NYSCEF DOC. NO. 1

SUPREME COURT OF THE STATE OF NEW Y	YORK	
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ONE TWELVE, INC. and DON BUCHWALD,	: Index No.:	
Plaintiffs,	: Date Purcha	ased
-against-	SUMMON	<u>s</u>
SIRIUS XM RADIO INC.,	:	
Defendant.	:	
	x	

TO THE ABOVE-NAMED DEFENDANT:

Sirius XM Radio Inc. 1221 Avenue of the Americas New York, New York 10020

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on plaintiffs' attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The action will be heard in the Supreme Court of the State of New York in and for the County of New York. Venue is proper under section 503 of the New York Civil Practice Law and Rules because defendant resides at 1221 Avenue of the Americas, New York, New York, 10020. Dated: New York, New York March 22, 2011

HUGHES HUBBARD & REED LLP By: Seth D. Rothman Stephan E. Hornung

One Battery Park Plaza New York, New York 10004-1482 (212) 837-6000

Attorneys for Plaintiffs One Twelve, Inc. and Don Buchwald

SUPREME COURT OF THE STAT COUNTY OF NEW YORK	E OF NEW YO	ORK	
ONE TWELVE, INC. and DON BU		- x : :	
	Plaintiffs,	:	Index No.
-against-		:	COMPLAINT
SIRIUS XM RADIO INC.,		:	
	Defendant.	:	
		- x	

Plaintiffs, One Twelve, Inc. ("One Twelve") and Don Buchwald ("Buchwald"), as and for their complaint against defendant Sirius XM Radio Inc. ("Sirius"), allege as follows:

Nature of the Action — Breach of Contract

1. World-renowned radio personality Howard Stern ("Stern") put Sirius on the map. In 2004, when Stern agreed to move his highly successful radio show to Sirius, Sirius was a fledgling company that was running a distant second to XM Satellite Radio Inc. ("XM") in a two-company race. Sirius faced an uncertain future in an uncertain industry. Stern instantly became Sirius's biggest star, bringing millions of subscribers to Sirius and recognition to the satellite radio industry.

2. Sirius courted Stern aggressively, offering his production company, One Twelve, an incentive-laced deal that, among other things, promised Stern an opportunity to share in Sirius's success. Sirius promised to pay One Twelve a series of escalating stock awards if Sirius exceeded its subscriber estimates in any year of Stern's contract by 2 million or more subscribers. It also promised to pay Buchwald a consulting fee equal to 10% of any compensation paid to One Twelve. 3. Sirius set the subscriber targets high with the idea that if Stern delivered, Sirius would more than recoup its investment in Stern. Stern delivered beyond expectations. The news of Stern's signing attracted higher-than-expected numbers of subscribers to Sirius even before Stern's show aired on its platform. As Stern began at Sirius in January 2006, the company announced that it had already surpassed an agreed-upon subscriber target and happily paid One Twelve certain deferred compensation that had become due under the contract.

4. Once the Howard Stern Show started running on Sirius, Stern's drawing power became even greater. Throughout the five years of his contract, Stern brought record numbers of new subscribers to Sirius and helped Sirius retain them. Sirius exceeded its internal subscriber estimates by a large margin in every year of Stern's contract.

5. Stern enabled Sirius to surpass its internal subscriber targets by more than 2 million subscribers in 2006 and in 2007. Fueled by this growth, Sirius did something that would have been unthinkable before it signed Stern. Sirius acquired XM in a 2008 merger. Thereafter, Sirius surpassed its internal subscriber estimates by more than 10 million subscribers in 2008 and by more than 8 million subscribers in 2009 and in 2010. In 2010, when the total number of Sirius subscribers hit 20 million, Sirius celebrated by hosting a Paul McCartney concert at the world-famous Apollo Theater.

6. Because of this success and the revenue that it brought into the company, One Twelve was entitled to receive the performance-based stock awards that Sirius had promised Stern. But, with the exception of a stock award that Sirius paid for the initial year of Stern's contract, Sirius has refused to pay One Twelve the additional performance-based stock awards to which One Twelve is entitled.

