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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SIRIUS XM RADIO, INC., a Delaware corporation; and DOES 1 through 10,

Defendants.

Case No. CV13-05693 PSG (RZx)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL AND TO STAY PENDING REVIEW

Date: November 24, 2014
Time: 1:30 p.m.
Place: Courtroom 880
Honorable Philip S. Gutierrez

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TABLE OF AUTHORITIES

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I. INTRODUCTION.

Even if everything in Sirius XM Radio, Inc.'s ("Sirius XM") motion to certify the Court's September 22, 2014, summary judgment ruling for interlocutory appeal were true, the motion would still not come close to satisfying the legal standard in the Ninth Circuit for certification. While Sirius XM has a history of being undaunted by the law, this time, it also seems to be undaunted by the facts. Indeed, Sirius XM based its motion on two very false factual predicates; namely, that:

> In the pending *Capitol Records* case against Sirius XM, the court addressing virtually identical briefing on a parallel issue, has, albeit tentatively, reached the opposite conclusion from this Court, finding section 980(a)(2) ambiguous and focusing in part on the balance of rights between the owner of a sound recording and a person or entity who lawfully purchased and now owns a copy of that recording.
>
> No state court has ever issued a ruling on this matter...

The true facts were that the "tentative" ruling in the *Capitol Records* case which Sirius XM claimed reached an "opposite conclusion" had ceased to be tentative and, more importantly, had ceased to be opposite. In addition, because the ruling in the *Capitol Records* case was a state court ruling, it was not true that "no state court has ever issued a ruling on this matter."

Sirius XM claimed not to know about the falsity of its representations when it filed its motion. However, even under its own explanation, it knew within minutes of its filing – ***and it also knew that the false statements were the foundation for its motion***. Yet, rather than withdrawing its motion, Sirius XM insisted on proceeding with it even though it had no factual basis and even less of a legal basis. Neither of

these shortcomings were cured or mitigated by Sirius XM's unauthorized October 28, 2014, supplemental filing.

There is simply no analysis under which Sirius XM can satisfy the Ninth Circuit's three-part test for certification. Sirius XM cannot show a controlling question of law, a substantial grounds for difference of opinion, or that an immediate appeal would materially advance the ultimate termination of this litigation. The only thing that Sirius XM can show is that it disagrees with this Court's ruling. That is nowhere near enough to justify the extraordinary remedy of interlocutory appeal or a stay of these proceedings.

II. FACTUAL AND PROCEDURAL HISTORY.

On August 1, 2013, Flo & Eddie filed suit against Sirius XM in Los Angeles Superior Court, alleging on behalf of itself and a putative class of owners of pre-1972 recordings (*i.e.*, recordings fixed prior to February 15, 1972) that Sirius XM, without a license or authorization, was reproducing, distributing, and performing those recordings as part of its satellite and internet services. Flo & Eddie alleged claims for violation of Cal. Civ. Code § 980(a)(2), misappropriation, unfair competition under Cal. Bus. & Prof. Code § 17200 and common law, and conversion, and sought on behalf of itself and the putative class, damages, restitution, and injunctive relief. On August 8, 2013, Sirius XM removed this case to federal court.

On March 25, 2014, the Court bifurcated discovery between liability and damages and ordered that damages discovery be deferred and that liability discovery be completed by July 14, 2014. Just prior to the close of liability discovery, on June 9, 2014, Flo & Eddie moved for summary judgment as to liability on all causes of action.

On August 27, 2014, during the pendency of the motion for summary judgment in this case, a hearing was held in the action entitled *Capitol Records LLC,*

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et al. v. Sirius XM Radio Inc., Superior Court of the State of California, County of Los Angeles, Case No. BC520981, on a motion filed by the plaintiffs in that case seeking a special jury instruction regarding the existence of a performance right in pre-1972 recordings. At that hearing, the Honorable Mary Strobel expressed views which she explicitly stated in writing were "tentative."[1]

On September 22, 2014, this Court granted Flo & Eddie's motion for summary judgment in part and denied it in part. Specifically, the Court granted the motion with respect to Sirius XM's public performance of pre-1972 recordings, but found triable issues of fact with respect to Sirius XM's reproduction and distribution of those recordings (the "Summary Judgment Order").

