical Composition Settlement Class together.

33. “Settlement Funds” refers to both (a) the Sound Recording Settlement Fund and (b) the Musical Composition Settlement Fund.

34. “Settlement Notice” means the notice of the settlement, substantially in the form attached hereto as Exhibit G, to be distributed to the Settlement Classes pursuant to the Preliminary Order.

35. “Sirius” means Sirius XM Radio, Inc. and its officers, directors, agents, employees, predecessors, successors, assigns and representatives, but excluding the entity formerly known as XM.

36. “Sirius Recording Devices” refers to any portable radio manufactured under license from Sirius and activated at any time through the end of the Term that is capable of receiving and decoding transmissions of the Sirius Service and of making recordings from such transmissions.

37. “Sirius Service” shall mean Sirius’ preexisting satellite digital audio radio service (as defined in 17 U.S.C. § 114(j)(10)).

38. “Summary Notice” means the summary form of notice, substantially in the form attached hereto as Exhibit F, to be published pursuant to the Preliminary Order.

39. “Sound Recording Settlement Class” means the class defined in ¶¶44-45 below.

40. “Sound Recording Settlement Class Fund” consists of (a) the \$1,600,000 Sound Recording Settlement Payment and (b) any interest earned thereon.

41. “Sound Recording Settlement Class Payment” means the one-time payment by Sirius to the Sound Recording Settlement Class of the sum of \$1,600,000.

42. “Sound Recording Settlement Class Released Claims” are any and all claims, rights, demands, obligations, controversies, debts, damages, losses, suits, causes of action, damages whenever incurred or liabilities of any kind or nature whatsoever, including costs, expenses, penalties and attorneys’ fees, whether known or unknown, suspected or unsuspected, in law or equity with respect to any and all plays of such sound recordings broadcast to any and all Sirius Recording Devices as against any of the Released Persons that, from the beginning of time through the date of the Final Approval Order, arise from, or are related in any way to the claims asserted in this Action, including any and all claims (i) brought or which could have been brought in this Action by Plaintiffs or by one or more members of the Sound Recording Settlement Class in connection with the recording or other exploitation capabilities and related functionality of the Sirius Recording Devices including without limitation Discontinued Units and FIFO Units; (ii) alleging that Sirius is liable to any Plaintiff or any member of the Sound Recording Settlement Class with regard to any sound recording transmitted by the Sirius Service under one or more theories of copyright infringement or any other wrongdoing alleged

in this Action; (iii) arising from, or related to, the recording of Sirius' Service on Sirius Recording Devices including without limitation Discontinued Units and FIFO Units; (iv) arising from or related to, the sales, marketing and promotion of Sirius Recording Devices including without limitation Discontinued Units and FIFO Units; and/or (v) arising from, or related to, ephemeral reproductions of sound recordings on computers and other transmission equipment owned or controlled or otherwise utilized by Sirius for making transmissions as part of the Sirius Service. Nothing in this Paragraph 42 shall be construed to release claims of any person or entity who is not a Plaintiff or a member of the Sound Recording Settlement Class.

43. "Term" shall mean the period from November 1, 2005 through December 31, 2011.

II. THE SETTLEMENT CLASSES

44. **The Sound Recording Settlement Class.** Subject to the Court's approval and subject to ¶45, and for purposes of this Agreement only, the undersigned agree and consent to the certification of the following Sound Recording Settlement Class:

All persons or entities who own or control (in whole or in part) exclusive rights in at least one sound recording protected under federal copyright law and/or state common law and/or unfair competition law that was transmitted by the Sirius Service at least once during the time period from November 1, 2005 to the date of entry of the Preliminary Order.

45. The following persons and entities are specifically excluded from the Sound Recording Settlement Class: (a) Sirius, the subsidiaries and affiliates of Sirius, any person or entity who is a partner, officer, director, employee, or controlling person of Sirius, or any entity in which Sirius has a controlling interest; (b) the following music labels (collectively, the "Major Music Labels"): Atlantic Recording Corporation; BMG Music; Capitol Records, Inc.; Elektra Entertainment Group Inc.; EMI Music North America; Interscope Records; Motown

Record Company, L.P.; Sony BMG Music Entertainment; UMG Recordings, Inc; Virgin Records America, Inc; and Warner Bros. Records, Inc.; and (c) any subsidiaries, affiliates, legal representatives, heirs, predecessors, successors and assigns of any of the above excluded parties.