7. When Sirius needed Stern, it promised him a share in any success that the company achieved. But now that Sirius has conquered its chief competitor and acquired more than 20 million subscribers, it has reneged on its commitment to Stern, unilaterally deciding that it has paid him enough. One Twelve and Buchwald bring this action to recover the amounts that are due and owing, together with interest and costs.

Parties and Venue

Plaintiff 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. One Twelve produces and distributes the Howard Stern Show.

9. Plaintiff Buchwald is a citizen of the State of Massachusetts and has a business address at 10 East 44th Street, New York, New York 10017. Buchwald is Stern's agent and serves as a consultant under the agreement between One Twelve and Sirius.

 Defendant 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.

 Venue is proper in this Court under CPLR 503 because Sirius and One Twelve reside in New York County.

Howard Stern

12. Howard Stern is a world-renowned radio and entertainment personality. Stern is a unique talent who is widely credited with revolutionizing talk radio. His brand of freewheeling discourse and reality programming is enormously popular and has made Stern into a household name.

13. In 2004, Stern's morning radio show, the Howard Stern Show, was broadcast in New York on WXRK and syndicated throughout the United States and in Canada. The Howard Stern Show aired in 46 major markets and was the first radio show ever ranked number one in New York and Los Angeles simultaneously.

14. It has been reported that at its peak, the Howard Stern Show had more than 20 million listeners, and Stern was, without question, the biggest star on radio. He enjoyed unparalleled levels of celebrity, influence, and popularity. Stern was especially popular with males between the ages of 18 and 49, an important demographic for advertisers.

15. Stern transcended radio, expanding 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 highly successful motion picture adaptation of "Private Parts," orchestrated the fastest-selling soundtrack in motion picture history, and starred in the most-watched entertainment pay-per-view special of all time.

Sirius and XM Each Seek to Sign Stern

16. In 2004, each of Sirius and XM separately approached Stern about moving to its platform once Stern's existing contract with Infinity Broadcasting Corporation expired at the end of 2005. At the time, Sirius and XM were the only two satellite radio providers in the United States. XM was the first to market, launching its service nationwide in 2001. Sirius followed a year later, launching its service nationwide in 2002.

17. At the time Sirius and XM approached Stern, the satellite radio industry was still getting started, and it was not clear that satellite radio would succeed. Satellite radio offered certain advantages over terrestrial radio, including 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.

18. Sirius and XM needed to sign top talent if they were going to make their business model viable, and there was no one bigger than Stern. Both companies coveted Stern. Each believed that signing Stern would bring millions of his listeners to its platform. Stern's fans had proven themselves to be loyal listeners, and Stern had demonstrated an ability to bring them to new media. Unlike music and sports programming, there was nothing else like the Howard Stern Show on radio. If listeners wanted Stern's brand of talk radio, they would have to subscribe to Sirius or XM to get it.

19. Because of Stern's celebrity, he had the potential to transform satellite radio into a viable alternative to AM and FM radio. Stern's move to satellite radio was expected to increase public awareness of satellite radio at a time when the new medium was struggling for recognition. Increased awareness promised new subscribers, regardless of whether they followed Stern or were attracted by other programming.

20. Both XM and Sirius courted Stern aggressively. XM told Stern that it wanted him because he was the "biggest brand in radio . . . King of All Media" and had a "demonstrated ability to market/build demand." It made adding Stern part of its publicly announced strategy to become "the HBO of radio."

Sirius Pursues Stern Aggressively

21. Sirius was especially intent on signing Stern. Sirius, which had entered the satellite radio market a year behind XM, was running a distant second in a two-company race. At the end of 2003, XM had more than 1.3 million subscribers compared to Sirius's

approximately 260,000 subscribers. By October 2004, XM had more than 2.5 million subscribers, while Sirius had fewer than 700,000 subscribers.

22. Moreover, Sirius had taken on significant debt. According to its 2004 annual report, Sirius had a year-end deficit of approximately \$1.9 billion, and expected its "cumulative net losses and cumulative negative cash flow to grow as [it] ma[d]e payments under [its] various contracts, incur[red] marketing and subscriber acquisition costs and ma[d]e interest payments on [its] debt."