On October 14, 2014, Judge Strobel abandoned the tentative views she expressed at the August 27, 2014, hearing and issued her "Ruling on Submitted Matter" (the "*Capitol Records* Order"), granting plaintiffs' motion and holding that the plaintiffs were entitled to the following jury instruction:

> The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not recapture the actual sounds fixed in such prior sound recording, but consists of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.

[1] According to the Merriman-Webster dictionary, the word "tentative" means "not done with confidence," "uncertain and hesitant," "not definite," and "still able to be changed."

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In the *Capitol Records* Order, Judge Strobel repeatedly cites to and follows the Summary Judgment Order. And, like this Court, Judge Strobel specifically holds that exclusive ownership of pre-1972 recordings includes a public performance right under California Civil Code § 980(a)(2). With respect to the scope of § 980(a)(2), there is simply no daylight between the Summary Judgment Order and the *Capitol Records* Order.

On October 15, 2014, Sirius XM filed its motion for certification of the Summary Judgment Order. Because the primary focus of Sirius XM's motion was Judge Strobel's August 27, 2014, tentative views as well as the supposed lack of any California state court ruling interpreting § 980(a)(2), on October 16, 2014, counsel for Flo & Eddie sent a letter to counsel for Sirius XM requesting that the certification motion be withdrawn. **(Declaration of Harvey Geller ["Geller Decl."] ¶ 2, Ex. A)** Sirius XM's primary counsel never responded to the letter. Instead, Sirius XM's local counsel responded by stating that he had not been aware of Judge Strobel's ruling at the time that the motion was filed. **(Geller Decl. ¶ 2, Ex. B)** Counsel for Flo & Eddie then sent a second letter on October 16, 2014, stating "[y]ou now have personal knowledge that the statements in the motion are materially false. Given that knowledge, please advise us whether Sirius XM intends to correct the record or whether it intends to stands on its false statements." **(Geller Decl. ¶ 3, Ex. C)** Neither primary nor local counsel for Sirius XM ever responded to that letter. **(Geller Decl. ¶ 3)** However, on October 28, 2014, just minutes before being substituted out of the case, Sirius XM's old counsel – without Court approval – filed a "Supplement" to Sirius XM's certification motion that tries to explain the failure to present a proper factual record while at the same insisting that the real facts are no impediment to the relief sought by Sirius XM.

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III. THE SUMMARY JUDGMENT ORDER DOES NOT MEET THE STANDARD FOR CERTIFICATION.

In its motion, Sirius XM treats interlocutory appeals as if they were the rule rather than a very narrow exception to the general rule that appellate review of a district court ruling should not occur until after entry of a final judgment. *In re Cement Antitrust Litig*. (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir. 1982), aff'd sub nom., *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *see* 28 U.S.C. § 1291; *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988) (discussing the so called 'final judgment rule' and noting that a decision is not final "until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment") (internal quotations omitted). "Finality as a condition of review is an historic characteristic of federal appellate procedure." *United States v. Szado*, 912 F.2d 390, 391 (9th Cir. 1990) (quoting *Cobbledick v. United States*, 309 U.S. 323, 324 (1940)). "Embodied in the finality requirement is a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals." *In re Subpoena Served on Cal. Public Utilities Com.*, 813 F.2d 1473, 1475 (9th Cir. 1987) (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974) (internal quotations omitted)).

To invoke the limited exception to the final judgment rule, Sirius XM must establish that the Summary Judgment Order: (1) involves a controlling question of law; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal from that order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) ("Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met.") Because Section 1292(b) is a departure from the normal rule, it is construed strictly and narrowly,

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James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1067 n.6 (9th Cir. 2002), and it is to be "applied sparingly and only in exceptional cases." *United States v. Woodbury*, 263 F.2d 784, 788 n.1 (9th Cir. 1959). As the Ninth Circuit has explained, § 1292(b) "was not intended merely to provide review of difficult rulings in hard cases," *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966), and it should not be used where it "would prolong the litigation rather than advance its resolution." *Syufy Enter. v. Am. Multi-Cinema*, Inc., 694 F. Supp. 725, 729 (N.D. Cal. 1988).