46. **Musical Composition Settlement Class.** Subject to the Court's approval and subject to ¶47, and for purposes of this Agreement only, the undersigned agree and consent to the certification of the following Musical Composition Settlement Class:

All persons or entities who own or control (in whole or in part) exclusive rights in at least one musical composition protected under federal copyright law of which a sound recording embodying such musical composition was transmitted by the Sirius Service at least once during the time period from November 1, 2005 to the date of entry of the Preliminary Order.

47. The following persons and entities are specifically excluded from the Musical Composition Settlement Class: (a) Sirius, the subsidiaries and affiliates of Sirius, any person or entity who is a partner, officer, director, employee, or controlling person of Sirius, or any entity in which Sirius has a controlling interest; (b) the HFA Settlement Participants, including without limitation, Famous Music LLC; Beechwood Music Corp.; Colgems-EMI Music Inc.; EMI April Music Inc.; EMI Blackwood Music Inc; EMI Gold Horizon Music Corp.; EMI Golden Torch Music Corp.; EMI Intertrax Music Inc.; EMI Sosaha Music Inc; EMI Jemaxal Music Inc.; EMI U Catalog Inc.; EMI Unart Catalog Inc.; EMI Virgin Music, Inc.; EMI Virgin Songs, Inc.; Jobete Music Co. Inc.; Screen Gems-EMI Music Inc.; WB Music Corp.; Warner-Tamerlane Publishing Corp.; Unichappell Music, Inc.; Sony/ATV Tunes LLC; Sony/ATV Tree Publishing; Sony/ATV Gross Keys Publishing; Sony/ATV Discos Music Publishing LLC; Sony/ATV Milene Music; and Sony/ATV Acuff Rose Music; and (c) any subsidiaries,

affiliates legal representatives, heirs, predecessors, successors and assigns of any of the above excluded parties.

III. THE SETTLEMENT CONSIDERATION

48. Subject to the other provisions of this Agreement and entry of the Preliminary Order requiring that notice of the Settlement be provided to members of the Settlement Classes, Sirius agrees to provide the following consideration to the Settlement Classes in exchange for the releases described in ¶¶49-50 below, Plaintiffs' agreement to perform all of their obligations under this Agreement and Plaintiffs' consent to the continuing jurisdiction of this Court over them with respect to the enforcement of this Agreement: (a) Sirius covenants and agrees that Sirius shall not include or cause to be included the Disaggregation Function in any Sirius Recording Device through the end of the Term; (b) Sirius consents to the continuing jurisdiction of this Court over it with respect to the enforcement of this Agreement; (c) Sirius agrees to pay or cause to be paid into the Escrow Fund, within fourteen (14) business days of entry of the Preliminary Order, the amount of \$2,244,133 consisting of the sum of (i) \$1,600,000 for the Sound Recording Settlement Payment, and (ii) \$644,133 for the Musical Composition Settlement Class Payment.

IV. RELEASES, DISCHARGE AND COVENANT NOT TO SUE

49. Plaintiffs agree and each member of the Settlement Classes shall be deemed to agree, that, upon the occurrence of the Effective Date, the Releasors will completely release and forever acquit and discharge the Released Persons, individually and collectively, from any liability, damages or other remedy arising from, or related to, any or all of the Released Claims. Subject to the limitations stated in this paragraph, upon the Effective Date, for consideration provided for herein, Plaintiffs covenant and agree, and each member of the

Settlement Classes shall be deemed to covenant and agree that he, she or it shall not, at any time, institute, cause to be instituted, assist in instituting or maintaining or permit to be instituted on his, her or its behalf any proceeding in any state or federal court, in or before any administrative agency, or any other proceeding or otherwise allege or assert against the Released Persons, individually or collectively, any of the Released Claims. In addition, this covenant not to sue any of the Released Persons applies to and bars any claim arising from, or related to, (a) any sound recording (and the musical composition embodied therein) transmitted by the Sirius Service at any time during or after the expiration of the Term and recorded on any Sirius Recording Device including without limitation Discontinued Units and FIFO Units that was activated at any time through the end of the Term for so long as such unit is activated as reflected in Sirius' books and records; (b) the sales, marketing and promotion of Sirius Recording Devices including without limitation Discontinued Units, and FIFO Units during the Term; and (c) ephemeral reproductions of sound recordings (including the embodied musical compositions) made before or during the Term on computers and other transmission equipment owned or controlled or otherwise utilized by Sirius for making transmissions as part of the Sirius Service.