23. Sirius needed Stern more than Stern needed Sirius. Stern was unsure if he wanted to continue in radio. He was under pressure to perform, keeping a grueling schedule that required getting up at 4 a.m., and was seriously thinking of retiring. Moving to satellite radio, and especially to Sirius, was a significant risk for Stern. Stern and Buchwald wanted assurances that if Stern made Sirius a success, they would share in that success.

Sirius Promises Stern a Chance to Share in the Company's Success

24. As the separate discussions with Sirius and XM progressed, Sirius emerged as the frontrunner. Sirius's initial offer was more attractive than XM's offer, and both Stern and Buchwald liked what they saw of Sirius's corporate culture. They believed that Sirius's management would support Stern's show and his efforts to develop new programming.

25. Buchwald made clear, however, that for Stern to sign with Sirius and continue on the air, Sirius's offer had to be terrific and beyond comparison. In particular, it was very important to Stern that he not be treated as an employee who was paid to perform. He wanted an opportunity to share in any success that the company enjoyed.

26. To accomplish this and to induce Stern to sign with Sirius, Sirius agreed to pay One Twelve performance-based compensation in the form of escalating stock awards. One

Twelve would receive these awards if Stern himself attracted a certain number of new subscribers to Sirius or if the total number of Sirius subscribers in any given year exceeded Sirius's internal estimates for that year, regardless of whether those subscribers were traceable to Stern.

27. Sirius set the targets for these awards at high levels. For One Twelve to receive an award based on the total number of Sirius subscribers, Sirius had to exceed its internal estimates in any given year by at least 2 million subscribers. This ensured that there would be a large margin of success before One Twelve became eligible for an award. For example, Sirius estimated that it would have 3.7 million subscribers by the end of 2006, which meant that for One Twelve to receive an award, the total number of Sirius subscribers would have to increase from fewer than 700,000 subscribers in October 2004 to 5.7 million subscribers by December 2006.

28. Sirius also agreed that One Twelve would receive additional stock awards if Sirius exceeded its internal estimates by multiples of 2 million subscribers. For each additional 2 million subscribers up to 10 million subscribers, One Twelve would receive an additional stock award. Thus, One Twelve was entitled to a second stock award if the total number of Sirius subscribers exceeded the internal estimate in any given year by 4 million subscribers, a third stock award if the total number of Sirius subscribers exceeded the internal estimate in any given year by 6 million subscribers, a fourth stock award if the total number of Sirius subscribers exceeded the internal estimate in any given year by 8 million subscribers, and a fifth stock award if the total number of Sirius subscribers exceeded the internal estimate in any given year by 6 million subscribers.

29. The subscriber targets were set high enough so that if they were reached, Sirius would not only be able, but happy to pay the performance-based stock awards to One Twelve. No subscribers were excluded from the subscriber count, and there were no restrictions on how subscribers would be counted. Nor were there any restrictions on how subscribers could come to Sirius. They could come because of Stern's efforts or they could have nothing to do with Stern. They could also come as a result of a merger or an acquisition.

30. Indeed, throughout the contract negotiations, Buchwald and Stern raised the possibility that Sirius and XM might merge, bringing both company's subscribers together under one entity. The parties added a separate provision to Stern's contract to account for the possibility of a merger and permit the broadcast of the Howard Stern Show to the combined subscribers of the surviving entity. Yet, even though the parties were discussing the possibility of a merger in this separate context, Sirius did not seek to exclude from its subscriber targets any additional subscribers that might come to Sirius as a result of such a merger or acquisition.

The Agreement

31. On or about October 1, 2004, One Twelve and Sirius executed a letter agreement (the "Agreement"). Buchwald also executed the Agreement with respect to a paragraph headed "Consulting Fee." The Agreement set forth the principal terms of the agreement between One Twelve and Sirius "with respect to the licensing to Sirius exclusively on radio of the Howard Stern [Show] and certain related matters."

32. The Agreement required Sirius to establish a channel dedicated to the Howard Stern Show and other programming developed by Stern. One Twelve agreed to produce the Howard Stern Show exclusively for airing live on Sirius from 6 a.m. to 10 a.m., Monday through Thursday, and a "best of" show to air on Friday in that same time slot.

33. One Twelve also agreed to make available, at its discretion, its archive of prior material for purposes of creating specials and promotions for the Howard Stern channel and to fill in for the Howard Stern Show when Stern was on vacation or otherwise not broadcasting new shows.