A. Sirius XM's Motion Fails to Establish a Controlling Question of Law.

Sirius XM argues that "every" order which, if erroneous, would be reversible error presents a controlling question of law. Of course, if that were the standard, then the exception would swallow the rule. An issue is not "controlling" under § 1292(b) unless its resolution on appeal could "materially affect the outcome of litigation in the district court," *In re Cement*, 673 F.2d at 1026, and even then it should only be used "in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id*. Sirius XM cannot make this showing.

Indeed, in seeking certification of the Summary Judgment Order, Sirius XM ignores the fact that the complaint in this action is much broader than the issue that it wants to certify for interlocutory appeal (i.e. whether §980(a)(2) provides an exclusive right of public performance to owners of pre-1972 recordings). While Sirius XM's public performance of pre-1972 recordings certainly violates §980(a)(2), the same conduct also violates the common law. That is why Flo & Eddie's claims are based not only on the statutory language of §980(a)(2), but also

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on the common law principles of misappropriation and conversion – both of which are stand-alone claims that do not require proof of a violation of §980(a)(2).[2] Sirius XM can hardly dispute that misappropriation and conversion have for decades been relied on by the California courts to protect the owners of pre-1972 recordings from unauthorized exploitation. *Capitol Records, Inc.* v. *Erickson*, 2 Cal. App. 3d 526 (1969); *A&M Records, Inc.* v. *Heilman*, 75 Cal. App. 3d 554 (1977).

Nor can Sirius XM dispute that any appeal of the §980(a)(2) issue will have no bearing on Flo & Eddie's reproduction and distribution claims. Those claims exist independently of the public performance claims and subject Sirius XM to liability under all of the same cause of action alleged in the complaint.

All of these additional grounds for recovery completely undermine Sirius XM's argument that the Summary Judgment Order is appropriate for interlocutory appeal. *See Mateo v. The M/S Kiso*, 805 F. Supp. 792, 800 (N.D. Cal. 1992) ("dispos[ing] of only one claim, not the entire suit...does not concern a controlling issue of law"); *In re Conseco Life Ins. Cost of Ins. Litig.*, 2005 U.S. Dist. LEXIS 45538, 2005 WL 5678841 at *6 (C.D. Cal. 2005) (that an interlocutory appeal "would not resolve all claims against [a party]...alone is a sufficient basis to deny certification."); *Rowe v. Bankers Life & Cas. Co.*, 2008 U.S. Dist. LEXIS 101839, 2008 WL 5156077 at *8 (D. Ariz. 2008) (denying motion to certify appeal where

[2] Misappropriation is a form of common law unfair competition and is established where a plaintiff shows that it has invested substantial time and money in the development of property that the defendant appropriated at little or no cost, thereby, injuring the plaintiff. *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal. App. 3d 1327, 1342 (1990). Conversion, on the other hand, is a strict liability tort and only requires a plaintiff to show (1) ownership or right to possession of the property; (2) conversion by a wrongful act or disposition of property rights; and (3) damages. *Welco Elecs., Inc. v. Mora*, 223 Cal. App. 4th 202, 208 (2014).

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plaintiff possessed claims that "will proceed to trial irrespective of whether this Court correctly interpreted the language" governing the certified question).

Because Sirius XM cannot satisfy its burden of showing that there is a controlling question of law, it tries to mask that deficiency by proffering a completely unsupported and irrelevant parade of horribles that is supposedly going to result from companies having to pay to use pre-1972 recordings.[3] Nothing in that parade supports certification. While Sirius XM complains that obtaining licenses would be a hassle **(Motion 6:16-18)**, that has no bearing on whether the Summary Judgment Order presents a controlling question of law. Moreover, the two cases that Sirius XM cites for the proposition that rulings should be certified that have "far-reaching implications" do not help its cause. **(Motion 5:3-9)** Indeed, while the District Court thought that certification was appropriate in *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, the Ninth Circuit disagreed. *See Ass'n of Irritated Residents v. Fred Schakel Dairy*, United States District Court, Central District of California, Case No. 05-cv-00707 (Dkt. 366). Similarly, in *Su v. Siemens Indus.*, 2014 U.S. Dist. LEXIS 80349 (N.D. Cal. June 10, 2014), the Ninth Circuit still has not agreed to accept the petition.