50. Upon the occurrence of the Effective Date and in consideration of the release and discharge described in ¶49 above, and for other valuable consideration, Plaintiffs, the members of the Settlement Classes, and Class Counsel shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits and causes of action, whether class, individual or otherwise in nature, that Sirius ever had, now may have, or hereafter can, shall or may have on account of or arising out of or resulting from the commencement and/or prosecution of any aspect of this Action.

V. THE APPROVAL OF THE SETTLEMENT

51. **The Preliminary Order.** Plaintiffs agree to present a motion to the Court (which Sirius shall not oppose) for entry of the proposed Preliminary Order (attached hereto as Exhibit D), which will provide, *inter alia*, for (a) preliminary approval; (b) appointment of Class Counsel; (c) certification of the Settlement Classes (for settlement purposes only); (d) dissemination of the Settlement Notice and Summary Notice; (e) specification of the deadline and procedures for any objections or Opt Outs; and (f) establishment of the time and place for a fairness hearing in order to determine whether to finally approve the Settlement.

52. **Notice of The Settlement.** Upon entry of the Preliminary Order and consistent with the Court's direction, Plaintiffs shall cause notice to be given to the members of the Settlement Classes in the following manner: (a) written notice substantially in the form of the Settlement Notice (attached as Exhibit G hereto) shall be served via electronic mail or via United States mail, first class, postage prepaid, to be sent or mailed out within sixty (60) days of the entry of the Preliminary Order to those members of the Settlement Classes who the Administrator is able to identify through reasonable efforts and reasonable cooperation of the Parties and for whom email or mailing addresses may be found; (b) a copy of the Summary Notice (attached as Exhibit F hereto) shall be published once in *Billboard*, *Variety*, *Daily Variety*, and *Music Week* to occur within thirty (30) days following the mailing of the Settlement Notice; and (c) a website operated by the Administrator will: (i) enable members of the Settlement Classes to access and download the Settlement Notice; (ii) provide a list of critical dates and deadlines in the settlement process; and (iii) provide relevant updates and information with respect to the Settlement and claims process.

53. **Final Order and Judgment.** After providing notice, Plaintiffs shall seek (and Sirius shall not oppose) Final Approval through entry of the proposed Final Order and Judgment (attached as Exhibit E hereto), the text of which, *inter alia*, will: (a) approve finally this Agreement and its terms contained herein as being a fair, reasonable and adequate settlement of the Action within the meaning of Federal Rule of Civil Procedure 23(e) and direct its consummation according to its terms; (b) direct that the Action be dismissed with prejudice and without costs; (c) bar and enjoin Plaintiffs and all members of the Settlement Classes who do not Opt Out from filing, commencing, prosecuting, assisting or maintaining, either directly or indirectly, any action released and/or barred by ¶49 above; (d) reserve exclusive jurisdiction over the Settlement, any motion or request to enforce the terms thereof, and the administration and consummation of this Settlement; and (e) approve a record of Opt Outs, which Class Counsel shall have filed with the Clerk of the Court and provided a copy of to counsel for Sirius in advance of the fairness hearing.

VI. RIGHT TO TERMINATE

54. This Settlement is conditioned, and shall only become final, upon Final Approval, entry of the Final Approval Order and Judgment (in all material respects in the form annexed hereto as Exhibit E), and the occurrence of the Effective Date. This Agreement shall, if either Sirius or Plaintiffs elect, be null and void and shall have no further force or effect in the event that: (a) Final Approval is not obtained based on the terms hereof; (b) the Final Approval Order and Judgment is not entered in all material respects in the form annexed hereto as Exhibit E; or (c) the Final Approval Order and Judgment is reversed on appeal and is not thereafter reinstated. In such an event, any and all amounts then constituting the Settlement Funds shall

be returned forthwith to Sirius, less all costs for notice and administration of the Settlement reasonably incurred and accounted for up to the date the Agreement becomes null and void.

55. Plaintiffs and Sirius expressly reserve all of their rights if the Agreement does not become effective. Plaintiffs and Sirius expressly agree that – in the event the Agreement does not become effective – this Agreement, and any and all discussions or negotiations associated with it, shall not be discoverable or offered into evidence or used in this Action or any other action for any purpose. In the event that the Agreement does not become effective, all Parties to the Action shall stand in the same position as if this Agreement had not been negotiated, made or filed with the Court.

