

No. 03-18-00573-CV

**In the Court of Appeals
for the Third Judicial District
Austin, Texas**

GLENN HEGAR, COMPTROLLER OF PUBLIC ACCOUNTS; AND
KEN PAXTON, ATTORNEY GENERAL OF THE STATE OF TEXAS,

Appellants/Cross-Appellees,

v.

SIRIUS XM RADIO INC.,

Appellee/Cross-Appellant.

On Appeal from the
261st Judicial District Court, Travis County

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL LETTER
BRIEF OR, ALTERNATIVELY, TO ENTER A
SUPPLEMENTAL BRIEFING SCHEDULE**

TO THE HONORABLE THIRD COURT OF APPEALS:

Per Texas Rules of Appellate Procedure 10.1(a) and 38.7, and Third Court Rule of Practice 58, Appellants/Cross-Appellees Glenn Hegar, Comptroller of Public Accounts, and Ken Paxton, Attorney General of the State of Texas (collectively, “the Comptroller”), respectfully seek leave to file a letter brief regarding the impact of the Texas Supreme Court’s recent ruling in this case. *See Sirius XM Radio Inc. v. Hegar*, 643 S.W.3d 402 (Tex. 2022).

I.

The Comptroller respectfully moves to file a supplemental letter brief following the Supreme Court's order remanding this case to this Court for further proceedings. In the alternative, the Comptroller respectfully requests that this Court enter an order providing the parties an opportunity to submit supplemental briefing.

As relevant here, the parties disputed (a) whether the receipts of Sirius XM Radio Inc. ("Sirius XM") from subscriber fees paid by Texas customers were from services performed in this State, and (b) the fair value of the services that are rendered in Texas by Sirius XM. The trial court entered judgment for Sirius XM, which the Comptroller appealed and Sirius XM cross-appealed. This Court reversed and rendered judgment for the Comptroller in May 2020. Sirius XM petitioned the Texas Supreme Court for review.

On March 25, 2022, the Texas Supreme Court issued its decision, reversing the judgment of this Court. *Sirius XM*, 643 S.W.3d at 404. Although this Court had agreed with the Comptroller that, under the Tax Code, Sirius XM's service receipts from Texas subscribers were sourced to Texas because the "receipt-producing, end-product act" was the enabling of each Sirius XM subscriber's radio to receive Sirius's signal, the Supreme Court disagreed, holding instead that a service is performed in Texas "if the people or equipment performing the service are physically located in Texas." *Id.* Consequently, the Supreme Court reversed this Court's judgment and remanded the case to this Court to consider the parties' remaining arguments. The mandate issued on May 4, 2022.

With respect to proceedings on remand, the Supreme Court stated as follows:

No court has yet considered the Comptroller's argument that the evidence of fair value Sirius proffered in the district court is insufficient to support the district court's judgment even if Sirius is right about how to apportion its services. If the Comptroller continues to take that position after today's decision, it may raise the issue in the court of appeals on remand.

Id. at 412. Based on the Supreme Court's discussion, the Comptroller believes that it would be appropriate to supplement the existing briefing to identify and address the remaining issues to be determined by this Court on remand, and the impact of the Supreme Court's opinion on this case.

Accordingly, the Comptroller respectfully requests leave to file the accompanying supplemental letter brief limited to explaining the effect of the Supreme Court's *Sirius XM* decision. Based on the arguments in the Comptroller's previous briefing and the Supreme Court's guidance, the Comptroller believes that supplemental briefing will provide helpful assistance in deciding the matters before this Court on remand. The proposed letter brief will confirm the Comptroller's argument on appeal that Sirius XM cannot rely on costs of performance to establish the fair value of its services that are rendered in Texas and that Sirius XM's fair-value evidence cannot justify the refund it seeks. Either of these grounds would require reversing the judgment of the trial court and rendering judgment for the Comptroller. But if there were any doubt, the Court should remand this case to the trial court in the interests of justice to permit further factual development on costs of performance in the light of the Supreme Court's discussion of Sirius XM's service. If, however, this Court believes that more-detailed supplemental briefing would be appropriate, the Comptroller respectfully requests the opportunity to supply such briefing.

II.

