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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 JOEL BROIDA, an individual, on  
11 behalf of himself, and on behalf of all  
12 persons similarly situated,

13 Plaintiff,

14 vs.

15 SIRIUS XM RADIO, INC.

16 Defendant.

CASE NO. **11CV1219 LAB RBB**

**COMPLAINT FOR:**

1. **Breach of Contract**
2. **Unfair Business Practices**
3. **False Advertising**

**CLASS ACTION**

17 **I. The Parties**

18 1. Plaintiff Joel Broida (Broida) is a citizen of Colorado and an individual  
19 customer of Defendant Sirius XM Radio, Inc. (Sirius XM), the successor in interest  
20 to Sirius Satellite Radio, Inc.(Sirius).

21 2. Defendant Sirius XM is a Delaware Corporation with its principal  
22 place of business at 1221 Avenue of the Americas, 36<sup>th</sup> Floor, New York, New  
23 York. Sirius Satellite Radio, Inc. (Sirius) is a former Delaware corporation that  
24 merged on July 28, 2008 with XM Satellite Holdings, Inc. (XM), thereby forming  
25 Sirius XM.

26 **II. Jurisdiction and Venue**

27 3. This action is a class action involving thousands of persons, a member  
28 of the plaintiff's class is a citizen of a state different from Defendant, and the

1 amount in controversy, in the aggregate, exceeds the sum of \$5,000,000, exclusive  
2 of interest and costs.

3 4. The jurisdiction of this Court is based upon 28 U.S.C. 1331, 1332 (d)  
4 and the Class Action Fairness Act.

5 5. Venue is proper as defendant transacts business in this District and  
6 throughout the United States.

7  
8 **III. Common Facts**

9 6. Sirius XM is in the business of providing internet radio services. In  
10 connection therewith, Sirius XM bills its customers a monthly internet connectivity  
11 charge, among other charges, and collects state and local taxes for and on behalf of  
12 taxing authorities, based on the amounts collected.

13 7. On or about, May 26, 2010, Plaintiff Broida purchased a two-year  
14 "Family Friendly" Plan in reliance upon advertised rates offered by Sirius XM.  
15 Specifically, Sirius XM advertised that persons purchasing a twenty four (24)  
16 month plan would pay for only 19 months, i.e. receive "5 months free." At the time  
17 of this advertisement, Sirius XM charged \$11.95 per month. The two-year plan  
18 should, therefor, have cost \$227.05. Instead, Sirius XM charged plaintiff and its  
19 other customers \$249.99 for the 24-month plan.

20  
21 **IV. The Internet Tax Fairness Act**

22 8. In 1996 the United States Congress passed, and the President approved,  
23 the Internet Tax Fairness Act (the "ITFA"). The ITFA, 47 U.S.C. § 151 (1998) as  
24 amended, bars state and local government from imposing fees and taxes on internet  
25 access. "No State or political subdivision thereof shall impose any of the following  
26 taxes during the period beginning November 1, 2003, and ending November 1,  
27 2014: ... (1) Taxes on Internet access."

28 9. Under the Internet Tax Fairness Act the phrase "internet access" means

1 “a service that enables users to connect to the Internet to access content,  
2 information, or other services offered over the Internet; (B) includes the purchase,  
3 use or sale of telecommunications by a provider of a service described in  
4 subparagraph (A) to the extent such telecommunications are purchased, used or  
5 sold.-- (I) to provide such service; or (ii) to otherwise enable users to access  
6 content, information or other services offered over the Internet[.]”

7 10. Despite the prohibition on taxation of internet access enacted by the  
8 Internet Tax Fairness Act, Sirius XM charged, and continues to charge, their  
9 customers fees and taxes based upon, in part, the cost of internet access.  
10

11 **V. Class allegations**

12 11. This action is thus brought, and may properly be maintained, as a class  
13 action pursuant to the provisions of California Code of Civil Procedure Section 382  
14 and Civil Code Section 1781(a) and Fed.R.Civ.P. 23. Plaintiff brings this action on  
15 behalf of himself and on behalf of a Class of all others similarly situated who,  
16 within four (4) years prior to the date of filing of this action, entered into a contract  
17 with Sirius XM for internet radio services.

18 12. The Class of persons for whose benefit this case is brought consists of  
19 (1) all Sirius XM customers, past and present, who contracted for internet radio  
20 services and were charged fees and/or taxes based upon the cost of internet access  
21 and/or (2) all Sirius XM customers who purchased the 24 month Family Friendly  
22 Plan and who paid more than \$227.05 for that service at the time when Sirius  
23 charged \$11.95 per month and advertised such purchasers would receive “5 months  
24 free.”

