

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
In re XM SATELLITE RADIO COPYRIGHT LITIGATION

MASTER DOCKET
06 Civ. 3733 (LAK)

This Document Relates to: 07 Civ. 4682 (LAK)
-----X

**STIPULATION GOVERNING REIMBURSEMENT OF EXPENSES AND
COMPENSATION OF SERVICES FOR MERLIN**

WHEREAS, a class action, captioned *Nota Music Publishing, Inc., et al v. XM Satellite - Radio Inc.*, 07 Civ. 4682 (LAK) (the “Action”), has been pending in the United States District Court for the Southern District of New York (the “Court”) since June 1, 2007 alleging that Defendant XM Satellite Radio, Inc. (“XM”), from on or around March 30, 2006 forward, caused to be manufactured and caused to be sold numerous XM Recording Devices;

WHEREAS, this stipulation incorporates by reference the definitions in the Settlement Agreement and all terms used herein shall have the same meaning as set forth in the Settlement Agreement;

WHEREAS, the Plaintiffs in this Action contend that XM has violated rights under federal and New York State law of the Plaintiffs and the members of a proposed Sound Recording Settlement Class and a proposed Musical Composition Settlement Class;

WHEREAS, extensive document discovery has been taken in the Action;

WHEREAS, XM has been incurring losses, and has made public disclosures that certain events might have caused it to have to seek bankruptcy protection;

WHEREAS, Plaintiffs then engaged in extensive negotiations to settle the claims against XM of the Plaintiffs and the Settlement Classes;

WHEREAS, Music and Entertainment Rights Licensing Independent Network B.V. (“Merlin”) is a non-profit organization which, among other things, represents the interests of independent music companies who own and/or control the rights of sound recordings;

WHEREAS, Merlin has represented to Plaintiffs and XM that (a) Merlin has the authority to act on behalf of numerous independent music companies, which are either (i) direct members (“Members”) or (ii) indirect licensors, *i.e.*, non-members for which Merlin represents it has or will have the right to settle claims hereunder for those licensors for whom an express written agreement by and between Merlin and each such licensor has been obtained (collectively, with Members, hereinafter called “Affiliates”); (b) Merlin Affiliates own interests in sound recordings; and (c) Merlin Affiliates are members of the proposed Sound Recording Settlement Class in the Action;

WHEREAS, Merlin has furnished Class Counsel with a list of its Affiliates;

WHEREAS, Merlin has been negotiating with XM since March 2008, outside of the Action, to obtain payments for Merlin Affiliates in consideration for a release by those Merlin Affiliates that was similar to the release that would be granted by members of the proposed Sound Recording Settlement Class in the Action;

WHEREAS, Merlin has agreed to participate and assist in the settlement of the Action;

WHEREAS, Charlie Lexton is a solicitor and general counsel for Merlin and Eric German is a partner (through his professional corporation) of Mitchell Silberberg & Knupp LLP (“Mitchell Silberberg”) who has acted on behalf of and negotiated for Merlin in its negotiations with XM directly and, more recently, through Class Counsel who are the signatories to this agreement;

WHEREAS, Merlin has represented that the fair value of the time that its counsel, executives and staff have expended (between March 2008 and the present) in its negotiations with XM and in helping to procure the proposed Settlement with the proposed Sound Recording Settlement Class exceed \$305,376.56 for Mr. Lexton, Mr. Charles Caldas (Merlin CEO) and Merlin staff and \$45,768.79 for Mitchell Silberberg;

WHEREAS, Plaintiffs and Class Counsel have agreed to apply to the Court for a payment from the Sound Recording Settlement Fund of up to \$304,000 to Merlin for its work to date;

WHEREAS, subject to Court approval, Merlin has agreed to aid in the settlement administration of the Sound Recording Settlement Class Fund by providing the names and addresses of Merlin Affiliates, encouraging Merlin Affiliates to participate in the Settlement, assisting in communicating with the Merlin Affiliates and otherwise assisting the Administrator including in the sending of the Settlement Notice and payments to Merlin Affiliates;

WHEREAS, Class Counsel, subject to Court approval, has agreed to move or petition the Court to pay Merlin from the Sound Recording Settlement Fund for the reasonable value of such settlement administration work by Merlin undertaken after the date of the Settlement Agreement;

NOW THEREFORE, it is hereby agreed by and between the undersigned:

1. **Sound Recordings Only:** This agreement relates only to sound recordings. Merlin does not purport to represent any entities with respect to musical compositions nor will it share in any proceeds from the Musical Composition Settlement Fund.

