



that Stern had 20 million listeners. The Howard Stern Show was the first radio show ever ranked number one in New York and Los Angeles simultaneously.

4. It is no exaggeration to say that Stern was the biggest star on radio. He is a unique talent who is credited with revolutionizing talk radio. He enjoyed unparalleled levels of celebrity, popularity, and influence in the radio industry. Stern was especially popular with males between the ages of 18 and 49, an important demographic for advertisers.

5. Stern had expanded into highly successful ventures in other media. He wrote two best-selling books, "Private Parts" and "Miss America." "Private Parts" was Simon & Schuster's fastest-selling book ever, and "Miss America" was then the fastest-selling book in publishing history. Stern starred as himself in the motion picture adaptation of "Private Parts," orchestrated the then fastest-selling soundtrack in motion picture history, and starred in the most-watched entertainment pay-per-view special of all time.

### **The Contract Negotiations**

6. In 2004, Sirius and XM Satellite Radio Inc. ("XM") each separately approached me about moving Stern to satellite radio when his existing contract with Infinity expired at the end of 2005. At the time, Sirius and XM were the only two satellite radio providers in the United States. Both companies had approached me before, but Stern and I had not felt then that satellite radio was sufficiently established to take a chance on them. Satellite radio offered certain advantages over terrestrial radio, such as coast-to-coast broadcasting, but Sirius and XM needed to convince listeners to pay for satellite radio even though they received terrestrial radio for free.

7. In 2004, satellite radio was beginning to look better to us, but it was still getting started and it was unclear to me if, and to what extent, Sirius and XM might succeed. Both companies were seeking to sign top talent and both companies coveted Stern. His fans had proved themselves to be loyal listeners, and Stern had demonstrated an ability to bring them to other media. There was nothing else like the Howard Stern Show on radio. Both companies realized that if they signed Stern, listeners who wanted his brand of talk radio would have to subscribe to Sirius or XM to get it.

8. Stern had the potential to create a huge subscriber-based business for whichever company got him. I was confident that if he moved to satellite radio, Stern would increase public awareness of satellite radio at a time when it was still struggling for recognition. I told executives at both Sirius and XM that they could spend hundreds of millions of dollars on advertising and promotion and not get the desired exposure and recognition that Stern would bring, if he became part of their company. Both Sirius and XM were eager to seize that opportunity.

9. I also told each company that if it wanted to get into business with Stern, its offer had to be better than and beyond comparison with anything the radio industry had known. At this time, Stern was unsure if he wanted to continue on the air when his contract with Infinity expired and was seriously thinking of retiring. Stern had been getting up daily at 4 a.m. for twenty years and was performing five-or-more-hour shows. I was keeping my eyes open for all opportunities for him, but with approximately two years left on his current contract, I did not want to put pressure on him to make a decision about what his future might be like down the road.

10. Both XM and Sirius courted Stern aggressively. As best as I can recall, Sirius approached me in the spring of 2004. As the year went on, it became clear to me that Sirius was especially intent on making a deal with Stern. Sirius, which had entered the satellite radio market after XM, was running a distant second in their two-company race. Sirius needed Stern badly, made no bones about it, and was worried that XM might sign him instead.

11. I had various meetings and conversations with Sirius representatives through the summer of 2004. As the communications progressed, Stern and I became intrigued with the possibility of him moving his show to Sirius. We liked what we saw of Sirius's corporate culture and believed that Sirius's management would support Stern's show and his efforts to develop new programming.

12. At Infinity, Stern had been treated as an employee who cashed a paycheck every two weeks. He was well paid, but he felt that he was not sharing enough in the revenue that his show was generating. Stern would not sign with Sirius if it meant continuing in this kind of relationship. If he would not be treated as a partner in the company, he was not interested. Stern was committed to creating this new business and helping Sirius grow, and he wanted to share in any success that the company enjoyed. I made clear to Sirius that this was the one mandate Howard passed along to me.

13. Sirius exhibited positive responses to my suggestions regarding compensation (guaranteed and potential) and creative approvals, and to the idea that Stern would be much more than a highly paid radio talent. Sirius and I always talked of Stern being a big part of the company who would be historically rewarded when it succeeded.

14. To get into business with Stern, Sirius assured us that he would share in any success the company enjoyed. Toward this end, it offered to pay Stern's production

company, One Twelve, performance-based compensation in the form of escalating stock awards. There would be two separate stock awards. One would be payable if Stern himself attracted a certain number of new subscribers to Sirius. The other would be payable if the total number of subscribers in any given year exceeded Sirius's internal estimates for that year, regardless of whether those subscribers were attributable to Stern.

