

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
:
:
ONE TWELVE, INC. and DON BUCHWALD, :
:
: Index No. 650762/2011
:
Plaintiffs, :
:
: Motion Sequence 001
:
- against - :
:
: **DEFENDANT’S STATEMENT OF**
:
: **MATERIAL UNDISPUTED FACTS**
:
: **IN SUPPORT OF ITS MOTION FOR**
:
: **SUMMARY JUDGMENT**
:
:
:
-----X

Pursuant to Rule 19-a of the Rules of the Commercial Division of this Court, defendant Sirius XM Radio Inc. (“Sirius”), by its attorneys, Kramer Levin Naftalis & Frankel LLP, hereby submits the following statement of material facts as to which there is no genuine issue to be tried, in support of its motion for summary judgment.

The Parties

1. One Twelve, Inc. (“One Twelve”) is a corporation organized under the laws of the State of New York with its principal place of business at 111 West 40th Street, New York, New York 10018. (Ex. B ¶ 8; Ex. C ¶ 8.)¹
2. One Twelve produces and distributes the Howard Stern Show. (Ex. B ¶ 8; Ex. C ¶ 8.)
3. Don Buchwald is Howard Stern’s agent. (Ex. B ¶ 9; Ex. C ¶ 9.)

¹ References to “Ex. ___” are to the exhibits attached to the Affidavit of Thomas D. Barry, sworn to May 11, 2011 (“Barry Aff.”).

4. Sirius is a corporation organized under the laws of the State of Delaware with its principal place of business at 1221 Avenue of the Americas, New York, New York 10020.

(Ex. B ¶ 10; Ex. C ¶ 10.)

5. At all relevant times until August 5, 2008, Sirius was known as Sirius Satellite Radio Inc. (Ex. E at 3-4.)

6. Sirius changed its corporate name from Sirius Satellite Radio Inc. to Sirius XM Radio Inc. on August 5, 2008, shortly after the effective date of a merger (the “Merger”) of a subsidiary of Sirius with XM Satellite Radio Inc. (“XM”). (Ex. E at 3-4.)

7. This action arises out of an agreement entered into on October 1, 2004 between One Twelve and Sirius, with Buchwald a party with respect to the “Consultant Fee” provision (the “Agreement”). (Ex. A.)

Background on Satellite Radio

8. Sirius and XM each operate satellite digital audio radio services. (Ex. D ¶ 2.)

9. Satellite radio offers digital quality broadcasts throughout the territorial United States via the use of satellites. (Ex. D ¶ 2.)

10. In 1997, Sirius obtained a license from the Federal Communications Commission (“FCC”) for nationwide broadcasting of a satellite digital audio radio service (“Sirius Service”). (Ex. D ¶ 14.)

11. In 1997, XM obtained a license from the FCC for nationwide broadcasting of a satellite digital audio radio service (“XM Service”). (Ex. D ¶ 8.)

12. Sirius and XM are the only two FCC-licensed satellite digital audio radio services. (Ex. D ¶ 20.)

13. XM commenced the XM Service in September 2001. (Ex. D ¶ 9.)

14. Sirius commenced the Sirius Service in February 2002. (Ex. D ¶ 15.)

15. At the time Sirius entered into the Agreement and throughout the Agreement's term, subscribers to the Sirius Service paid subscription fees to Sirius for the Sirius Service and agreed to Sirius' Terms and Conditions. (Barry Aff. ¶ 4; Ex. O.)

16. At the time Sirius entered into the Agreement and throughout the Agreement's term, XM subscribers paid subscription fees to XM for the XM Service and agreed to XM's Customer Agreement (later called Terms and Conditions). (Barry Aff. ¶ 5; Ex. P.)

17. When the Agreement was entered into and throughout the term of the Agreement, a Sirius subscriber needed a Sirius-compatible radio to receive the Sirius Service. (Ex. D ¶ 25.)

18. When the Agreement was entered into and throughout the term of the Agreement, an XM subscriber needed an XM-compatible radio to receive the XM Service. (Ex. D ¶ 25.)

19. When the Agreement was entered into and throughout the term of the Agreement, a Sirius radio could not receive the broadcast signal from XM satellites, and an XM radio could not receive the broadcast signal from Sirius satellites. (Ex. D ¶ 25.)

20. Prior to the Merger, Sirius and XM subscribers received different content, with major differences in the talk and sports programming. Only XM offered Major League Baseball play-by-play broadcasts. Only Sirius offered the National Football League. XM offered Oprah Winfrey, while Sirius offered Martha Stewart. XM featured Opie & Anthony. Sirius exclusively offered the Howard Stern Show. (Ex. D ¶¶ 9, 15-16.)