34. The Agreement was not limited to the Howard Stern Show. One Twelve also agreed to develop additional on-air talent and shows at its discretion to air exclusively on the Howard Stern channel, a second channel, and a premium channel that Sirius might create for Stern.

35. 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.

36. The bonus stock compensation was set aside upon the signing of the Agreement and was to be paid to One Twelve at the end of its term on December 31, 2010. The Agreement provided, however, that One Twelve would receive this guaranteed bonus on an accelerated basis if Sirius exceeded certain subscriber targets.

37. The Agreement gave Stern the opportunity to earn additional shares of stock for further exceeding subscriber targets. As a way to ensure that Stern would share in Sirius's success, the Agreement provided for a series of escalating performance-based stock awards. 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.

(a) Sirius was required to pay One Twelve a performance-based stock award
if the Agreement remained in effect and, on or before December 31, 2010, either
(i) Sirius had acquired a total number of 2 million or more HS-Generated
Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar
year exceeded the "Siri Internal Estimate" year-end subscriber target for such year
by more than 2 million subscribers.

(b) Sirius was required to pay One Twelve a second performance-based stock award if the Agreement remained in effect and, on or before December 31, 2010, either (i) Sirius had acquired a total number of 4 million or more HS-Generated Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar year exceeded the "Siri Internal Estimate" year-end subscriber target for such year by more than 4 million subscribers.

(c) Sirius was required to pay One Twelve a third performance-based stock award if the Agreement remained in effect and, on or before December 31, 2010, either (i) Sirius had acquired a total number of 6 million or more HS-Generated Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar year exceeded the "Siri Internal Estimate" year-end subscriber target for such year by more than 6 million subscribers.

(d) Sirius was required to pay One Twelve a fourth performance-based stock
award if the Agreement remained in effect and, on or before December 31, 2010,
either (i) Sirius had acquired a total number of 8 million or more HS-Generated
Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar

year exceeded the "Siri Internal Estimate" year-end subscriber target for such year by more than 8 million subscribers.

(e) Sirius was required to pay One Twelve a fifth performance-based stock award if the Agreement remained in effect and, on or before December 31, 2010, either (i) Sirius had acquired a total number of 10 million or more HS-Generated Subscribers or (ii) the total number of Sirius subscribers at the end of any calendar year exceeded the "Siri Internal Estimate" year-end subscriber target for such year by more than 10 million subscribers.

38. With respect to clause (i) of these provisions, an "HS-Generated Subscriber" is defined in the Agreement as a Sirius subscriber directly and trackably (*e.g.*, through a promotion code or dedicated web site or 800 number) generated through any marketing or sales initiative One Twelve directs to Stern's fan base, other than certain excluded initiatives.

39. With respect to clause (ii) of these provisions, the phrase "total number of Sirius subscribers" refers to the total number of subscribers belonging to Sirius Satellite Radio Inc. (now Sirius XM Radio Inc.) in any given year. The word "total" was intended to have its plain meaning, and the contractual provisions contain no restrictions or caveats on its use.

40. The "Siri Internal Estimates" were set forth in an exhibit to the Agreement. The subscriber estimates for the calendar years 2006 through 2010 were:

(a)	<u>2006</u> :	3,707,000
(b)	<u>2007</u> :	5,291,000

(c) 2008: 7,192,000

- (d) <u>2009</u>: 9,284,600
- (e) 2010: 12,112,400

41. The parties anticipated that Sirius and XM might merge. In the event of a merger, the parties added a separate provision to the Agreement to make clear that all of the subscribers of the surviving company would be treated as subscribers of that company for purposes of the Agreement. Thus, in the event of a merger, Sirius agreed to pay One Twelve a fee, "whereupon the HS Programs may be broadcast to all subscribers of the surviving company." Although Sirius now claims otherwise, the fee paid under this provision was not intended to substitute for or replace any other compensation that would be payable to One Twelve following a merger or acquisition.

42. Finally, Sirius agreed to pay Buchwald a consulting fee equal to ten percent (10%) of any compensation paid to One Twelve.