25 13. Plaintiff's claims are typical of the claims of the Class because he and  
26 all members of the putative Class have sustained damages as a result of (1) paying  
27 fees and taxes based upon the cost for internet access and/or (2) signing up for a 24  
28 month plan based upon the advertised promise of receiving “5 months free.”

1           14. There are numerous questions of law and fact common to the Class  
2 which predominate over any questions affecting only individual class members,  
3 including but not limited to the following:

- 4           - whether Sirius XM charged Plaintiff and the Class fees and taxes  
5 based upon the cost of internet access in violation of the Internet  
6 Tax Fairness Act;
- 7           - whether Sirius XM's actions violated California law;
- 8           - whether Sirius has been unjustly enriched by its retention of a  
9 portion of the tax;
- 10          - whether Sirius XM should be enjoined from collecting fees and  
11 taxes based upon the cost of internet access;
- 12          - whether Sirius XM should be required to seek a refund of the  
13 fees and taxes paid by its customers and to return any refund to  
14 Plaintiff and the members of the Class.
- 15          - whether Sirius XM falsely advertised the benefits of its 24 month  
16 Family Friendly Plan.

17           15. All common questions are able to be resolved through the same factual  
18 occurrences as specifically and/or generally alleged herein.

19           16. Plaintiff will fairly and adequately represent and protect the interests of  
20 the members of the Class. Plaintiff has no claims antagonistic to those of the Class.  
21 Plaintiff has retained competent and experienced counsel in complex class action  
22 litigation. Counsel is committed to the vigorous prosecution of this action.

23           17. The prosecution of separate actions by the Plaintiff and individual  
24 members of the Class against Sirius XM could create a risk of inconsistent or  
25 varying adjudications on the common issues of law and fact related to this action.

26           18. A class action is superior to other methods for the fair and efficient  
27 adjudication of this controversy since the Class is so numerous that joinder of all  
28 members in a single action would be impracticable and the repetitive testimony of

1 each Class member at trial would be unnecessary and an inefficient use of judicial  
2 resources. Since the practices engaged in are common to all members of the Class,  
3 judicial economy would not be served by multiple actions with duplicative and  
4 repetitive testimony. Furthermore, as the monetary injury suffered by individual  
5 Class members may be relatively small, the expense and burden of individual  
6 litigation would make it impossible for members of the Class to individually  
7 redress the wrongs done to them.

8 19. The expense and burden of litigation would substantially impair the  
9 ability of the Class members to pursue individual cases to protect their rights. In  
10 the absence of a class action, Sirius XM will retain the benefits of its wrongdoing  
11 and will continue to collect fees and taxes improperly.

12 20. The identification of the individual Class members may be effectuated  
13 by reference to Defendant's records.

14 21. Plaintiff is aware of no difficulty which will be encountered in the  
15 management of this litigation which would preclude its maintenance as a class  
16 action.

17  
18 **VI. Causes of Action**

19 **FIRST CAUSE OF ACTION**  
20 **(Breach of Contract)**

21 22. Plaintiff realleges and incorporates by reference paragraphs 1 through  
22 21 inclusive, of this Complaint, as though set forth in full herein.

23 23. Sirius XM and Plaintiff entered into a written contract.

24 24. The written contract is a form contract used by Sirius XM with all its  
25 customers similarly situated to Plaintiff.

26 25. The contract between Sirius XM and Plaintiff permits Sirius XM to  
27 charge for its services including internet access on a monthly basis and permits it to  
28 charge Plaintiff for all applicable and legally due federal, state and local fees and/or

1 taxes.

2 26. The contract does not permit Sirius XM to charge for fees and taxes  
3 that may not be calculated or billed based upon the cost of internet access.  
4 Nevertheless, Plaintiff has been required to pay these unlawful charges.

5 27. Despite the prohibition on state and local fees and taxes imposed by the  
6 Internet Tax Fairness Act, Sirius XM charged Plaintiff fees and/or taxes based  
7 upon the cost of his internet access.

8 28. Furthermore, and with respect to those customers who purchased the  
9 Family Friendly 24-month Plan, and who signed up for the plan at the time Sirius  
10 XM advertised that it offered "5 months free," Sirius XM breached said contract by  
11 charging those customers, including plaintiff, a higher than advertised rate. That is  
12 to say, Sirius XM induced customers to enter into a contract based upon a material  
13 mistake of fact, i.e. the price of the 24-month Family Friendly Plan.

14 29. In doing the acts complained of herein, Sirius XM breached its  
15 contractual obligations to Plaintiff and the putative Class causing him and the class  
16 damages in an amount to be proven at the time of trial.