15. I understood that Sirius was going to set the subscriber targets high enough so that if those benchmarks were reached, Sirius would have the revenue and be happy to pay the performance-based stock awards to One Twelve. We also discussed how subscribers would be counted. With respect to the stock awards based on Stern's efforts, the subscribers would have to be directly trackable to Stern (e.g., through a promotional code, dedicated web site, or phone number). In addition, Sirius did not want to pay awards based on listeners who were offered substantial incentives or rebates to subscribe, and it put language into the Agreement to make sure that such subscribers would not count. With respect to the separate stock awards based on the company's success, the company told me that all of its subscribers would be counted. There was no discussion about excluding any subscribers. Nor did Sirius suggest limiting the awards to subscribers who came to the company through its internal growth, as opposed to an acquisition or merger.

16. Sirius made a written offer to Stern in September 2004. On or about September 20, 2004, Scott Greenstein, Sirius's President, Entertainment and Sports, provided me with Sirius's written offer in the form of a draft letter agreement. Over the next two weeks, my in-house lawyer, Richard Basch, and I were in regular contact with representatives of Sirius, and in particular Doug Kaplan, who was negotiating on behalf of Sirius.

17. The final agreement was signed on or about October 1, 2004 (the "Agreement"). Stern signed the Agreement on behalf of One Twelve. I signed the Agreement as to a paragraph headed "Consulting Fee," and Sirius's CEO, Joseph Clayton, signed on behalf of the company. Stern, Kaplan, and I initialed each page of the Agreement. A true and correct copy of the Agreement is attached hereto as Exhibit A.

### **The Agreement**

18. In exchange for developing programming and making it available exclusively to Sirius for a five-year term, the Agreement provided for One Twelve to receive a signing bonus and annual compensation, payable in cash. The Agreement also provided for bonus stock compensation and, upon reaching certain thresholds, performance-based compensation and revenue sharing provisions. I was entitled to a consulting fee equal to [REDACTED] of all amounts (whether in cash or in stock) paid to One Twelve.

19. The final version of the Agreement provides for annual cash compensation in a fixed amount of [REDACTED] per year plus my [REDACTED] consulting fee. Previously, Sirius had agreed to pay One Twelve [REDACTED] annually plus my [REDACTED] fee. Sirius, however, expressed concerns that it might not have sufficient revenue to pay those amounts biweekly. It asked to defer [REDACTED] of this fixed compensation to the end of the contractual term so that it could reduce the annual compensation to [REDACTED] plus my [REDACTED]. Sirius agreed, however, that if Stern's signing was a success, it would pay the deferred amounts sooner. As a result, the Agreement provided that One Twelve and I would be entitled to receive this deferred compensation on an accelerated basis if:

either (a) Sirius acquires 1,000,000 HS-Generated Subscribers . . . or (b) the total number of Sirius subscribers exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for the applicable year by more than 1,000,000 subscribers.

20. As I understood it, the idea was that if Sirius could bring in one million additional subscribers, it would be assured of having sufficient revenue to pay the deferred compensation. This is, in fact, what happened.

21. As a way to ensure that Stern would share in Sirius's success, the Agreement also provided for two separate series of escalating performance-based stock awards. As agreed, these awards were payable to One Twelve if Sirius acquired a certain number of "HS-Generated Subscribers" (as defined in the Agreement) or a certain "total number of Sirius subscribers," regardless of whether those subscribers were HS-Generated Subscribers. The contract provision reads:

[One Twelve] shall receive a performance-based stock award of [REDACTED] if this Agreement remains in effect and, on or before December 31, 2010, either (i) Sirius has acquired a total of 2,000,000 or more HS-Generated Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 2,000,000 subscribers.

22. This provision is [REDACTED], with One Twelve being entitled to receive [REDACTED] if the total number of Sirius subscribers exceeded the "Siri Internal Estimate" by four million, six million, eight million, or ten million subscribers respectively.

23. I discussed with Sirius the all encompassing nature of the provision, and it was agreed that no subscribers would be excluded from these subscriber totals. Consistent with our discussions, the Agreement does not contain any restrictions or exclusions with respect to these subscribers; all of the company's subscribers are to be counted. As a result, I understood the phrase "total number of Sirius subscribers" to refer to all of the company's subscribers.