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[3] To support its "end of the world" prognostication, Sirius XM attaches a blog post from the Technology & Marketing Law Blog – a blog that is run by attorney/professor Eric Goldman – as an exhibit to its motion. Neither Mr. Goldman nor Tyler Ochoa (the other author of the post and, like Mr. Goldman, an attorney/professor) have been qualified as experts on the issue of pre-1972 recordings nor do their opinions constitute evidence. The blog post lacks foundation and is nothing more than inadmissible hearsay and improper legal opinion.

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B. <u>There is No Split In The Law That Presents Any Substantial Grounds For Difference of Opinion</u>.

When Sirius XM's argument that there is a substantial ground for difference of opinion is stripped of the false facts upon which it is based, what is left is a perfunctory argument that is based on nothing more than Sirius XM's disagreement with the Summary Judgment Order. However, that has never been a sufficient basis to allow an interlocutory appeal. *Mateo,* 805 F. Supp. at 800 ("A party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference;' the proponent of an appeal must make some greater showing."); *Kowalski v. Anova Food, LLC*, 958 F. Supp. 2d 1147, 1154 (D. Hawaii 2013) (same).

What Sirius XM must show – but cannot – is that that courts are in disagreement regarding the scope of § 980(a)(2) or that the plain language of § 980(a)(2) presents a difficult question. *Couch*, 611 F.3d at 633 (finding no substantial ground for difference of opinion where "defendants have not provided a single case that conflicts with the district court's construction or application" of a particular statute); *see also SEC v. Private Equity Mgmt. Group*, *LLC*, 2010 U.S. Dist. LEXIS 55644 at *8 (C.D. Cal. May 10, 2010) (holding that the moving party needed to show "a legitimate and 'substantial ground for difference of opinion' between and among judicial bodies") (citation omitted); *Lucas v. Bell Trans*, 2009 U.S. Dist. LEXIS 101836 at *12 (D. Nev. 2009) ("[A]lthough the question is a matter of first impression, it is neither novel nor particularly difficult. It is a relatively straightforward matter of statutory interpretation.")

Sirius XM has not cited a single case that conflicts with the Summary Judgment Order. What Sirius XM does do is cite to the tentative opinion in the *Capitol Records* case – an opinion that was abandoned in favor of a final opinion that expressly cited to and followed the Summary Judgment Order. Far from

meeting the "high" threshold necessary to establish a ***difference*** of opinion, *In re ThinkFilm, LLC*, 2013 U.S. Dist. LEXIS 25407 at *6 (C.D. Cal. Feb. 21, 2013), what Sirius XM has actually established by citing to *Capitol Records* is that there is no difference of opinion regarding the scope of § 980(a)(2). Moreover, "the mere fact that the circuit courts have not yet ruled on an issue is insufficient to establish a substantial ground for difference of opinion." *Hansen Bev. Co. v. Innovation Ventures, LLC*, 2010 U.S. Dist. LEXIS 18003 at *9 (S.D. Cal. 2010); *see also In re Flor v. Bot Fin. Corp.*, 79 F.3d 281, 284 (2nd Cir. 1996) ("the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate substantial ground for difference of opinion").

Significantly, the Summary Judgment Order was not even the first decision in this District to find liability under California law for the unauthorized public performance of pre-1972 recordings. In *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198 (C.D. Cal. 2010), the defendants (owners of two websites) were found liable for reproducing, selling, and ***publicly performing*** pre-1972 recordings without proper authorization. As this Court correctly noted in the Summary Judgment Order, the treatment of § 980(a)(2) by the court in *Bluebeat* "when confronted with public performance facts suggests that the court interpreted 'exclusive ownership' under the statute's text to include the right of public performance so unambiguously that the issue did not even warrant analysis beyond repeating the statutory language." **(Summary Judgment Order at 9.)**

The plain language of § 980(a)(2) coupled with the ease with which the *Bluebeat* court concluded that publicly performing pre-1972 recordings without proper authorization was a violation of California law, as well as the quick abandonment by Judge Strobel of her tentative opinion, completely disposes of Sirius XM's argument that "reasonable jurists" might disagree regarding the scope

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of § 980(a)(2). When the issues are presented properly, the reasonable jurist in Sirius XM's hypothetical simply does not exist.