17  
18 **SECOND CAUSE OF ACTION**

19 **(Violation of Consumer Protection laws )**

20 30. Plaintiff realleges and incorporates by reference paragraphs 1 through  
21 29 inclusive, of this Complaint, as though set forth in full herein.

22 31. In failing to inform the Plaintiffs and the Class that it intended to  
23 charge them fees and taxes that were not due, and in collecting charges that are  
24 unlawful, deceptive and/or unfair, and to the extent Sirius advertised programs at  
25 rates not delivered, Sirius XM violated California Business and Professions Code  
26 § 17200, as well as the applicable consumer protection laws of each of the other  
27 states.

28 32. In doing the acts complained of herein, Sirius XM has caused loss of

1 money to Plaintiff and the members of the class in an amount to be proven at the  
2 time of trial.

3  
4 **THIRD CAUSE OF ACTION**

5 **(False Advertising)**

6 33. Plaintiff realleges and incorporates by reference paragraphs 1 through  
7 32 inclusive, of this Complaint, as though set forth in full herein.

8 34. Sirius XM at all pertinent times herein intended to cause Plaintiff and  
9 those similarly situated to rely upon its advertising materials and to induce them to  
10 enter into contracts with Sirius XM based upon those materials. Said erroneous  
11 advertising materials were uniform. By advertising that plan participants in the 24  
12 month Family Friendly Plan would receive "5 months free," while simultaneously  
13 charging those plan participants for more than 19 months, Sirius XM  
14 misrepresented the true extent of its charges to Plaintiff and the class, collected  
15 excessive charges, and damaged Plaintiff and the class in an amount to be proven at  
16 the time of trial, all in violation of California Business and Professions Code  
17 section 17500 and the applicable false advertising statutes of each of the states.

18 35. At all times herein, Plaintiff and the class reasonably relied upon the  
19 advertising materials generated by Sirius XM.

20  
21 **PRAYER**

22 **WHEREFORE**, Plaintiff prays for relief as follows:

23  
24 **ON THE FIRST CAUSE OF ACTION**

- 25 1. For money damages;  
26 2. For attorney and paralegal fees;  
27 3. For prejudgment interest as allowed by law;  
28 4. For costs of suit incurred herein; and

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5. For such other relief as the Court deems just and proper.

ON THE SECOND CAUSE OF ACTION

1. For disgorgement by Defendant of all amounts that have been obtained in connection with any of the deceptive, unfair and/or unlawful business practices alleged herein;
2. For restitution according to proof;
3. For attorney and paralegal fees;
4. For prejudgment interest as allowed by law;
5. For costs of suit incurred herein; and
6. For such other relief as the Court deems just and proper.

ON THE THIRD CAUSE OF ACTION

1. For disgorgement by Defendant of all amounts that have been obtained in connection with any of the deceptive, unfair and/or unlawful business practices alleged herein;
2. For restitution according to proof;
3. For attorney and paralegal fees;
4. For prejudgment interest as allowed by law;
5. For costs of suit incurred herein; and
6. For such other relief as the Court deems just and proper.

Dated: June 1, 2011

MORRIS AND ASSOCIATES

by: Stephen B. Morris  
Stephen B. Morris  
Attorney for Plaintiff



# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

### I. (a) PLAINTIFFS

JOEL BROIDA, an individual, on behalf of himself, and on behalf of all persons similarly situated, +

(b) County of Residence of First Listed Plaintiff Arvada, CO  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Stephen B. Morris, 444 West C Street, ste 300, San Diego, CA 92101 (619) 239-1300

### DEFENDANTS

SIRIUS XM RADIO, INC.

County of Residence of First Listed Defendant New York, NY  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**11CV 1219 LAB RBB**

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### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                                |                                |   |                                |                                |
|---|----------------------------|--------------------------------|--------------------------------|---|--------------------------------|--------------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | PTF <input type="checkbox"/> 1 | DEF <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | PTF <input type="checkbox"/> 4 | DEF <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2     | <input type="checkbox"/> 2     | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5     | <input type="checkbox"/> 5     |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3     | <input type="checkbox"/> 3     | Foreign Nation  | <input type="checkbox"/> 6     | <input type="checkbox"/> 6     |

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input checked="" type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
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### V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

### VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. section 1331, 1332

Brief description of cause:

Overcharging for service, false advertising and unlawful collection for taxes and/or tees.

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND:  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

6/2/11

SIGNATURE OF ATTORNEY OF RECORD

*Stephen Morris*

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**COPY**