24. This was consistent with the purpose of the awards: to provide Stern with a share in the success of the company. It did not matter how these subscribers came into the company. They could come because of Stern's efforts, or they could have nothing to do with Stern. They could also come into Sirius as a result of a merger or an acquisition. Indeed, on a number of occasions, I suggested to Sirius that it might combine or merge with XM. Yet Sirius never sought to limit the performance-based stock awards to account for that possibility.

25. The Agreement also contains a paragraph headed "XM Merger" which provides that:

In the event Sirius merges with XM Satellite Radio, Sirius shall pay [One Twelve] a fee of [REDACTED], whereupon the HS Programs may be broadcast to all subscribers of the surviving company.

26. The [REDACTED] fee mentioned in this paragraph had nothing to do with the performance-based stock awards. This fee came about when Sirius wanted to reduce the annual compensation from [REDACTED] to [REDACTED]. I told Mark Rowan, a member of the Board of Directors of Sirius, that it would be tough for me to go back to Howard and ask him to accept an annual guarantee of [REDACTED]. I asked Mark Rowan if he could give Howard something in return for lowering the annual guarantee by [REDACTED] a year and making a contingent deferred payment. I suggested that if Sirius merged with XM, Sirius would give Howard an additional bonus. Mark Rowan and I agreed that it would be a [REDACTED] bonus payment plus my [REDACTED] consulting fee.

27. This payment was not intended to be, and no one ever suggested that it would be, the only form of compensation paid in the event of a merger or acquisition. Nor did anyone suggest that the merger fee would replace or reduce the performance-based stock awards. No one would have dared to suggest such a thing because everyone understood the mandate that

Stern be treated as a partner in the business and have a chance to share in its success, and I certainly was not about to trade performance-based stock awards that I thought would be worth [REDACTED] for a one-time payment of [REDACTED].

28. Following my discussion with Mark Rowan, Sirius drafted the “XM Merger” paragraph and inserted it into the Agreement. Although Sirius drafted a merger provision indicating that in the event Sirius and XM combined, all of the subscribers would be “subscribers of the surviving company,” it did not, as I have just explained, ask to adjust the performance-based stock awards to account for this possibility or seek to exclude any subscribers from the performance-based stock awards.

#### **Stern’s Signing Is a Huge Success for Sirius and Satellite Radio**

29. On October 6, 2004, it was announced that Stern would be joining Sirius when his contract with Infinity ended at the end of 2005. On the news of Stern’s signing, Sirius’s stock jumped 15.5% and Stern’s listeners started subscribing. On the day before we announced the agreement, Sirius reported that it had 674,459 subscribers. By the end of the year, Sirius reported that that number had nearly doubled to 1,143,258 subscribers.

30. Sirius continued to gain subscribers throughout 2005, even though Stern had not yet joined the company. It was clear that he was a big part of this success, even if the new subscribers could not yet be directly trackable to him. Indeed, in November 2005, Mel Karmazin, the new CEO of Sirius, predicted that Stern would “significantly contribute” to a blowout fourth quarter. As it turned out, Sirius reportedly added another 1.2 million subscribers that quarter, and had 3,316,560 subscribers by year’s end.

31. By the time Stern’s show premiered on Sirius’s platform on January 9, 2006, Sirius had already exceeded the estimates in the Agreement by more than

1 million subscribers. As I explained in paragraph 18 above, this entitled One Twelve to the stock compensation that had been deferred. Sirius paid this deferred compensation to One Twelve and paid me my [REDACTED] consulting fee.

32. Sirius's growth continued throughout 2006. By the end of 2006, Sirius reported that it had more than six million subscribers, surpassing its estimates by more than two million subscribers. In January 2007, Sirius paid One Twelve the first performance-based stock award and paid me my [REDACTED] consulting fee.

### **Sirius Acquires XM**

33. In 2008, Sirius acquired XM. Following the acquisition, Sirius paid One Twelve the [REDACTED] "merger fee" and paid me my [REDACTED] consulting fee. It also made the HS Programs available to all Sirius subscribers, including the Sirius subscribers who had been acquired from XM. I thought that Sirius would do this as part of its regular programming, but it decided to charge a premium for the HS Programs, creating a package for XM listeners called the "Best of Sirius," which featured the Howard Stern channels, among other programming.