2. To the extent that any award by the Court of attorneys' fees is at least 33 1/3% of the Sound Recording Settlement Fund, Class Counsel agree to petition and move the Court for the payment to Merlin from such fees of \$304,000 as the reimbursement of its time and expenses

and in compensation for its services. If the amount of attorneys' fees awarded to Class Counsel from the Sound Recording Settlement Fund is less than 33 1/3% of such Fund, then the amount that Class Counsel agrees to petition and move the Court for payment to Merlin shall be reduced. The amount of such deduction shall be the amount by which the attorneys' fees award is less than 33 1/3% multiplied by a fraction, the denominator of which is Class Counsels' lodestar attributable to sound recordings plus Merlin's lodestar and the numerator of which is Class Counsels' lodestar attributable to Sound Recordings.¹ PROVIDED that, Class Counsel agrees, subject to Court approval, that the minimum amount that it shall move the Court for payment to Merlin is \$100,000 of an award of attorneys' fees.

Example:

The Sound Recording fee award is \$200,000 less than 33 1/3% of the Sound Recording Settlement fund. Assume that Class Counsel's lodestar is \$1,600,000 million attributable to Sound Recording Settlement Fund and Merlin's lodestar is \$400,000. The sum of \$400,000 and \$1,600,000 is \$2,000,000 dollars. Dividing \$1,600,000 by \$2,000,000 equals 0.8. Multiplying \$200,000 (the amount by which the fee is less than 33 1/3% of the Sound Recording Settlement Fund) by 0.8 produces \$160,000. In this example, Class Counsel agrees to request a payment to Merlin of \$304,000 (see ¶2 above) minus \$160,000 or \$144,000.

3. Class Counsel shall pay Merlin its fee the amount determined pursuant to ¶2 and in accordance with the other terms of this agreement within seven (7) business days of the receipt by Class Counsel of any attorneys' fee award in the Action.

4. **Merlin's Administration Fees:** Separately, also subject to Court approval, Class Counsel further agrees to petition the Court for reimbursement (from the Sound Recording

¹ Class Counsels' lodestar attributable to sound recordings shall be determined by Class Counsel based on their judgment of how and why their professional services were performed. Without limiting Class Counsels' discretion, Class Counsel presently expects to determine their lodestar attributable to sound recordings by multiplying their total lodestar by a fraction the denominator of which is \$5,377,117 and the numerator of which is \$3,950,000.

Settlement Administration Fee and/or the Sound Recording Settlement Fund) of Merlin's reasonable fees incurred in connection with its assistance with the notice and claims administration process. Merlin will not object to the Plan of Allocation, will not purport to exclude its Affiliates from the Settlement and will, instead, submit on behalf of its Affiliates a Proof of Claim or Proofs of Claim permitting its members to participate in the Settlement in the Action based upon the Plan of Allocation.

For any Merlin Affiliate for whom Merlin purports to submit a Proof of Claim, Merlin agrees to provide Class Counsel with written proof directly executed (including by electronic confirmation) by such Affiliate that Merlin has authority to act on its behalf.

5. **Right of Merlin Affiliates to Exclude Themselves From The Settlement, Object To The Settlement, or Submit Their Own Proof of Claim:** Notwithstanding anything else herein, the parties agree that any Merlin Affiliate shall have the right to Opt Out of the Settlement, to object to the Settlement, to submit its own Proof of Claim or otherwise object to anything herein or in the Settlement. Subject to Court approval, the Settlement Notice shall inform applicable members of the Sound Recording Settlement Class of all the foregoing, including that Merlin will file a Proof of Claim or Proofs of Claim on behalf of Merlin Affiliates. Any individual action (including filing a Proof of Claim) by a Merlin Affiliate shall constitute that Sound Recording Settlement Class member's operative conduct and shall supersede any action by Merlin on behalf of its Affiliates, including any Proof of Claim Merlin may file on behalf of such Affiliate.

6. **Class Notice and Administration of Merlin Affiliate Claims:** Merlin agrees to supply addresses to the Administrator for the sending of the Settlement Notice to the portion

of the Sound Recording Settlement Class who are Merlin Affiliates. Subject to Court approval, the Settlement Notice sent to Merlin Affiliates may be in a Merlin envelope.

7. **SoundExchange:** Contingent upon SoundExchange² agreeing to provide its services for what Class Counsel determines is a reasonable fee, Class Counsel agrees to utilize SoundExchange's data in order to compute the monies owned to members of the Sound Recording Settlement Class, including Merlin Affiliates, as set forth in the Plan of Allocation.

8. **Sound Recording Class Administration Costs:** Merlin is aware of and has read the Stipulation and Agreement of Settlement in this Action. Consistent with such agreement and subject to Court approval, Class Counsel and Merlin agree that Sound Recording Settlement Class administration expenses will be paid as follows: (1) first they will be paid from the \$300,000 Sound Recording Settlement Class Administration Fee negotiated by Class Counsel; (2) any excess Sound Recording Settlement Class administration expenses from the proposed Sound Recording Settlement Fund; and (3) if the Sound Recording Settlement Class administration expenses are less than \$300,000, then any remaining funds shall be used for administration expenses for the Musical Composition Settlement Class.