Notably, jurists in California are not alone in finding liability for the violation of the performance right in pre-1972 recordings. Jurists in New York and Pennsylvania have reached the same conclusion. *Capitol Records LLC v. Harrison Greenwich LLC*, No. 65224 (N.Y. Sup. Ct. May 13, 2014) (clarifying that the prior grant of summary judgment reported at *Capitol Records, LLC v. Harrison Greenwich, LLC*, 984 N.Y.S.2d 274 (2014) included the unauthorized public performance of The Rumor Recording); *Capitol Records LLC v. Escape Media Group, Inc.*, Case No. 12-cv-06646 (Dkt. 90) (Magistrate's May 28, 2014, Report and Recommendation finding Escape Media's Internet streaming service (Grooveshark) liable for common law copyright infringement for the digital performance of pre-1972 sound recordings.);[4] *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433 (1937) (holding that the performers of musical works embodied in sound recordings had a protectable common law property interest in the performances in those recordings and that unlicensed radio broadcasts of their recordings violated that right and constituted unfair competition).

The only case ever to come out differently was the Second Circuit's 1940 decision in *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940). *RCA* is one of two cases forming the basis for Sirius XM's motion for reconsideration filed in *Capitol Records* by Sirius XM's new counsel. ***However, RCA ceased to be good law 59 years ago.*** Indeed, in *RCA*, the Second Circuit held that, under New York

[4] Escape Media filed objections to that Report and Recommendation with District Judge Alison Nathan. However, those objections did not specifically address any issues regarding pre-1972 recordings. (Dkt. 94) As of this filing, no ruling has been made on the Objections.

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law, the sale of a record to the public constituted a "general publication" that ended all common-law copyright protection. *Id*. at 88. Thus, the *RCA* court reasoned that if ***all*** property rights in a musician's performance ended with the initial sale of the recordings embodying that performance, then it could not enjoin the public performance of the recordings at issue. *Id*. But in 1950, New York expressed a very different view of its own law. In *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), the New York Supreme Court held that the sale of a record to the public was ***not*** a general publication and did not end common-law copyright protection. The ruling in *Metro. Opera Ass'n* caused the Second Circuit in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 663 (2d Cir. 1955) to concede that its holding in *RCA* was wrong and was not the law of New York. And to the extent that there is question as to whether *RCA* remains bad law today, that was answered again in *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540, 554 (2005).

The other so-called new case relied on by Sirius XM in its motion for reconsideration for the proposition that there were "no rights" in pre-1972 recordings was *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904 (S.D. Cal. 1950). *Supreme Records* has the dubious distinction of relying on the thoroughly discredited holding in *RCA* while at the same time rejecting the widely accepted principles espoused by the United States Supreme Court in *Int'l News Serv. v. AP*, 248 U.S. 215 (1918). But more importantly, *Supreme Records*, as Sirius XM characterizes it, has never been the law in California, which explains why Sirius XM tries to prop up that case by arguing that it was actually "clarified" later by the California Court of Appeal in *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969) and *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977). *Erickson* and *Heilman* (both of which relied on *Int'l News Serv.*) never mentioned the holding in *Supreme Records* – much less that

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they were clarifying it – because there was no need to. *Supreme Records* never stood for the proposition (as Sirius XM suggests in its motion for reconsideration in *Capitol Records*) that California did not recognize rights in sound recordings.[5]

As a final throw away, Sirius XM departs from its focus on § 980(a)(2) to contend that the Court's treatment of Sirius XM's dormant Commerce Clause argument in the Summary Judgment Order is also a controlling question of law upon which reasonable jurists could disagree. However, those mythical jurists would first need to repeal 17 U.S.C. § 301(c) and then overrule the Supreme Court's holdings in *Goldstein v. California*, 412 U.S. 546 (1973); *Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985) and *White* v. *Mass. Council of Const. Employers, Inc.*, 460 U.S. 204, 213 (1983). Moreover, Sirius XM's complaint that it might be required to modify its operations or obtain licenses to continue exploiting pre-1972 recordings is completely irrelevant. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978) (rejecting the "notion that the Commerce Clause protects the particular structure or method of operation in a retail market"); *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006) ("[W]hen a defendant chooses to manufacture one product for a nationwide market,

[5] Sirius XM's characterization of *Supreme Records* as meaning that there were "no rights" in sound recordings ignores the fact that the District Court actually only held that the "arrangement" embodied in the recording was not protectable against a second recording that imitated (but did not copy) the original recording. That conclusion is the one and only exception that the California Legislature adopted from the federal Copyright Act when it enacted § 980(a)(2) (granting exclusive ownership in pre-1972 recordings "as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.")