34. Following Sirius's acquisition of XM, Sirius announced that it now had more than 18 million subscribers, and by year end, Sirius reported that it had more than 19 million subscribers. This exceeded the "Siri Internal Estimate" contained in the Agreement by more than 10 million subscribers. A true and correct copy of Sirius's July 29, 2008 press release announcing the completion of Sirius's acquisition of XM Satellite Radio Inc. is attached hereto as Exhibit B, and true and correct copies of the relevant portions of Sirius's 2008 Form 10-K filed with the Securities Exchange Commission ("SEC") are attached hereto as Exhibit C.

35. By the end of 2009, Sirius reported that the total number of Sirius subscribers had dipped slightly and was under 19 million subscribers (this still exceeded the "Siri Internal Estimate" contained in the Agreement by more than 8 million subscribers). By the end

of 2010, the last year of the Agreement, Sirius reported that the total number of Sirius subscribers surpassed 20 million, an all-time high. This exceeded the “Siri Internal Estimate” contained in the Agreement by more than 8 million subscribers. True and correct copies of the relevant portions of Sirius’s 2009 Form 10-K filed with the SEC are attached hereto as Exhibit D, and true and correct copies of the relevant portions of Sirius’s 2010 Form 10-K filed with the SEC are attached hereto as Exhibit E.

36. Throughout this period, Sirius publicly proclaimed that it had close to or more than 20 million subscribers. For example:

(a) In its 2009 Form 10-K, Sirius reported to the SEC, “[a]s of December 31, 2009, we had 18,772,758 subscribers. Our subscriber totals include subscribers under our regular and discounted pricing plans; . . . certain subscribers to SIRIUS Internet Radio and XM Online, our Internet services.” (emphasis added).

(b) On November 23, 2010, Sirius took out an ad in the New York Post boasting that Sirius XM had reached 20,000,000 subscribers. The ad appeared on the front and back pages and occupied two full pages of an insert in the middle of the paper. True and correct copies of the relevant pages of the November 23, 2010 edition of the New York Post are attached hereto as Exhibit F.

(c) In a December 9, 2010 press release announcing the re-signing of Stern, Sirius quoted Karmazin, who said, “Howard is a great talent and we are thrilled that he will continue to provoke, engage and entertain on SIRIUS XM. Our agreement is good news on all fronts — it is good for SIRIUS XM subscribers and good for SIRIUS XM stockholders. Howard forever changed radio and was instrumental in putting SIRIUS on the map when he first launched on satellite

radio. He is one of the few ‘one-name’ entertainers in the country and our 20 million subscribers are lucky to have him.” (emphasis added). A true and correct copy of Sirius’s December 9 press release is attached hereto as Exhibit G.

(d) On December 13, 2010, Sirius hosted an exclusive Paul McCartney concert at the world-famous Apollo Theater to celebrate reaching 20 million subscribers. Tickets were closed to the public, and were instead awarded to Sirius subscribers through promotions and call-in contests across Sirius’s on-air channels. The concert was broadcast on one of Stern’s channels and several other channels.

(e) On February 15, 2011, Sirius announced its 2010 financial results. The company boasted that it had achieved a record number of 20.2 million subscribers, and that it had enjoyed revenue of \$2.82 billion. The company reported that “[e]nding subscribers as of December 31, 2010 were 20,190,964, up 8% from the 18,772,758 subscribers reported as of December 31, 2009.” (emphasis added). A true and correct copy of Sirius’s February 15 press release is attached hereto as Exhibit H.

### **Sirius Refuses to Pay the Performance-Based Stock Awards**

37. In each year of Stern’s Agreement, Sirius exceeded its own internal estimates by more than two million subscribers. As I noted above, in January 2007, Sirius paid One Twelve the performance-based stock award for the 2006 calendar year and also paid me my consulting fee. But, with the exception of this initial payment, Sirius has failed to pay One Twelve or me the performance-based compensation that we are owed under the Agreement.

38. Howard and I had been discussing how the acquisition would bring large numbers of new subscribers to Sirius, entitling us to the stock awards based on Sirius subscribers. In 2009, Richard Basch contacted Sirius to confirm that, based on the acquisition, the new subscriber numbers had triggered the payment of the awards. Although Richard did not get a satisfactory response from Sirius, Howard and I decided not to press the issue at that time or send Sirius a formal demand for payment because of Sirius's then-precarious financial condition. There were many reports that Sirius was struggling with debt and that Sirius's ability to attract subscribers was being hurt by the downturn the economy was experiencing. Howard and I were concerned that a formal demand for payment might interfere with the company's ability to find new financing, and given the company's cash poor position, might even cause it to fold.