21. Prior to the Merger, XM subscribers did not receive the Howard Stern Show as part of their XM service. (Barry Aff. ¶ 9.)

The Merger

22. The Merger became effective on July 28, 2008. (Ex. B ¶ 57; Ex. C ¶ 57.)
23. The Merger was structured such that Sirius issued 4.6 shares of its stock for each share of XM's stock. (Ex. D n. 71)
24. Based on the closing price of Sirius' common stock on February 16, 2007, the last trading day before the public announcement of the Merger, the 4.6 exchange ratio in the Merger represented approximately \$17.02 in value for each share of XM common stock, a premium from its then trading value of \$13.98. In the aggregate, based on the February 16, 2007 closing price of Sirius common stock, Sirius paid approximately \$5.6 billion for the stock of XM. (Barry Aff. ¶ 8.)
25. After the Merger and throughout the balance of the term of the Agreement, Sirius subscribers continued in their contractual relationships with Sirius, paying subscription fees to Sirius and receiving the Sirius Service on their Sirius radios; XM subscribers continued in their contractual relationship with XM, paying subscription fees to XM and receiving the XM Service on their XM radios. (Barry Aff. ¶ 7; Exs. R & S.)
26. After the Merger, the two companies began to broadcast substantially identical music programs (e.g., '60s Hits) and introduced certain packages of sports and talk programming. (Barry Aff. ¶ 10.)
27. Sirius offered for an extra fee of \$4.04 per month (i.e., \$16.99 per month verses \$12.95 per month for basic service) a variety of "Best of" XM packages, which allowed Sirius subscribers to select to receive via the Sirius system (that is, broadcast via the Sirius satellites to Sirius radios) certain exclusive XM programs. (Barry Aff. ¶ 10; Ex. F.)

28. XM similarly offered for the same additional fee “Best of” Sirius packages, which allowed XM subscribers to select to receive via the XM system four months after the merger certain of Sirius’ exclusive programs, including the choice of the NFL and the Howard Stern Show. (Barry Aff. ¶ 11.)

29. From the time of the Merger in July 2008 through December 31, 2010, Sirius had in the range of 9.0 to 9.7 million subscribers, and XM had in the range of 9.7 to 10.4 million subscribers. (Barry Aff. ¶ 12.)

30. At most, the “Best of” packages had only approximately 1 million Sirius subscribers and approximately 1 million XM subscribers. (Barry Aff. ¶ 13.)

31. The Howard Stern show could be heard only by those XM subscribers who paid for a “Best of” Sirius package (approximately 9% of all XM subscribers in 2010) and selected a package with the Howard Stern Show. At least 91% of XM subscribers did not receive the Howard Stern Show. (Barry Aff. ¶ 14.)

32. XM continued to operate under the name XM Satellite Radio Inc. as a separate corporation wholly-owned by Sirius through the term of the Agreement. (Barry Aff. ¶ 6; Ex. G.)

33. On January 12, 2011, XM was rolled up into Sirius. (Barry Aff. ¶ 6; Ex. Q.)

Subscriber Data

34. The number of subscribers to the Sirius Service and the number of subscribers to the XM Service on December 31 of 2003 through 2010, in each case drawn from the companies’ annual financial reports filed with the SEC, are set forth in the chart below²:

² Barry Aff. ¶ 3.

<u>Date</u>	<u>Number of Sirius Subscribers</u>	<u>Number of XM Subscribers</u>
December 31, 2003	261,061	1,360,228
December 31, 2004	1,143,258	3,229,124
December 31, 2005	3,316,560	5,932,957
December 31, 2006	6,024,555	7,628,552
December 31, 2007	8,321,785	9,026,837
December 31, 2008	9,153,115	9,850,741
December 31, 2009	9,023,658	9,749,100
December 31, 2010	9,753,243	10,437,721

The Agreement

35. In 2004, the Howard Stern Show was being syndicated by Infinity Broadcasting Corporation over terrestrial radio (e.g., FM radio in cars, offices and homes) under a contract expiring at the end of 2005. (See Ex. B ¶ 16; Ex. C ¶ 16.)

36. Stern was a world-renowned radio and entertainment personality with the potential to accelerate the growth of Sirius. (Ex. B ¶ 12; Ex. C ¶ 12.)

37. In 2004, Sirius entered into discussions with Stern and Buchwald about moving the Howard Stern Show from terrestrial radio to Sirius once his then-existing contract with Infinity Broadcasting Corporation expired at the end of 2005. (Ex. B ¶ 16; Ex. C ¶ 16.)