9. **Agreed Press Release:** After such time as the Court has granted Preliminary Approval, Class Counsel and Merlin agree to issue a mutually agreed upon press release detailing Merlin's role in facilitating the sound recording settlement in the Action.

Dated: New York, New York
October 15, 2010

² SoundExchange is a non-profit performance rights organization that collects royalties on behalf of sound recording rights owners.

LOVELL STEWART HALEBIAN JACOBSON LLP

By: 

Christopher Lovell (CL 2595)
Christopher M. McGrath (CM 4983)
61 Broadway, Suite 501
New York, New York 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4775

LAW OFFICES OF JEFFREY L. GRAUBART, P.C.

By: _____

Jeffrey L. Graubart (JG 1338)
350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

LAW OFFICES OF JOSHUA GRAUBART, P.C.

By: _____

Joshua Graubart, Esq.
6 E. 39th Street, 8th Floor
New York, New York 10016
Telephone: (646) 781-9321
Facsimile: (646) 224-8088

By: _____

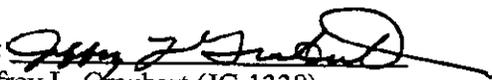
Steven J. D'Onofrio, Esq. (SD 8794)
5335 Wisconsin Avenue, N.W., Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875

Counsel for Plaintiffs and the Settlement Classes

LOVELL STEWART HALEBIAN JACOBSON LLP

By: _____
Christopher Lovell (CL 2595)
Christopher M. McGrath (CM 4983)
61 Broadway, Suite 501
New York, New York 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4775

LAW OFFICES OF JEFFREY L. GRAUBART, P.C.

By: 
Jeffrey L. Graubart (JG 1338)
350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

LAW OFFICES OF JOSHUA GRAUBART, P.C.

By: _____
Joshua Graubart, Esq.
6 E. 39th Street, 8th Floor
New York, New York 10016
Telephone: (646) 781-9321
Facsimile: (646) 224-8088

By: _____
Steven J. D'Onofrio, Esq. (SD 8794)
5335 Wisconsin Avenue, N.W., Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875

Counsel for Plaintiffs and the Settlement Classes

LOVELL STEWART HALEBIAN JACOBSON LLP

By: _____

Christopher Lovell (CL 2595)
Christopher M. McGrath (CM 4983)
61 Broadway, Suite 501
New York, New York 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4775

LAW OFFICES OF JEFFREY L. GRAUBART, P.C.

By: _____

Jeffrey L. Graubart (JG 1338)
350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

LAW OFFICES OF JOSHUA GRAUBART, P.C.

By:  _____

Joshua Graubart, Esq.
6 E. 39th Street, 8th Floor
New York, New York 10016
Telephone: (646) 781-9321
Facsimile: (646) 224-8088

By: _____

Steven J. D'Onofrio, Esq. (SD 8794)
5335 Wisconsin Avenue, N.W., Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875

Counsel for Plaintiffs and the Settlement Classes

LOVELL STEWART HALEBIAN JACOBSON LLP

By: _____

Christopher Lovell (CL 2595)
Christopher M. McGrath (CM 4983)
61 Broadway, Suite 501
New York, New York 10006
Telephone: (212) 608-1900
Facsimile: (212) 719-4775

LAW OFFICES OF JEFFREY L. GRAUBART, P.C.

By: _____

Jeffrey L. Graubart (JG 1338)
350 West Colorado Boulevard, Suite 200
Pasadena, California 91105-1855
Telephone: (626) 304-2800
Facsimile: (626) 304-2807

LAW OFFICES OF JOSHUA GRAUBART, P.C.

By: _____

Joshua Graubart, Esq.
6 E. 39th Street, 8th Floor
New York, New York 10016
Telephone: (646) 781-9321
Facsimile: (646) 224-8088

By: _____


Steven J. D'Onofrio, Esq. (SD 8794)
5335 Wisconsin Avenue, N.W., Suite 950
Washington, D.C. 20015
Telephone: (202) 686-2872
Facsimile: (202) 686-2875

Counsel for Plaintiffs and the Settlement Classes

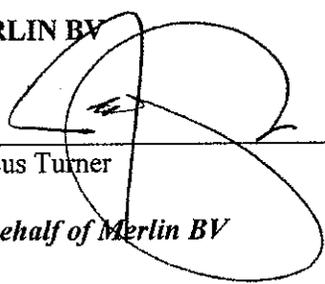
MITCHELL SILBERBERG & KNUPP LLP

By: 

Eric J. German
11377 W. Olympic Blvd.
Los Angeles, California 90064
Telephone: (310) 312-3214
Facsimile: (310) 231-8414

Counsel for Merlin

MERLIN BV

By: 

Marcus Turner

On behalf of Merlin BV