39. In 2009, Sirius obtained financing from Liberty Media and, by 2010, there were reports that the company's financial situation had stabilized. In early 2010, I asked my Chief Financial Officer to contact Sirius about the performance-based compensation that Sirius now owed for 2008 and 2009. Sirius claimed that no compensation was due.

40. I next asked Richard Basch to write to Sirius's General Counsel, asking for an explanation as to why the performance-based compensation was not paid for either 2008 or 2009. Sirius again refused to pay. Its lawyer referred to our conversations of the previous year, and expressed surprise that Richard was seeking an explanation for Sirius's failure to pay. Sirius's lawyer claimed that the subscribers on the XM platform did not count toward the total number of Sirius subscribers and pointed out that we had already received the "merger bonus."

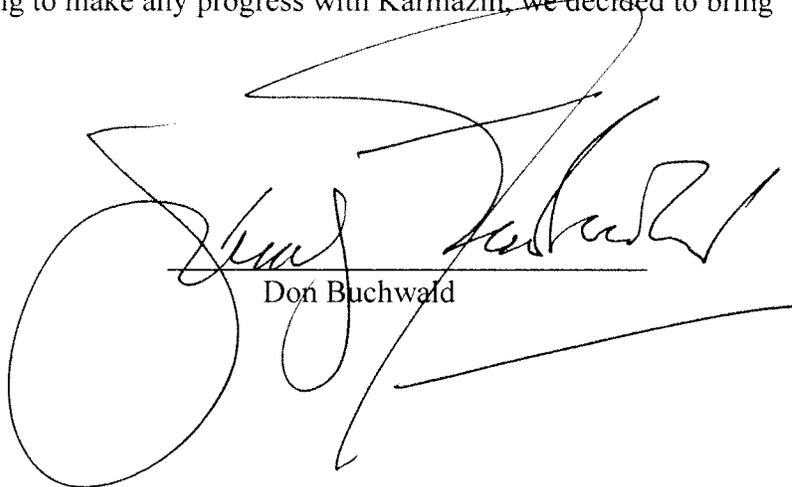
41. Sirius's position is contrary to what we had agreed. As I have explained, it was agreed that the performance-based stock awards would be based on the total number of

subscribers and that no subscriber would be excluded, regardless of how they came into the company. Sirius itself has looked to these subscribers as a measure of its success. When Sirius issues press releases and makes SEC filings, it takes credit for all of its subscribers, including those on the XM platform, but when it is time to pay One Twelve what it promised, Sirius tries to exclude about half those subscribers. We never discussed any such exclusion, and there is no such exclusion in our Agreement.

42. The Agreement refers to “the total number of Sirius subscribers.” Based on our discussions and the fact that the word Sirius is defined in the Agreement to be “Sirius Satellite Radio Inc.,” the company that is now Sirius XM Radio Inc., I read the Agreement to refer to all of the company’s subscribers, regardless of which platform they are on and regardless of how they came into the company. This is what the Agreement was supposed to mean so that it could accomplish its purpose of providing Stern with a share in the company’s success, and this is what it does, in fact, mean.

43. Sirius’s CEO, Mel Karmazin, was not at Sirius when I negotiated the Agreement with the company. The CEO at that time was Joseph Clayton. Scott Greenstein has told me a number of times that Karmazin is unhappy with the size of the Agreement that was negotiated and agreed to by his predecessor, and that Karmazin has said that if he had been CEO at the time, he would have given Stern much less and not given into all our demands. He might have tried to do that, but in that case, as I told Scott Greenstein more than once, Sirius would not have gotten Stern.

44. During the negotiation of Stern's new agreement, I attempted to discuss the performance-based stock awards with Karmazin. Karmazin, however, refused to discuss any resolution of this matter. I went ahead and got Howard's new contract done, even though the non-payment of the performance-based stock awards remained unresolved. Later, when Howard and I realized that we were not going to make any progress with Karmazin, we decided to bring this lawsuit.



Don Buchwald

Sworn to before me this  
16 day of June, 2011

Richard Basch  
Notary Public

RICHARD BASCH  
Notary Public, State of New York  
No. 02BA5016414  
Qualified in New York County  
Commission Expires 8-9-13