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rather than target its products to comply with state laws, defendant's choice does not implicate the commerce clause.")

C. <u>An Interlocutory Appeal Would Dramatically Slow Down, Not Speed Up, This Litigation</u>.

Like many defendants, from the outset of this litigation, Sirius XM has been in delay mode – and there can be no bigger delay than stopping the litigation for an appeal to the Ninth Circuit that will inevitably take many years and will only touch on one of the many issues in the case; namely, the scope of § 980(a)(2). It will not address the alternative theory that a performance right exists under California common law independent of § 980(a)(2) or that Flo & Eddie's reproduction and distribution claims constitute a separate basis for recovery under each of the same causes of action. Thus, while a resolution of the § 980(a)(2) issue in Flo & Eddie's favor establishes Sirius XM's liability, it does not follow that a resolution of the § 980(a)(2) issue in Sirius XM's favor would result in judgment being entered for Sirius XM.

Regardless of how the Ninth Circuit rules on the scope of § 980(a)(2), the case is going to be remanded back to the District Court to complete the exact same pre-trial tasks that the parties are now in the process of completing. Therefore, under any analysis, an interlocutory appeal will slow this case down and will not materially advance the litigation. That shortcoming is, by itself, fatal to Sirius XM's motion. *FDIC v. Countrywide Sec. Corp.*, 966 F. Supp. 2d 1031, 1045-1046 (C.D. Cal. 2013) (An interlocutory appeal must be likely to materially speed the termination of the litigation, and thereby "save the courts and the litigants unnecessary trouble and expense."); *see also Mateo*, 805 F. Supp. at 800 ("If an interlocutory appeal would actually delay the conclusion of the litigation, the Court should not certify the appeal."); *Syufy Enterprises*, 694 F. Supp. at 729 (declining to certify an interlocutory appeal where it "would prolong the litigation rather than

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advance its resolution"). This is especially true here given that any decision by the Ninth Circuit will most certainly come long after the scheduled trial date of August 2015, a date which Sirius XM's new counsel re-confirmed in court is acceptable and which the Court indicated is firm. *Shurance v. Planning Control International, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988) (interlocutory appeal would not materially advance the ultimate termination of the litigation because the appeal could not be completed before the scheduled trial date).[6]

Finally, although their music is timeless, the artists who created pre-1972 recordings are aging and depend on the royalties from a marketplace that has been ravaged by piracy. The artists who hope to benefit from this litigation are necessarily going to suffer tremendously from the delay that would result from an interlocutory appeal. That is an added reason to deny certification. *In re Conseco*, LEXIS 45538 at *9 (considering "the advanced ages of so many class members" in denying certification). This case will be to trial long before any issues on appeal can even be briefed (much less ruled on). At the conclusion of trial, Sirius XM can then file an appeal that is actually permitted by the Federal Rules, if it so chooses.

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[6] The District Court cases cited by Sirius XM as supporting its argument that immediate appellate review is appropriate were rather odd choices. In *Axa Rosenberg Group v. Gulf Underwriters*, 2004 U.S. Dist. LEXIS 16851 (N.D. Cal. Aug. 16, 2004), the Ninth Circuit denied the petition to permit interlocutory appeal. *See Axa Rosenberg Group v. Gulf Underwriters*, United States District Court, Northern District of California, Case No. 04-cv-00415 (Dkt. 59). In *Lakeland Vill. Homeowners Ass'n v. Great Am. Ins. Grp.*, 727 F. Supp. 2d 887 (E.D. Cal. 2010), the case was dismissed before the Ninth Circuit ever ruled on defendant's petition. And, as noted above, in *Su v. Siemens Indus.*, the petition has not yet been ruled on by the Ninth Circuit.

IV. CONCLUSION.

The test for certification of an interlocutory appeal is clear, and so too is Sirius XM's failure to satisfy that test or its burden. Sirius XM's motion should be denied.

Dated: November 3, 2014

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