Stern's Signing Is a Huge Success for Sirius and Satellite Radio

43. On October 6, 2004, Stern announced that he would be joining Sirius once his contract with Infinity Broadcasting ended. This announcement was widely publicized in the mainstream media, and Sirius's stock jumped 15.5% percent as a result. Stern's signing was considered a breakthrough moment for Sirius and for the three-year-old medium of satellite radio.

44. As one journalist put it, with the Stern deal, "Sirius went from 'What's that?' to 'I want that.'" He predicted that listeners who knew nothing about subscription radio would now "go to Best Buy or Circuit City and ask for the one with Howard Stern." <u>L.A. Times</u>, Oct. 7, 2004, at 1.

45. The <u>Washington Post</u> reported that "Stern's decision could lead a flood of subscribers to begin paying for what has long been taken for granted as a free part of the media landscape." Walter Sabo, a consultant to Sirius and a member of the Sirius team that signed Stern, was quoted as saying, "[t]his deal has the potential to turn FM into AM and AM into shortwave." <u>Washington Post</u>, Oct. 8, 2004, at E1.

46. The <u>Boston Globe</u> quoted Jim Collins, vice president of corporate communications at Sirius, who recognized that "Stern seems to have the ability to move his fan base: to see his movies, to buy his books." The <u>Globe</u> also quoted Joseph P. Clayton, the chief executive of Sirius, who hailed Stern as a figure of "unprecedented recognition and popularity . . . who is capable of changing the face of satellite radio." <u>Boston Globe</u>, Oct. 7, 2004, at A1.

47. Clayton was particularly effusive about Stern's signing. In statements to the press and to analysts, he predicted that Stern would attract millions of new listeners to Sirius once he started on January 1, 2006. Clayton called Stern "the No. 1 celebrity in radio," <u>USA</u> <u>Today</u>, Oct. 7, 2004, at 1B, and "the most effective person to shift traditional radio listenership to satellite radio — in particular, to Sirius Satellite Radio." <u>L.A. Times</u>, Oct. 7, 2004, Part C, at 1. He claimed that Stern's signing established "Sirius Satellite Radio as the successor to FM much the same way FM replaced AM." <u>Newsday</u>, Oct. 7, 2004, at A56.

48. At the same time, Sirius proclaimed that the benefits of Stern's signing would far outweigh the compensation and incentives that were promised to him. In its October 6, 2004 Form 8-K, Sirius estimated that it would recoup its fixed obligations under the Agreement once it acquired approximately 1 million incremental subscribers. Sirius reported that if it "achieve[d] the incentive milestones contained in the agreement" that it believed that

"the material positive effects on [its] business [would] far outweigh the related incentive payments."

49. Sirius acknowledged that it was "obligated to make substantial stockbased incentive payments under the agreement if [it] significantly exceed[ed] agreed upon yearend subscriber targets during the term of the agreement." But Sirius stated that any such payments would be more than offset because its "agreement with Stern [would] have material positive benefit to [its] business, including a positive impact on consumer awareness, average revenue per subscriber, churn and partner relations."

50. As of October 5, 2004, Sirius had 674,459 subscribers. By year end, it had reached 1,143,258 subscribers. As the January 1, 2006 premiere of the Howard Stern Show approached, subscriber levels and sales of aftermarket satellite radios skyrocketed. From September 2005 to December 2005, Sirius subscribers increased from 2,173,920 to 3,316,560.

51. In November 2005, Mel Karmazin, Sirius's chief executive officer, told analysts that Sirius was "anticipating a blowout fourth quarter," citing anticipated holiday sales of satellite radios and increased subscriptions driven by Stern's January launch. Karmazin gave Stern the credit that he deserved for this spike in Sirius subscribers. "The indications are that Howard Stern is going to significantly contribute toward our picking up market share in the most important months of the year." <u>Chicago Tribune</u>, Nov. 5, 2005, Zone C, at 1.

52. In January 2006, Sirius announced that it had already exceeded the subscriber target that permitted Stern to receive his bonus stock compensation on an accelerated basis. This was a remarkable achievement, as it meant that Stern's signing alone had brought millions of new subscribers to Sirius, even before the Howard Stern Show had begun to air on

Sirius's platform. Sirius issued to One Twelve and Buchwald the shares of stock that were due under the Agreement.

