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

ONE TWELVE, INC. and DON BUCHWALD, Plaintiffs, - against - SIRIUS XM RADIO INC., Defendant.	Index No. 650762/2011 Motion Sequence 001

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiffs' opposition memorandum begins and ends with trite rhetoric accusing Sirius of taking advantage of Howard Stern. (Pl. Mem. 1-2, 24-25). The rhetoric is just plain wrong. Sirius complied in all respects with the unambiguous language of the Agreement. It is undisputed that—over the term of the Agreement—Sirius paid One Twelve (Stern's production company) over [redacted] dollars in cash and shares of Sirius common stock and paid Don Buchwald (Stern's agent) over [redacted] dollars in cash and shares of Sirius common stock. That is all they were due under the Agreement.

Putting aside plaintiffs' rhetoric, the opposition papers confirm that there is one issue on this motion: whether, in counting the "total number of Sirius subscribers" under the Performance Based Compensation provisions of the Agreement, the 9-plus million XM subscribers should be treated as "Sirius subscribers" following the Sirius/XM merger. Sirius' moving memorandum provided five complementary reasons why the unambiguous language of the Agreement does not include XM subscribers within the words "Sirius subscribers." (Sirius Mem. 2-3, 12-21). Plaintiffs' opposition leaves Sirius' interpretation of the unambiguous language unscathed. (*See* Point I, below).

Plaintiffs assert that the Agreement "is clear on its face" in favor of them (Pls. Mem. 1), but their opposition papers are largely consumed by extrinsic evidence and arguments applicable only to a contract that is ambiguous. Their extrinsic evidence should not be considered because the Agreement is unambiguous. To the extent plaintiffs' extrinsic evidence and related arguments are considered, the Court will find them to be comprised of errors of law, inadmissible evidence, assertions of facts not material to this motion, and distortions of the Agreement's plain language. Plaintiffs' request for discovery lacks a showing of any need for

that discovery and is merely an attempt to forestall enforcement of the Agreement's plain language. (*See* Point II, below).

The opposition papers include Stern's refrain that he did not want to be an employee "who cashed a paycheck every two weeks" but rather he wanted to be "partners" with Sirius. (*See, e.g.*, Stern Aff. ¶¶ 7-8). On its face, the Agreement is an exclusive *license* to Sirius for broadcasting the Howard Stern Show and not a partnership agreement. (Barry Aff. Ex. A at 1). In all events, the paychecks Stern was supposedly unhappy to cash bi-weekly added up to [redacted] for each year of the five-year Agreement. And it is also undisputed that One Twelve received [redacted] shares of Sirius common stock in January 2006 when the number of Sirius subscribers triggered payment under the Agreement's Bonus Stock Compensation provision (*see* Sirius Mem. 6) and received another [redacted] shares of Sirius common stock in January 2007 when the number of Sirius subscribers triggered the first award under the Performance Based Compensation provisions (*id.*). In total, by early January 2007 One Twelve had received [redacted] shares (and Buchwald had received [redacted] shares). They were already sharing in the success of Sirius and—if they kept the stock—they stood to benefit from the continued growth of Sirius, beyond their big guaranteed cash payments.

ARGUMENT

I. THE UNAMBIGUOUS LANGUAGE OF THE AGREEMENT COMPELS DISMISSAL OF THE COMPLAINT

Sirius presents a simple argument. The plain language of the Agreement shows that the words "Sirius subscribers" referred to those persons who had contracted with Sirius for its subscription-based satellite radio service ("Sirius Service"), and were a different group of persons from those who contracted for the *competing* XM satellite radio service ("XM Service") that did not broadcast the Howard Stern Show. This construction of the Agreement reads the

words "Sirius subscribers" consistent with the dictionary meaning of "subscriber" (*see* Sirius Mem. 13) and with the actual persons who subscribed to the Sirius Service (and not the XM Service) on October 1, 2004. Plaintiffs do not dispute the dictionary definition, and they concede that "[a]t the time the Agreement was drafted, Sirius and XM were two unrelated companies." (Pl. Mem. 13 n. 3).