38. A true and accurate copy of the Agreement is attached as Exhibit A to the Barry Aff. (Ex. A.)

39. Stern executed the Agreement on behalf of One Twelve. (Ex. A at 10.)

40. Stern also executed the Agreement on his own behalf under language that states:

To induce Sirius to enter into the foregoing Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, I hereby (i) confirm the foregoing Agreement, the grant of all

rights granted therein and the authority and right of [One Twelve] to enter into the foregoing Agreement with respect to me; (ii) agree to perform all services, obligations and undertakings required of me as specified in such Agreement; (iii) personally guarantee the performance by [One Twelve] of all of its obligations under such Agreement; and (iv) agree that all payments to or on behalf of [One Twelve] shall discharge any obligations of Sirius to me in connection with the rights granted in such Agreement.

(Exh. A at 10.)

41. Buchwald executed the Agreement as to the paragraph headed

“Consulting Fee.” (Ex. A at 10.)

42. Stern and Buchwald initialed each page of the Agreement, as did Douglas

Kaplan, a Senior Vice President of Sirius, on behalf of Sirius. (Ex. A.)

43. The Agreement’s term ran through December 31, 2010. (Ex. A at 8.)

44. Exhibit A to the Agreement, which is entitled “Subscriber Estimates,” contains “Siri Internal Estimates” for the years 2004 through 2010. The Siri Internal Estimates were based in part on subscriber projections made by industry analysts at various large financial institutions, which are identified on Exhibit A below the Siri Internal Estimates. (Ex. A.)

45. These analysts reports separately state the projected numbers of Sirius subscribers and XM subscribers. (Ex. H at 94, Fig 91; Ex. I at 68, Table 44.)

46. On October 6, 2004, Sirius announced that that it had entered into the Agreement with Stern and that the Howard Stern show would air on Sirius beginning on January 1, 2006. (Ex. J.)

47. The Howard Stern Show premiered on Sirius in January 2006 and was broadcast in accordance with the Agreement through December 31, 2010. (Ex. B ¶ 53; Ex. C ¶ 53.)

48. Sirius paid more than [REDACTED] in cash to One Twelve and more than [REDACTED] to Buchwald as a Signing Bonus and Annual Cash Compensation due bi-weekly for the term of the Agreement. (Barry Aff. ¶ 15.)

49. Pursuant to the Bonus Stock Compensation provision of the Agreement, Sirius set aside [REDACTED] shares of its common stock (valued initially at [REDACTED]) upon signing of the Agreement. On December 31, 2005 there were 3,316,560 Sirius subscribers, exceeding by more than 1,000,000 the Siri Internal Estimate of 2,256,000 for that year. Sirius delivered these [REDACTED] shares to One Twelve in January 2006 (within two weeks of the first airing of the Howard Stern Show) and [REDACTED] shares to Buchwald. (Barry Aff. ¶ 16; Ex. K at 2.)

50. Between the date of the Agreement and January 2006, the market value of these shares had more than doubled. (Ex. L.)

51. On January 9, 2007, Sirius delivered to One Twelve [REDACTED] shares (valued at [REDACTED]) and [REDACTED] shares to Buchwald (valued at [REDACTED]) pursuant to the Performance Based Compensation provisions of the Agreement because the condition precedent for the first Performance Based Compensation award had been satisfied (i.e., more than 2 million Sirius subscribers above the Siri Internal Estimate subscriber target for 2006). (Barry Aff. ¶ 17; Ex. M at 2.)

52. In August 2008, Sirius paid [REDACTED] to One Twelve and [REDACTED] to Buchwald due under the Agreement's XM Merger provision. (Barry Aff. ¶ 18; Ex. B ¶ 58; Exh. C ¶ 58.)

53. One Twelve and Stern concede that Sirius performed all of its obligations under the Agreement, except for the alleged breach stated in the Complaint.

54. Currently, Sirius broadcasts the Howard Stern Show under a new five-year contract effective January 1, 2011. (Ex. N.)

Dated: New York, New York
May 11, 2011

KRAMER LEVIN NAFTALIS & FRANKEL LLP

By: /s/ Gary P. Naftalis

Gary P. Naftalis
Michael S. Oberman
Peter A. Abruzzese
Jared I. Heller
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100 (phone)
(212) 715-8000 (fax)
gnaftalis@kramerlevin.com
moberman@kramerlevin.com
pabruzzo@kramerlevin.com
jheller@kramerlevin.com

Attorneys for Defendant Sirius XM Radio Inc.