53. On January 9, 2006, the Howard Stern Show premiered on Sirius. In the first quarter of 2006, the total number of Sirius subscribers increased to 4,077,747, and by year end, the total number of Sirius subscribers had reached 6,024,555. This figure exceeded Sirius's internal estimate by more than 2 million subscribers, entitling One Twelve to a performance-based stock award and Buchwald to a consulting fee equal to 10% of this amount. In accordance with its contractual obligations, Sirius again paid One Twelve and Buchwald the amounts earned.

54. Karmazin announced the payment of the bonus, noting that Sirius's investment in Stern had "dramatically paid off." Karmazin stated in a Sirius press release that "SIRIUS has significantly outperformed earlier subscriber expectations, now generating over \$300 million more revenue than Wall Street expected at the time Howard agreed to join us. Our exceptional programming, product offerings, and brand have led SIRIUS to set a satellite radio record in 2006 with 2.7 million net subscriber additions."

Sirius Acquires XM in a 2008 Merger

55. A month later, in February 2007, Sirius and XM announced that Sirius would be acquiring XM through a merger of the two companies. If not for the dramatic success that Stern had brought Sirius, Sirius would not have been in a position to acquire its rival and the merger would not have happened.

56. Throughout 2007, Sirius subscribership continued to grow. On February26, 2008, Sirius announced that as of December 31, 2007 it had set a new record, reaching

8,321,785 subscribers. This exceeded the 2007 Siri Internal Estimate by more than 3 million subscribers.

57. The acquisition of XM was formalized on July 28, 2008, and the following day, Sirius announced that it now had more than 18.5 million subscribers.

58. Following the merger, Sirius paid One Twelve the fee set forth in the Agreement so that it could make HS Programs available to all Sirius subscribers, including the Sirius subscribers who had been acquired from XM. Sirius chose to do this through a premium package called the "Best of Sirius," which featured the Howard Stern channels, among other programming.

59. By the end of 2008, the total number of Sirius subscribers had reached 19,003,856, exceeding the estimate contained in the Agreement by more than 10 million subscribers. By the end of 2009, the total number of Sirius subscribers had dipped slightly to 18,772,758, exceeding the estimate contained in the Agreement by more than 8 million subscribers. By the end of 2010, the last year of the Agreement, the total number of Sirius subscribers had reached an all-time high of 20,190,964 total subscribers, exceeding the estimate contained in the Agreement, the total number of Sirius subscribers had reached an all-time high of 20,190,964 total subscribers.

60. Throughout this period, Sirius publicly proclaimed that it had close to or more than 20 million subscribers. It has done this repeatedly and in various contexts. 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) 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 — <u>it is good for SIRIUS XM subscribers</u> 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 <u>our 20</u> <u>million subscribers are lucky to have him</u>." (emphasis added).

(c) 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 also broadcast on one of Stern's channels and several other channels.

(d) On February 15, 2011, Sirius announced its full year 2010 financial results. The company crowed that it had achieved a record number of 20.2 million subscribers, that it had enjoyed revenue of \$2.82 billion, up 14% over 2009, and that it had reached adjusted EBITDA of \$626 million, up 35% over 2009. The company reported that "[n]et subscriber additions in 2010 were 1,418,206, compared to a net subscriber loss in 2009 of 231,098. Ending 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).

Sirius Refuses to Pay the Performance-Based Stock Awards

61. In each year of Stern's Agreement, Sirius exceeded its own internal estimates by more than 2 million subscribers. On January 9, 2007, Sirius paid One Twelve the performance-based stock award for the 2006 calendar year in the form of unrestricted Sirius common stock. It also paid Buchwald his consulting fee. But, with the exception of this initial payment, Sirius has failed to pay One Twelve or Buchwald the performance-based compensation due and owing to them under the Agreement.

62. Stern and Buchwald decided not to demand payment while Sirius was struggling or reportedly on the verge of bankruptcy. For example, following the end of the 2008 calendar year, Sirius had publicly announced that if it did not obtain new financing it would be forced to file for bankruptcy, and Stern and Buchwald did not want to take any action that might cause the company further financial distress or impair its ability to attract financing.