Sirius' construction also ties together the words "Sirius subscribers" with the "Siri Internal Estimates" in Exhibit A to the Agreement ("SIRI" being Sirius' NASDAQ symbol). Under the Performance Based Compensation provisions, an award became due if "the total number of Sirius subscribers at the end of any calendar year exceeds the 'Siri Internal Estimate' year-end subscriber target set forth for such year by more than [2, 4, 6, 8, or 10 million] subscribers." (Barry Aff. Ex. A at 2). The Siri Internal Estimates were therefore the year-end subscriber targets against which One Twelve's and Buchwald's entitlement to Performance Based Compensation was measured. Sirius' memorandum (at 3, 15-16, 19-21) explained and emphasized the importance of the Siri Internal Estimates. Plaintiffs' passing mention of the Siri Internal Estimates (Pl. Mem. 18) misses the key point: that the assumptions underlying the Sirius Internal Estimates confirm the parties' understanding of which persons were to be counted as Sirius subscribers.

The Siri Internal Estimates were indisputably based on projections of subscribers to the Sirius Service made *before* the Agreement was signed and announced (i.e., projected growth *without* the Howard Stern Show being broadcast by Sirius). These estimates did not include projected growth of XM subscribers (even though estimates of growth in the number of subscribers to the XM Service were available at the time). (*See* Sirius Mem. 20) (listing projections of XM subscribers for 2005-2010). It would be illogical to conclude that the

parties—having agreed in the Performance Based Compensation provisions to thresholds of 2, 4, 6, 8 and 10 million Sirius subscribers above the year-end Siri Internal Estimates—intended that all XM subscribers be counted for Performance Based Compensation upon a merger without making an adjustment to the Siri Internal Estimates to factor in the projected number of XM subscribers over the term of the Agreement. Indeed, plaintiffs concede (Pl. Mem. 4) that the number of XM subscribers on day one of the Agreement was already at the level necessary to trigger the first award of [redacted] in shares for One Twelve and [redacted] for Buchwald were those XM subscribers to be counted as "Sirius subscribers."

Sirius' construction is supported further by the XM Merger provision. The parties anticipated the possibility of a Sirius/XM merger, and the Agreement contains the parties' *quid pro quo*—that "[i]n the event Sirius merges with XM Satellite Radio, Sirius shall pay [One Twelve] a fee of [redacted], whereupon the HS Programs may broadcast to all subscribers of the surviving company." (Ex. A at 8). That is the full extent of Sirius' agreement to pay One Twelve and/or Buchwald in the event of a Sirius/XM merger: a simple statement granting the right to broadcast the content to "all subscribers of the surviving company." No words in the Agreement say that One Twelve and Buchwald were to also receive Performance Based Compensation counting XM subscribers after a Sirius/XM merger. *See Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475, 775 N.Y.S.2d 765, 767-68 (2004) ("[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"). And, as shown in Sirius' memorandum (at 16-17), the wording of the XM Merger provision is significant. In referring to subscribers after a merger, the XM Merger provision uses the phrase "all subscribers of the surviving company"; it does not say all "Sirius subscribers."

Plaintiffs argue (Pl. Mem. 1, 2, 6, 17) that the Agreement did not "exclude" XM subscribers in the Performance Based Compensation provisions, but there was no need to do so: on October 1, 2004, the words "Sirius subscribers" meant subscribers to the Sirius Service. It is far more significant that the Agreement does not state in words or substance that, in the event Sirius completed a merger with XM, XM subscribers would be counted as "Sirius subscribers"—especially when the XM Merger provision obligated Sirius to pay [redacted] to One Twelve and [redacted] to Buchwald upon such a merger. *See, e.g., Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157, 468 N.Y.S.2d 649, 654 (2d Dep't 1983) ("An obligation undertaken by one of the parties that is intended as a promise or agreement should be expressed as such, and not left to implication."). Under plaintiffs' "specious reasoning," "parties to a contract must not only agree on what they are obligated to do, but, at their peril, must enumerate and rule out every matter that they are not obligated to do." *Monarch Cortland v. Columbia Cas. Co.*, 165 Misc. 2d 98, 101, 626 N.Y.S.2d 426, 428 (Sup. Ct. Cortland Cty. 1995), *aff'd as modified,* 224 A.D.2d 135, 138, 646 N.Y.S.2d 904, 906 (3d Dep't 1996) ("An express provision in the policy will give rise to such an obligation [to pay preverdict interest], . . . but the absence of an express provision in the policy at issue clearly establishes the parties' intent that the policy not cover preverdict interest") (internal citation omitted).

