

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SIRIUS XM RADIO INC.,
Petitioner,

v.

FRAUNHOFER-GESELLSCHAFT ZUR FÖRDERUNG DER
ANGEWANDTEN FORSCHUNG E.V.,
Patent Owner.

Case IPR2018-00681
Patent No. 7,061,997

**PATENT OWNER'S SUR-REPLY
TO PETITIONER'S REPLY TO PATENT OWNER'S
PRELIMINARY RESPONSE**

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UPDATED EXHIBIT LIST

Fraunhofer Ex. 2001	Sirius XM Holdings Inc., SEC Form 10-K for the year ended December 31, 2017, Filed January 31, 2018
Fraunhofer Ex. 2002	Sirius XM Holdings Inc., SEC Form 8-K, November 14, 2013
Fraunhofer Ex. 2003	Pandora Media, Inc., SEC Schedule 13D, September 22, 2017
Fraunhofer Ex. 2004	Pandora Media, Inc., SEC Joint Filing Agreement (Exhibit A) to Schedule 13D, September 22, 2017
Fraunhofer Ex. 2005	Sirius XM Holdings Inc., SEC Form 8-K, January 10, 2018
Fraunhofer Ex. 2006	Sirius XM Holdings Inc., Exhibit 10.1 to SEC Form 8-K, January 10, 2018 (Meyer Employment Agreement)
Fraunhofer Ex. 2007	Sirius XM Holdings Inc., SEC Form 8-K, January 14, 2014
Fraunhofer Ex. 2008	Sirius XM Holdings Inc., Exhibit 10.1 to SEC Form 8-K, January 14, 2014 (Donnelly Employment Agreement)
Fraunhofer Ex. 2009	Executed Summons to Sirius XM Radio Inc., attaching Complaint for Patent Infringement, Dated February 22, 2017
Fraunhofer Ex. 2010	Fruanhofer Complaint for Patent Infringement against Defendant Sirius XM Radio Inc., Filed February 22, 2017
Fraunhofer Ex. 2011	Sirius XM Holdings Inc., SEC Form 10-K for the year ended December 31, 2016, Filed February 2, 2017
Fraunhofer Ex. 2012	Defendant Sirius XM Radio Inc.'s Corporate Disclosure Statement Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, April 25, 2017
Fraunhofer Ex. 2013	<u>Erik Knutson v. Sirius XM Radio Inc.</u> , No. 12-cv-0418-AJB-NLS (S.D. Cal.), First Amended Class Action Complaint for Damages
Fraunhofer Ex. 2014	<u>Francis W. Hooker v. Sirius XM Radio Inc.</u> , No. 4:13-cv-3 (E.D. Va.), Class Complaint
Fraunhofer Ex. 2015	<u>Yefim Elikman v. Sirius XM Radio Inc. and Career Horizons, Inc.</u> , No. 1:15-cv-02093 (N.D. Ill.), Second Amended Class Action Complaint

Fraunhofer Ex. 2016	<u>Anthony Parker v. Sirius XM Radio Inc.</u> , No. 8:15-cv-01710-JSM-EAJ (M.D. Fla), Class Action Complaint
Fraunhofer Ex. 2017	<u>Francis W. Hooker et al. v. Sirius XM Radio Inc.</u> , No. 4:13-cv-3 (E.D. Va.), Final Order Approving Settlement and Certifying the Settlement Class, December 22, 2016
Fraunhofer Ex. 2018	File History of U.S. 7,061,997 (excerpted)
Fraunhofer Ex. 2019	Corporate Overview for Sirius XM Satellite Radio, retrieved from https://www.siriusxm.com/corporate?intemp=GN_FOOTER_NEW_AboutSiriusXM_Corp on June 29, 2018
Fraunhofer Ex. 2020	SIRI – Sirius XM Holdings Inc. Company Profile – CNNMoney.com, retrieved from https://money.cnn.com/quote/profile/profile.html?symb=SIRI on July 2, 2018
Fraunhofer Ex. 2021	Sirius XM Holdings Inc. (SIRI) Company Profile, Reuters, retrieved from https://www.reuters.com/finance/stocks/company-profile/SIRI.OQ on July 5, 2018
Fraunhofer Ex. 2022	LinkedIn Profile for Sirius XM Holdings Inc., retrieved from https://www.linkedin.com/company/sirius-xm-radio-inc./ on July 5, 2018
Fraunhofer Ex. 2023	Written Statement of David J. Frear, Chief Financial Officer, Sirius XM Holdings Inc. Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, Hearing on Music Licensing Under Title 17, June 25, 2014