63. In 2009, Sirius obtained financing in the form of an investment from Liberty Media and, by 2010, its financial situation appeared to have stabilized. In early 2010, Stephen Fisher, the Chief Financial Officer at Don Buchwald & Associates, Inc., asked Andrew Moss, Sirius's Vice President, Finance, about the performance-based compensation owed for 2008 and 2009. In response, Moss alleged that no such compensation was due.

64. On or about, March 4, 2010, Richard Basch, Executive Vice President, Legal and Administrative Affairs at Don Buchwald & Associates, Inc., wrote to Patrick Donnelly, Sirius's General Counsel, asking for an explanation as to why the performance-based compensation was not paid for either 2008 or 2009. Despite the parties' agreement and Sirius's own public pronouncements regarding its subscriber levels, Donnelly claimed that Sirius subscribers on the XM platform did not count towards the total number of Sirius subscribers.

Basch pointed out that this position was contrary to the plain meaning of the Agreement and the parties' intent, but Sirius steadfastly refused to pay the performance-based compensation due to One Twelve and the corresponding amount due to Buchwald.

65. In December 2010, the parties negotiated Stern's new contract with Sirius. During the course of those discussions, Buchwald and Stern again demanded that Sirius pay the performance-based compensation owed to One Twelve under the Agreement and the corresponding fee owed to Buchwald. Sirius again refused to pay these amounts.

66. In 2004, when Sirius desperately needed Stern to make its business viable, it induced him to move to Sirius by offering him a chance to share in the success of the company. Now that Stern has put the company on the map, brought in millions of subscribers, and helped it conquer its chief rival, Sirius has unilaterally decided that Stern has been paid enough. The amounts owed to One Twelve and Buchwald represent a fraction of the revenues that Stern enabled Sirius to achieve, yet Sirius refuses to honor its commitments to him and Buchwald.

<u>First Cause of Action</u> (Breach of Contract — One Twelve)

67. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 66 with the same force and effect as if set forth here in full.

68. One Twelve and Sirius entered into the Agreement. The Agreement is a binding and enforceable contract.

69. One Twelve fully performed under the Agreement.

70. The total number of Sirius subscribers exceeded the subscriber targets set forth in the Agreement in each year of the Agreement. Accordingly, under the terms of the Agreement, One Twelve is entitled to certain performance-based stock awards. 71. Under the Agreement, the performance-based stock awards were payable in unrestricted shares of Sirius common stock on the fifth business day of the following year after Sirius achieved an excess subscriber target.

72. Sirius has breached the Agreement by failing to pay One Twelve the awards that are due and owing. Despite notice and an opportunity to cure its breaches, Sirius persists in refusing to pay One Twelve the awards that are due and owing.

73. By reason of the foregoing, One Twelve has incurred damages and is entitled to judgment against Sirius in an amount to be determined at trial, together with interest and costs.

<u>Second Cause of Action</u> (Breach of Contract — Buchwald)

74. Plaintiffs repeat and re-allege each and every allegation contained in paragraphs 1 through 73 with the same force and effect as if set forth here in full.

75. Buchwald and Sirius entered into an agreement with respect to the paragraph of the Agreement headed "Consulting Fee."

76. Under that paragraph, Sirius agreed to pay Buchwald, as a consultant, "a consulting fee equal to ten percent of all compensation (whether in the form of cash or stock) paid to [One Twelve] under [the] Agreement."

77. Buchwald fully performed under the Agreement.

78. Buchwald's consulting fee was payable concurrently with each corresponding payment to One Twelve under the Agreement.

79. Sirius breached the Agreement by failing to pay Buchwald his consulting fees relating to One Twelve's performance-based stock compensation. Despite notice and an

opportunity to cure its breaches, Sirius persists in refusing to pay Buchwald amounts that are due and owing.

80. By reason of the foregoing, Buchwald has incurred damages and is entitled to judgment against Sirius in an amount to be determined at trial, together with interest and costs.

WHEREFORE, plaintiffs demand judgment against the defendant as follows:

(a) on the First Cause of Action in an amount to be determined plus interest and costs;

(b) on the Second Cause of Action in an amount to be determined plus interest and costs; and

(c) for such other and further relief as the Court deems just and proper.

Dated: New York, New York March 22, 2011

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