Unable to find support in the words of the Agreement, plaintiffs repeatedly grasp for the rule of *contra proferentum*. (Pl. Mem. 6, 13, 14). But this rule of construction against the draftsman has no place where, as here, the contract language is unambiguous and where the case presents a bargain negotiated by sophisticated parties. *See Coliseum Towers Associates v. County of Nassau*, 2 A.D.3d 562, 565, 769 N.Y.S.2d 293, 297 (2d Dep't 2003) ("The contra proferentem doctrine was inapplicable to the subject lease since the record demonstrates that

CTA participated in negotiating its terms"). The opposition papers themselves preclude any reliance on this doctrine: they boast that Buchwald has 50 years of experience in the entertainment industry, they employ a barrage of adjectives to describe the greatness of Howard Stern, and they recount negotiations between the parties, emphasizing the negotiating power that One Twelve possessed where Sirius and its then-sole competitor, XM, were both trying to land Stern. (*See, e.g.,* Buchwald Aff. ¶¶ 2, 4-10).

Plaintiffs assert that "[t]he parties considered the possibility that subscribers might come into Sirius through a merger or an acquisition." (Pl. Mem. 16). But the XM Merger provision does not refer to subscribers "com[ing] into Sirius through a merger" and plainly does not contain an agreement to count XM subscribers for purposes of the Performance Based Compensation provision. *See Iconoclast Advisers LLC v. Petro-Suisse Ltd.,* 2010 WL 2218406, at *6 (N.Y. Sup. Ct. N.Y. Cty. May 14, 2010) (Fried, J.) (where agreement defined transaction between specific parties, court could not rewrite the agreement to include entities related to the parties because "[t]his would make a new engagement agreement between the parties, one would be much broader than that to which the parties agreed. . . . If the parties had intended to make the engagement apply to any entities related to the specifically names parties, they could have negotiated and included such a provision, but they did not do so.").

Plaintiffs then argue that "[i]t makes no difference" to Sirius how subscribers are acquired. (Pl. Mem. 18). But it is undisputed that Sirius completed the merger by paying XM shareholders common stock of Sirius valued at $5.6 billion in exchange for their XM shares (using the closing price of Sirius' stock the day before the merger was announced and including a premium of $3.04 over XM's closing price that same day). (See Pl. 19-a Counterstatement at 5 ¶ 24). Plaintiffs themselves point out how, post-merger, Sirius faced substantial debt that could

"possibly cause it to fold." (Pl. Mem. 9-10 n.2). The Agreement simply did not obligate Sirius to turn over [redacted] in Sirius common stock to One Twelve and Buchwald upon completion of this extraordinary transaction.

And were the Court to read "Sirius subscribers" to include all XM subscribers after the merger as plaintiffs urge (Pl. Mem. 12), this reading would render the XM Merger provision meaningless. If all subscribers, post-merger, are treated as "Sirius subscribers," then there would be no need for the consent given in the XM Merger provision for "all subscribers of the surviving company" to receive the Howard Stern Show conditioned on payment of the [redacted] because the Agreement already licensed Sirius to broadcast the Howard Stern Show to its subscribers. And if the XM subscribers are considered to be "Sirius subscribers" for the Performance Based Compensation provisions, there would be no logic in paying One Twelve an additional [redacted] for a right Sirius would automatically have and as to which it would have paid heavily under the Performance Based Compensation provisions. Plaintiffs' reading of the Agreement must be rejected, since it requires the Court to render superfluous the language of the XM Merger provision. *See UBS Securities LLC v. Red Zone LLC*, 77 A.D.3d 575, 579, 910 N.Y.S.2d 55, 59 (1st Dep't 2010) ("a contract should not be interpreted so as to render any of its clauses meaningless.").[1]