56. Sirius shall have the right, but not the obligation, to terminate the Agreement in its entirety or to terminate the Agreement as to either the Sound Recording Settlement Class or the Musical Composition Settlement Class by providing written notice to Plaintiffs of their election to do so within thirty (30) days of the occurrence of the following events: (a) members of the Sound Recording Settlement Class entitled to more than 15% of the Sound Recording Settlement Class Fund (to be determined consistent with the Plan of Allocation) validly Opt Out of the Settlement pursuant to the terms and conditions set forth in the Settlement Notice (allowing Sirius to terminate the Agreement or – at its election – the Agreement as to the Sound Recording Settlement Class); or (b) members of the Musical Composition Settlement Class entitled to more than 15% of the Musical Composition Settlement Class Fund (to be determined consistent with the Plan of Allocation) validly Opt Out of the Settlement pursuant to the terms and conditions set forth in the Settlement Notice (allowing Sirius to terminate the Agreement or – at its election – the Agreement as to the Musical Works Settlement Class).

57. In the event that Sirius elects to terminate this Agreement in whole or in part pursuant to ¶56 above, the Administrator shall promptly return to Sirius all amounts theretofore paid by Sirius into the Escrow Fund if Sirius terminates the Agreement in its entirety or all amounts theretofore paid by Sirius into the sub-funds maintained by the Escrow Agent related to the portion of the Agreement terminated by Sirius, except that Sirius shall be responsible for all costs and expenses related to notifying the Settlement Classes of its decision to terminate, as well as all notice and administration costs and expenses reasonably incurred by the Administrator up to the date of such termination.

58. To the extent permitted by applicable law, Plaintiffs shall have the option up to, but not after, the date of entry of the Preliminary Order to terminate this Agreement upon the occurrence of any of the following events: (a) dissolution of and/or the liquidation of substantially all of Sirius' assets; (b) the filing of a petition in bankruptcy or insolvency or for an arrangement or reorganization by, for or against Sirius, which is not dismissed within ninety (90) days; (c) the appointment of a receiver or trustee for all or a portion of the assets of Sirius or the business unit(s) of Sirius operating Sirius' Service; (d) Sirius' assignment of assets for the benefit of creditors; (e) Sirius' insolvency; (f) Sirius' inability to pay its debts as they become due; or (g) Sirius' acknowledgment in writing that it is insolvent or unable to pay any portion of any debt upon coming due. This termination will become effective immediately upon written notice by Plaintiffs to Sirius.

59. In the event Plaintiffs elect to terminate this Settlement Agreement, Plaintiffs shall be responsible for all costs and expenses related to notifying the Settlement Classes of such decision to terminate, while the Escrow Fund shall be used in a manner consistent with

¶¶71-72 for any administration costs and expenses reasonably incurred by the Administrator up to the date of such termination.

VIII. REVERSION

60. If any member or members of the Sound Recording Settlement Class or Musical Composition Settlement Class entitled in the aggregate of up to and including 2% (but not more than 2%) of such class members' respective Settlement Fund (to be determined consistent with the Plan of Allocation) validly Opt Out of the Settlement Agreement pursuant to the terms set forth in the Settlement Notice, then Sirius shall not have any right to reversion or any pay back from the respective Settlement Fund(s) PROVIDED THAT Sirius' foregoing right to reversion with respect to any person or entity in the Musical Composition Settlement Class that was eligible for but elected not to enter into the HFA Settlement shall not be limited by or subject to the foregoing 2% threshold but instead Sirius' right to reversion shall be the full amount applicable to such Opt Outs (to be determined consistent with the Plan of Allocation). In no event will any reversion applicable to Opt Outs in the Musical Composition Settlement Class that were eligible for but elected not to enter into the HFA Settlement exceed \$80,004 in the aggregate with respect to the Musical Composition Settlement Class Payment. However, reversion payments applicable to Opt Outs of the Musical Composition Settlement Class may exceed \$80,004 with respect to those Musical Composition Settlement Class members who were not eligible to enter the HFA Settlement. As set forth in the Settlement Notice, Opt Outs must be postmarked no later than 45 days before the date of the Fairness Hearing. After Opt Outs (if any) have been received, the Parties shall work together in good faith to determine the respective shares of Opt Outs by such persons or entities in order to ensure that Sirius does not pay more than 100% of the amount allocated for the total market of music publishers,

including those included in the Musical Composition Settlement Class. The methods used by the Parties may include requests for information from Opt Outs and, if necessary, subpoenas to obtain market share and other information or a practical formula to calculate an amount applicable to an Opt Out.