I. SIRIUS XM FAILED TO PROPERLY IDENTIFY ALL RPIS

A petitioner must satisfy its burden “to establish that it has ... identif[ie]d] all the [RPIS].” *Galderma S.A. v. Allergan Industrie, SAS*, IPR2014-01422, Paper No. 14, at 5 (Mar. 5, 2015). “[U]ncorroborated testimonial evidence” is insufficient to satisfy this burden, in part because a petitioner “is far more likely to be in possession of ... relevant evidence than is a patent owner.” *Radware, Inc. v. F5 Networks, Inc.*, IPR2017-01185, Paper No. 9, at 17-19 (Oct. 11, 2017).

The Petitioner has failed to satisfy this burden of persuasion. Despite its reply, Petitioner fails to present any meaningful evidence establishing that it is sufficiently distinct from SXM Holdings and Liberty that it can truly be deemed the only party capable of controlling these proceedings. Instead, Petitioner relies entirely on the uncorroborated testimony of its (and SXM Holdings’) general counsel, which is plainly inadequate. *See id.* at 18-19 (RPI burden not met by party testimony without documentary support); *Atlanta Gas Light Co. v. Bennett Regulator Guards, Inc.*, IPR2013-00453, Paper No. 88, at 11 (Jan. 6, 2015) (same); *Aceto Corp. v. Gowan Co.*, IPR2015-01016, Paper No. 15, at 9-11 (Oct. 2, 2015).

In this case, Petitioner asserts but fails to prove that SXM Holdings is merely a “non-operational holding company.” Reply at 1. To the contrary, there is ample evidence that SXM Holdings is so “intertwined” with Petitioner that the two “effectively operate as a single entity,” which the Board has consistently found

reflects “an actual measure of control or opportunity to control the filing of and participation in an IPR.” *Zerto*, IPR2014-01254, Paper No. 35, at 14; *Radware*, IPR2017-01185, Paper No. 9, at 7; *Galderma*, IPR2014-01422, Paper No. 14, at 5; *Zoll Lifecor*, IPR2013-00606, Paper No. 13, at 10, 15 (parent and subsidiary both RPIs where they “repeatedly held themselves out ... as a single entity”); *Reflectix, Inc. v. Promethean Tech*, IPR2015-00039, Paper No. 18, at 11-12 (Apr. 24, 2015).

For example, SXM Holdings submits SEC filings describing its satellite radio business, conflating parent and subsidiary as “we,” and indicating that SXM Holdings conducts real-world operations like “transmit[ting] music,” “acquir[ing] subscribers through marketing,” and entering “agreements” with automakers. Ex. 2001-4. SXM Holdings and Petitioner are jointly involved in legal matters, ***including lawsuits that name only Petitioner*** but for which SXM Holdings participates in settlement negotiations and makes payments. Ex. 2011-19. SXM Holdings and Petitioner also share ***the exact same nine-person top-level executive team***, including the same CEO and President. *See* Ex. 2004-2 to -3. The Board has emphasized that the “presence at the helm” of a single individual as “CEO of both parent and subsidiary,” “strongly implies an involved and controlling parent corporation representing the unified interests of itself and Petitioner.” *Galderma*, IPR2014-01422, Paper No. 14, at 12. Importantly, several of the high-level positions at SXM Holdings involve specific operational responsibilities, such as

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