[1] Plaintiffs also trip over themselves in responding to a hypothetical Sirius included in its moving memorandum (Sirius Mem. 20 n. 5)—the possibility that Sirius merge with another subscriber-based media company, Dish TV, which provides satellite television services and also music channels. Plaintiffs argue that this case is about radio subscribers and not television subscribers (Pl. Mem. 19-20), but this distinction does not save their reading of the Agreement. They argue that "Sirius subscribers" means all subscribers of the corporate entity now named Sirius XM Radio Inc., no matter how those subscribers are obtained. Under that reading, if Sirius merged with Dish TV, all subscribers of Sirius and its subsidiaries would count for the Performance Based Compensation provision, and One Twelve and Buchwald would reap a windfall because of the extraordinary merger transaction by Sirius with Dish TV—an absurd result. *See, e.g., Greenwich Capital Fin. Products, Inc. v. Negrin,* 74 A.D.3d 413, 415, 903 N.Y.S.2d 346, 348

In sum, XM subscribers do not count as "Sirius subscribers" for purposes of the Performance Based Compensation provisions of the Agreement. It is undisputed that the number of Sirius subscribers (i.e., subscribers to the Sirius Service) did not exceed the Siri Internal Estimates for calendar years 2007 through 2010 by the thresholds of 4, 6, 8 and 10 million subscribers necessary to satisfy the conditions precedent to Sirius' obligation to pay Performance Based Compensation awards to One Twelve and Buchwald after the award paid in January 2007 with respect to calendar year 2006. In fact, the number of Sirius subscribers at the end of 2009 and 2010 did not even reach the Siri Internal Estimates for 2009 and 2010 (let alone exceed them). Under the unambiguous terms of the Agreement, One Twelve and Buchwald did not earn the amounts they seek in this action.

II. PLAINTIFFS' EXTRINSIC EVIDENCE IS ENTITLED TO NO WEIGHT

Plaintiffs spend most of their opposition discussing extrinsic evidence that has no place here because the Agreement is unambiguous. When an agreement is unambiguous, a party may not rely on parol evidence to attempt to create an ambiguity in order to defeat a summary judgment motion. *See Triax Capital Advisors, LLC v. Rutter*, 83 A.D.3d 490, 492, 921 N.Y.S.2d 54, 56 (1st Dep't 2011); *see also Bazin v. Walsam, 240 Owner, LLC*, 72 A.D.3d 190, 194-95, 894 N.Y.S.2d 411, 414 (1st Dep't 2010) (absence of provision was not ambiguity, but merely omission).

Even if the Agreement were ambiguous (which it is not), the extrinsic evidence offered by plaintiffs is mostly inadmissible and of no force. First, plaintiffs offer rank hearsay. The most egregious example appears in paragraph 38 of Buchwald's affidavit, which alleges that

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(1st Dep't 2010) (a "contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties") (citations omitted).

"[i]n 2009," Don Buchwald & Associates attorney "Richard Basch contacted Sirius to confirm that, based on the acquisition, the new subscriber numbers had triggered the payment of the awards." But plaintiffs submit no affidavit from Basch, even though Basch *notarized* the Buchwald and Stern affidavits. Plaintiffs compound their use of hearsay by purporting to describe the contents of correspondence between Basch and Sirius' General Counsel (Buchwald Aff. ¶ 40) and then failing to attach the writings themselves.

Second, plaintiffs offer vague allegations of no probative force, like "I discussed with Sirius the all encompassing nature" of the performance based stock provision (Buchwald Aff. ¶ 23) and "I communicated to Sirius that if I moved my show to Sirius, we had to be partners." (Stern Aff. ¶ 8). These assertions do not identify a person at Sirius with whom the affiant supposedly spoke nor a date and time for such alleged discussion. Glaringly absent is a statement asserting under oath that a specific officer of Sirius ever stated during negotiations in words or substance that the XM subscribers would be treated as Sirius subscribers for the Performance Based Compensation provisions upon any merger. Instead, plaintiffs offer their subjective understanding, like Buchwald stating "I understood the phrase 'total number of Sirius subscribers' to refer to all of the company's subscribers.'" (Buchwald Aff. ¶ 23). One side's subjective understanding cannot prove the parties' mutual intent. *See Slattery Skanska Inc. v. Am. Home. Assur. Co.*, 67 A.D.3d 1, 14, 885 N.Y.S.2d 264, 274 (1st Dep't 2009) ("That one party to the agreement may attach a particular, subjective meaning to a term that differs from the term's plain meaning does not render the term ambiguous.").[2]