61. The following examples illustrate the meaning of the provisions of ¶60, above.

Example No. 1: Members of the Sound Recording Settlement Class cumulatively representing 1.5% of the Sound Recording Settlement Class Fund validly Opt Out of the Settlement. In such instance, Sirius shall not be entitled to any reversion or pay back in respect of the Sound Recording Settlement Class Fund. However, if any member or members of the Sound Recording Settlement Class and/or the Musical Composition Settlement Class (not including any person or entity in the Musical Composition Settlement Class that was eligible for but elected not to enter into the HFA Settlement) entitled in the aggregate to more than 2% of the Sound Recording Settlement Class Fund (to be determined consistent with the Plan of Allocation) and/or the Musical Composition Settlement Class Fund (to be determined consistent with the Plan of Allocation) validly Opt Out of the Settlement Agreement pursuant to the terms set forth in the Settlement Notice, then Sirius shall be entitled to a reversion or pay back of the amount in excess of 2% of such Opt Outs from the Sound Recording Settlement Class Fund and/or the Musical Composition Settlement Class Fund.

Example No. 2: Members of the Musical Composition Settlement Class, exclusive of the persons or entities that were eligible for but elected not to enter into the HFA settlement, cumulatively representing 2.5% of the Musical Composition Settlement Class Fund validly Opt Out of the Settlement. In such instance, Sirius shall be entitled to a reversion or pay back in the amount of 0.5% of the Musical Composition Settlement Class Fund.

Example No. 3: Persons or entities of the

Musical Composition Settlement Class that were eligible for but elected not to enter into the HFA Settlement cumulatively representing 1.5% of the Musical Composition Settlement Class Fund validly Opt Out of the Settlement Agreement, then Sirius shall be entitled to a reversion or pay back of the entire 1.5% from the Musical Composition Settlement Class Fund.

IX. THE MAINTENANCE AND DISBURSEMENTS FROM THE SETTLEMENT FUNDS

62. Except as provided in ¶¶54-59 hereof and as authorized by an order of the Court, the Net Settlement Funds shall remain in the Escrow Account until the Effective Date. Thereafter, the Net Settlement Funds shall be distributed in a manner approved by the Court. Plaintiffs shall propose that the Net Settlement Funds be distributed in accordance with the Plan of Allocation attached hereto as Exhibit H. However, if for any reason, the Court adopts a plan of allocation that is different in any respect from the [Proposed] Plan of Allocation in Exhibit H hereto, then such plan adopted by the Court shall control and shall not cause a termination of this Agreement but shall have no effect upon the Parties' right to terminate this Settlement Agreement pursuant to ¶¶54-59 herein.

63. The Settlement Funds shall be invested in United States Government Treasury Bills or Notes of no more than twelve (12) months' duration or in money market funds whose portfolio is composed of short-term United States Agency of Treasury securities (provided, however, that such portions of the Settlement Funds as may reasonably be needed to pay current expenses associated with providing notice to the Settlement Classes, administering the Settlement Funds, and administering the Settlement may be deposited in any Banking Institution (as defined below)). Any and all interest earned on the Settlement Funds, if any, shall become and remain part of the Settlement Funds. If Class Counsel deem it necessary, they may, with the prior written authorization of Sirius, which will not be unreasonably

withheld, take reasonable action to ensure the protection of principal to the greatest extent possible, including but not limited to, depositing the Settlement Funds in a non-interest bearing Escrow Account at a FDIC insured banking institution (“Banking Institution”) which has not opted out of the Transaction Account Guarantee Program or the Temporary Liquidity Guarantee Program effective as of December 19, 2008, pursuant to which the FDIC is providing a full guarantee for funds held in FDIC-insured depository institutions (which have not opted-out of the program) in non-interest bearing transaction accounts above the existing deposit insurance limit through December 31, 2010, unless extended.

64. Disbursement for all reasonable costs and expenses associated with providing notice of the Settlement to the proposed Settlement Classes, all reasonable expenses and costs associated with administering the Settlement, including claims administration, work with financial institutions and experts, and consulting and advisory fees, and any payments, costs and expenses incurred in connection with taxation matters relating to the Settlement and this Agreement, shall be paid from the Settlement Funds following entry of the Preliminary Order and up to the Effective Date of Settlement subject to approval of the Court.

65. In the event the Agreement is disapproved, rescinded, or otherwise fails to become effective, any and all amounts incurred as of the date of such occurrence shall not be refundable to Sirius unless otherwise provided in this Agreement.

66. **Tax Treatment of the Settlement Funds.** The Settlement Funds shall be designated as trusts under New York law and, to the extent held at a financial institution designated by Class Counsel, shall be established as fiduciary accounts (the “Settlement Fiduciary Account”). For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the “administrators” of the Settlement

Fiduciary Account shall be the Fiduciary Account Agents. The Fiduciary Account Agents shall timely and properly file, or cause to be filed on a timely basis, all tax returns necessary or advisable with respect to the Settlement Fiduciary Account (including without limitation all income tax returns, all informational returns, and all returns described in Treas. Reg. § 1.468B-2(1)). Subject to ¶67 below, Sirius shall have no responsibility nor liability with respect to the tax treatment of the Settlement Funds and the Settlement Funds shall indemnify and hold Sirius harmless for taxes and related expenses, if any, payable by Sirius by reason of income earned on the Settlement Funds.

67. The Administrator shall be solely responsible for filing all informational and other tax returns necessary to report any net taxable income earned by the Settlement Funds and shall file all informational and other tax returns necessary to report any income earned by the Settlement Funds and shall be solely responsible for taking out of the Settlement Funds, as and when legally required, any tax payments, including interest and penalties due on income earned by the Settlement Funds. All taxes (including any interest and penalties) due with respect to the income earned by the Settlement Funds shall be paid from the Settlement Funds. Sirius shall have no responsibility to make any filings relating to the Settlement Funds and will have no responsibility to pay tax on any income earned by the Settlement Funds or pay any taxes on the Settlement Funds, unless the Settlement is not consummated and the Settlement Funds are returned to Sirius. In the event the Settlement is not consummated and the Settlement Funds are returned to Sirius, Sirius shall be responsible for the payment of any taxes (including any interest or penalties) on said income, and Class Counsel shall be obliged to apply for a refund of any taxes previously paid and, upon receipt of such refund (if any), forward said refund to Sirius.

X. ATTORNEYS' FEES, LITIGATION COSTS AND EXPENSES, INCENTIVE AWARDS, ADMINISTRATION COSTS AND EXPENSES AND OTHER FEES

68. At any time after entry of the Preliminary Order, Class Counsel may make one or more applications to the Court for: (a) awards of fees from the Settlement Funds in connection with the Action and Settlement of the Action and the administration of the Settlement Funds, and interest thereon; (b) reimbursements or payments from the Settlement Funds of any litigation costs and expenses incurred in connection with the prosecution or settlement of this Action, and interest thereon; (c) incentive awards to be paid to Plaintiffs out of the Settlement Funds; and (d) reimbursement of expenses and compensation of services to Merlin pursuant to the Stipulation Governing Reimbursement of Expenses and Compensation of Services for Merlin (see Exhibit J hereto). Any such payments under this paragraph must be approved by the Court.

69. Notwithstanding the existence of any timely filed objections to this Agreement, or potential appeals from the Final Approval Order, or collateral attack on the Agreement or any part thereof, any attorneys' fees and expenses awarded by the Court in the Final Approval Order shall be paid by the Escrow Agent to Class Counsel within ten (10) business days after entry of the Final Approval Order awarding such fees and expenses if so directed by the Court, subject to each Class Counsel's joint and several obligation to make appropriate refunds or repayments to the Settlement Funds, if any, when, as a result of an appeal and/or further proceedings on remand, or successful collateral attack, the fee or expense award is reduced or reversed, or the Settlement is terminated pursuant to ¶¶54-59 of this Agreement.

70. **Incentive Awards.** Class Counsel intends to apply to the Court for an aggregate incentive award in the amount of \$60,000 to be shared among the class representative Plaintiffs. Notice of this application shall be provided in the Settlement Notice.

71. **Sound Recording Settlement Class Fund.** The Sound Recording Settlement Class Fund may be used for administration and notice costs in respect of the Sound Recording Settlement Class.

72. **Musical Composition Settlement Class Fund.** The Musical Composition Settlement Class Fund may be used for administration and notice costs in respect of the Musical Composition Settlement Class.

73. **Reimbursement of Administrator and Other Expenses.** After the Effective Date of the Settlement, Class Counsel, on behalf of the Administrator, may apply to the Court from time to time for reimbursement from the Settlement Funds of costs and expenses reasonably incurred by the Administrator in the administration of the settlement and distribution of the Settlement Funds.