[2] Stern states that *after* the Agreement was announced, he told a gathering of Sirius executives that Sirius "would be so successful that we would acquire XM." (Stern Aff. ¶ 14). Such a post-Agreement statement proves nothing. The opposition papers do not even allege that a similar statement was made *before* the Agreement was signed.

To justify their use of extrinsic evidence, plaintiffs wrongly argue that Sirius has submitted "extrinsic evidence in support of its motion." (Pl. Mem. 1, 20-21). Sirius primarily relies on the language of the Agreement itself, but offered evidence on two subjects—neither of which constitutes extrinsic evidence of the parties' intent. Sirius submitted evidence of events post-dating the Agreement, most particularly details about the merger and its aftermath. That is not extrinsic evidence—it is evidence pertinent to whether events triggered the Performance Based Compensation provisions. And Sirius offered evidence concerning the background circumstances in which the parties negotiated; plaintiffs concede that the cases relied upon by Sirius hold that a court may consider evidence "used to provide background." (Pl. Mem. 20 n. 7). *See* 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 32:7 (4th ed. 1999) ("In theory, the circumstances surrounding the execution of a contract may always be shown and are always relevant to a determination of what the parties intended by the words they chose.").

Plaintiffs emphasize the undisputed fact that, after the merger, Sirius publicly reported in the aggregate the number of subscribers to the Sirius Service and XM Service, suggesting that this somehow shows Sirius included XM subscribers as "Sirius subscribers." But plaintiffs' point fails for at least four reasons. First, the various quotes almost invariably speak of "Sirius XM" subscribers—referring to the renamed entity that came to own XM Satellite Radio Inc.—and thus the quotes themselves do not use "Sirius subscribers." Second, the fact that the publicly traded Sirius XM reported after July 28, 2008 aggregate subscriber numbers has no bearing on what the parties to the Agreement intended in October 2004. During the term of the Agreement, XM remained a public company and filed reports periodically with the SEC announcing the number of XM subscribers. (*See* Barry Aff. Ex. T). Third, to the extent plaintiffs

are pointing to these statements to suggest how Sirius understood the Agreement, it would constitute the type of extrinsic evidence excluded where the contract language is unambiguous. *See, e.g., Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.,* 716 F. Supp. 1504, 1514-15 (S.D.N.Y. 1989) ("The parol evidence rule bars plaintiffs from arguing that the speeches made by company executives prove defendants agreed or acquiesced to a term that does not appear in the indentures."). Fourth, plaintiffs' opposition rebuts their own point. Exhibit G to the Buchwald affidavit—a December 9, 2010 press release announcing the new contract between Stern and Sirius—quotes Stern himself as saying on a date after the present dispute had arisen (emphasis added): "On my first day in satellite radio Sirius had approximately 600,000 subscribers. Today, the *two companies* have 20 million." Stern thereby attributed the 20 million aggregate subscribers to both Sirius and XM, and did not say Sirius by itself had 20 million subscribers.[3]

Plaintiffs also fail to show a need for discovery. They offer affidavits from Howard Stern and Don Buchwald purporting to reprise the negotiations for the Agreement, and neither states that he needs discovery in order to be able to recall the negotiations. The affidavits do not include a single draft of the Agreement and do not state that Buchwald's agency neglected to retain drafts—signaling that the drafts are of no significance. Plaintiffs have failed to show why they need "disclosure into the negotiation, drafting and interpretation of the Agreement."