XI. MISCELLANEOUS PROVISIONS

74. **Authority.** In executing this Settlement Agreement, Class Counsel represents and warrants that they have been fully empowered to execute this Settlement Agreement on behalf of the Settlement Classes (subject to final approval by the Court and after notice to all members of the Settlement Classes), and that all actions necessary for the execution of this Settlement Agreement have been taken.

75. **Best Efforts.** The Parties agree to use their best efforts to effectuate this Settlement.

76. **Binding Effect.** This Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of Defendant, the Released Persons, Plaintiffs and Class Counsel.

77. **Choice of Law.** All terms of this Agreement shall be governed by and interpreted according to the substantive laws of the State of New York without regards to its choice of law or conflict of law principles.

78. **Confidentiality.** The Parties agree to keep private and confidential the terms of this Agreement—except for disclosure at the Court’s direction or *in camera* to the Court—until this Agreement is filed with the Court.

79. **Execution in Counterparts.** The parties may execute this Agreement in counterparts. Facsimile and/or scanned signatures shall be deemed an original signature for purposes of executing the Agreement. The original signature pages shall thereafter be appended to this Agreement.

80. **Exhibits.** All of the exhibits attached hereto are hereby incorporated by reference as though fully set forth herein.

81. **Headings.** The headings herein are used for the purpose of convenience only and are not meant to have legal effect.

82. **Integrated Agreement.** This Agreement and its exhibits contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the Parties and is not subject to any condition not provided herein.

83. **Modifications and/or Amendments.** This Agreement may not be modified or amended except in a writing executed by the parties and approved by the Court.

84. **No Admission of Wrongdoing.** This Agreement, whether or not finally approved by the Court, and any negotiations, proceedings or agreements relating to the Agreement, the Settlement, and any matters arising in connection with settlement negotiations, proceedings, or agreements (a) shall not be described as, construed as, offered or received

against Sirius as evidence of and/or deemed to be evidence of any presumption, concession, or admission by Sirius of: the truth of any fact alleged by Plaintiffs; the validity of any claim that has been or could have been asserted in the Action or in any litigation or forum; the deficiency of any defense that has been or could have been asserted in the Action or in any litigation or forum; or any liability, fault, or wrongdoing of Sirius; (b) shall not be described as construed as, offered or received against Plaintiffs or the members of the Settlement Classes, as evidence of any infirmity in the claims of Plaintiffs and the Settlement Classes or that the damages recoverable in the Action would not have exceeded the Settlement Funds; (c) shall not be described as, construed as, offered or received against any of the Parties in any other civil, criminal or administrative action or proceeding, provided, however, that (i) if it is necessary to refer to this Agreement to effectuate the provisions of this Agreement, it may be referred to in such proceedings, and (ii) if this Agreement is approved by the Court, Sirius may refer to it to effectuate the protections granted it hereunder; and (d) shall not be described as or construed against Sirius or the Plaintiffs or any members of the Settlement Classes as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been awarded to Plaintiffs and the Settlement Classes after trial.

85. **No Conflict Intended.** Any inconsistency between this Agreement and any exhibits attached hereto shall be resolved in favor of this Agreement. Any inconsistency between the headings used in this Agreement and the text of the paragraphs of this Agreement shall be resolved in favor of the text.

86. **No Party Is the Drafter.** This Agreement shall not be construed more strictly against one Party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Parties, it being recognized that it is the result of arms-

length negotiations among the Parties, and all Parties have contributed substantially and materially to the preparation of this Stipulation.

87. **No Third-Party Beneficiaries.** This Stipulation is not intended to and does not create rights enforceable by any persons or entities other than the Parties and the members of the Settlement Classes. There are no third-party beneficiaries.

88. **Notices.** All notices under this Agreement shall be sent to the following persons by United States mail and electronic mail. If to Plaintiffs, then to Christopher Lovell, Esq., Lovell Stewart Halebian Jacobson LLP, 61 Broadway, Suite 501, New York, New York 10006 (clovell@lshllp.com); Jeffrey L. Graubart, Law Offices of Jeffrey L. Graubart, P.C., 350 West Colorado Boulevard, Suite 200, Pasadena, California 91105 (jlg@jlgraubart.com); Law Offices of Joshua Graubart, P.C., 6 E. 39th Street, 6th Floor, New York, New York 10016 (jggraubart@graubartlaw.com); and Steven J. D’Onofrio, 5335 Wisconsin Avenue, N.W. Suite 950, Washington, D.C. 20015 (sdonofrio@mindspring.com). If to Sirius, then to Peter A. Abruzzese, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, New York 10036 (pabruzzo@kramerlevin.com), with a copy to Patrick L. Donnelly, c/o Sirius XM Radio Inc., 1221 Avenue of the Americas, 36th Fl., New York, N.Y. 10020 (pdonnelly@siriusxm.com). Notice may also be sent to such other address as a party to this Agreement may designate in writing, from time to time, in accordance with this Agreement.

89. **Protective Order.** The Effective Date shall constitute “the final judgment” for purposes of Paragraph 22 of the Protective Order entered in the Action October 3, 2007, and the Parties shall comply with the provisions of said Paragraph 22 based on such Effective Date. The Protective Order remains in force and in effect according to its terms.

90. **Publicity.** A. Class Counsel and Plaintiffs shall not make any official public statements or statements to the media that disparage the business or reputation of Sirius or its counsel based on the subject matter of the Action, provided that this sentence does not apply to statements in any judicial proceeding.

B. Sirius and its counsel shall not make any official public statements or statements to the media that disparage the business or reputation of any of the Plaintiffs or Class Counsel based on the subject matter of the Action, or to disparage the Action, provided that this sentence does not apply to statements in any judicial proceeding.

91. **Retention of Exclusive Jurisdiction.** The parties hereby irrevocably submit, to the fullest extent permitted by law, to the exclusive jurisdiction of the United States District Court for the Southern District of New York for any suit, action, proceeding or dispute arising out of or relating to this Settlement Agreement, or to the applicability of this Settlement Agreement, and exhibits hereto. Solely for purposes of such suit, action or proceeding, to the fullest extent permitted by law, the parties hereto irrevocably waive and agree not to assert, by way of motion, as a defense or otherwise, any claim or objection that they are not subject to the jurisdiction of such Court, or that such Court is, in any way, an improper venue or an inconvenient forum or that the Court lacked power to approve this Settlement Agreement or enter any of the orders contemplated hereby.

92. **Severability.** If any provision of this Settlement Agreement or the application thereof to any party or circumstance is held invalid or unenforceable, and if the Settlement is not terminated pursuant to the provisions herein, then the remaining provisions of this Settlement Agreement and the application of such provisions to other parties or circumstances

shall not be affected thereby, and the provisions of this Settlement Agreement being severable in any such instance.

93. **Waiver.** The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Agreement.

Dated: New York, New York
April 29, 2011

LOVELL STEWART HALEBIAN JACOBSON LLP

By: 

Christopher Lovell
Christopher M. McGrath
61 Broadway, Suite 501
New York, New York 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4775

LAW OFFICES OF JEFFREY L. GRAUBART, P.C.

By: _____
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350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

LAW OFFICES OF JOSHUA GRAUBART, P.C.

By: _____
Joshua Graubart, Esq.
6 E. 39th Street, 6th Floor
New York, New York 10016
Telephone: (646) 781-9321
Facsimile: (646) 224-8088

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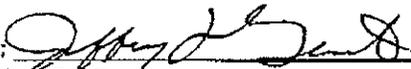
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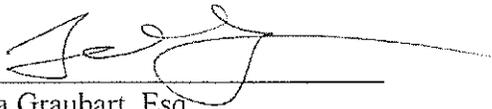
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Counsel for Plaintiffs and the Proposed Settlement Classes

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Counsel for Defendant Sirius XM Radio Inc.

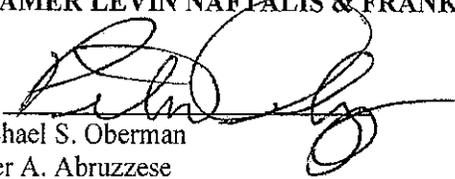
SIRIUS XM RADIO INC.

By: _____
Officer

By: _____
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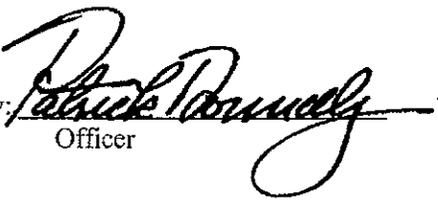
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Counsel for Defendant Sirius XM Radio Inc.

SIRIUS XM RADIO INC.

By: 
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