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[3] Plaintiffs' Rule 19-a counterstatement concedes 34 of the 54 facts asserted in Defendant's Rule 19-a statement in their entirety (¶¶ 1-4, 7, 9-11, 13-14, 20-24, 26, 33, 35-43, 45, 46, 48-52, 54) and concedes the material parts of ten others. (¶¶ 5-6, 8, 12, 27-28, 32, 34, 44, 47). Plaintiffs attempt to dispute ten facts but do so on the entirely unsupported assertion that they require discovery. Because the Court can and should find that the Agreement is unambiguous, the few facts plaintiffs attempt without good reason to dispute are entirely immaterial for purposes of this motion. Plaintiffs set out what they call 69 "Additional Material Facts that are in Dispute." (Pl. Rule 19-a Counterstatement at p. 11-23.) Plaintiffs have merely recast their brief as numbered paragraphs, including legal assertions and conclusions, parol evidence regarding the parties' negotiations and self-praise (portraying Stern as the savior of Sirius laboring long hours). None of this raises an issue of material fact.

(Pl. Mem. 23) (bold and capital letters omitted). CPLR § 3212(f) "should not be resorted to where, as here, there has been a failure to demonstrate that the discovery sought would produce relevant evidence to support the plaintiff's allegations." *Riddy v. HSBC USA, Inc.*, 21 A.D.3d 465, 466, 799 N.Y.S.2d 741, 742 (2d Dep't 2005) (citation omitted). In such cases, courts routinely grant summary judgment without allowing the discovery a plaintiff seeks. *See, e.g., Best Payphones, Inc. v Empire State Payphone Ass'n.*, 272 A.D.2d 139, 139, 708 N.Y.S.2d 11, 12 (1st Dep't 2000) ("The motion court properly declined to defer defendant's summary judgment motion on the basis of plaintiff's purported need for further discovery since plaintiff failed to make the threshold showing that facts essential to justify opposition may exist") (internal quotations and citation omitted).

Plaintiffs try to contrive fact issues in seeking discovery, which is not permissible. *See Friedman v. Ocean Dreams, LLC*, 56 A.D.3d 719, 720, 868 N.Y.S.2d 131, 132 (2d Dep't 2008) (rejecting "feigned factual issues designed to avoid the consequences of defendants' documentary evidence"). For example, Point II B (Pl. Mem. 21-23) argues there is an issue as to "whether the Sirius Service and the XM Service Were Wholly Separate." (Bold and initial capitalization omitted). However, Sirius' moving memorandum argued in Point II D (Sirius Mem. 17-19) that "[a]t all relevant times, 'Sirius Subscribers' and 'XM Subscribers' have been wholly separate groups" (bold and initial capitalization omitted)—not that the services were wholly separate. Sirius offered the Annual Report on Form 10-K filed on March 31, 2009 by XM Satellite Radio Inc., which reports that XM had 9,850,741 subscribers as of December 31, 2008 (Barry Aff. at Ex. T, p.22), and plaintiffs do not dispute the accuracy of the number of XM subscribers reported to the SEC as of December 31, 2009 and December 31, 2010. (*See* Barry Aff. ¶ 3; Sirius Rule 19-a Statement ¶ 34; Pl. Rule 19-a Counterstatement ¶ 34). Plaintiffs

provide no basis for questioning that through the end of the term of the Agreement, XM subscribers remained a separately identifiable group from Sirius subscribers.

The discovery plaintiffs seek concerns basic facts that are, or should be, already known to them. For example, plaintiffs claim a need for disclosure regarding whether "subscribers to the Sirius Service paid subscription fees to Sirius for the Sirius Service" and whether "XM subscribers paid subscription fees to XM for the XM Service." (Pl. Rule 19-a Counterstatement ¶¶ 15, 16.) Yet plaintiffs' affidavits show that they have been familiar since at least 2004 with the companies' business model—namely, that Sirius and XM each offered a subscription-based service. (*See, e.g.,* Stern Aff. ¶¶ 5, 6; Buckwald Aff. ¶¶ 10, 11).

CONCLUSION

For the foregoing reasons, as well as those in Sirius' moving memorandum, this Court should grant summary judgment dismissing the Complaint with prejudice.

Dated: New York, New York
July 8, 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
pabruzzese@kramerlevin.com
jheller@kramerlevin.com

Attorneys for Defendant Sirius XM Radio Inc.