Counsel has conferred with Sirius XM regarding supplemental briefing. Under-signed counsel proposed a supplemental briefing schedule but opposing counsel responded that Sirius XM opposes additional briefing.

The Comptroller wishes to minimize any burden to the parties and this Court that might result from supplemental briefing. The Comptroller, however, understands some measure of supplemental briefing to be appropriate in the light of the Supreme Court's guidance, both to preserve the Comptroller's arguments on remand and to advise this Court concerning the issues remaining to be decided. The Supreme Court's ruling may affect whether and to what extent Sirius XM is entitled to any refund because insofar as any costs of performance are relevant to the fair value of Sirius XM's service, *but see* Reply/Response Br. 23-25, the Supreme Court has focused on those aspects of a service that are of "benefit [to] the customer" or constitute "useful work." *Sirius XM*, 643 S.W.3d at 408, 411. As the letter brief explains, at trial, Sirius XM relied on certain costs that go beyond the Supreme Court's description of a service in Texas, meaning either that this Court should reverse and render judgment for the Comptroller or, at a minimum, remand for further proceedings on fair value in the light of the Supreme Court's new guidance.

Accordingly, the Comptroller respectfully requests leave to file the attached proposed supplemental letter brief. The Comptroller is unopposed to Sirius XM filing a response to the proposed supplemental letter brief. Alternatively, the Comptroller requests that this Court enter an appropriate supplemental briefing schedule to apprise the Court of the parties' respective positions.

III.

The Comptroller's request for leave to file a supplemental letter brief is not sought for delay, but so that justice may be done. If the Court deems that justice requires additional briefing beyond that discussed in the proposed supplemental letter brief, the Comptroller respectfully requests the opportunity to present supplemental briefing on whatever just terms this Court may prescribe. *See* Tex. R. App. P. 38.7.

PRAYER

The Comptroller requests that the Court grant leave to file the attached supplemental letter brief. Alternatively, the Comptroller requests that this Court enter an appropriate supplemental briefing schedule.

Respectfully submitted.

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Attorney General of Texas

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CERTIFICATE OF CONFERENCE

I certify that I conferred on June 15, 2022, with Jeff Friedman and Scott Brister, counsel for Sirius XM Radio Inc., via email, who confirmed on June 18, 2022, that Sirius XM Radio Inc. is opposed to supplemental briefing.

/s/ Ari Cuenin
Ari Cuenin

CERTIFICATE OF SERVICE

On June 22, 2022, this document was served electronically on Daniel H. Schlueter, counsel for Sirius XM Radio Inc., via DanSchlueter@eversheds-sutherland.com, Jeff Friedman, counsel for Sirius XM Radio Inc., via JeffFriedman@eversheds-sutherland.com, and Scott Brister, counsel for Sirius XM Radio Inc., via sbrister@HuntonAK.com.

/s/ Ari Cuenin
Ari Cuenin

CERTIFICATE OF COMPLIANCE

According to Microsoft Word, the body of this motion contains 997 words.

/s/ Ari Cuenin
Ari Cuenin

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June 22, 2022

Via Electronic Filing

Mr. Jeffrey D. Kyle, Clerk
Third Court of Appeals
P.O. Box 12547
Austin, TX 78711-2547

Re: No. 03-18-00573-CV, *Hegar v. Sirius XM Radio Inc.*

Dear Mr. Kyle:

On March 25, 2022, the Texas Supreme Court issued its ruling in *Sirius XM Radio Inc. v. Hegar*, 643 S.W.3d 402 (Tex. 2022), reversing this Court's judgment and remanding for further proceedings. The mandate issued on May 4, 2022.

In relevant part, the Supreme Court's opinion states that this Court's

conclusion that Sirius failed to present sufficient evidence of fair value flowed from its view that the district court had misidentified the relevant service performed by Sirius. Because we now reverse on that predicate question, the basis for the court of appeals' objection to Sirius's fair-value evidence falls away.

No court has yet considered the Comptroller's argument that the evidence of fair value Sirius proffered in the district court is insufficient to support the district court's judgment even if Sirius is right about how to apportion its services. If the Comptroller continues to take that position after today's decision, it may raise the issue in the court of appeals on remand.

Id. at 412 (citation omitted).

Letter to Mr. Kyle, Clerk
June 22, 2022
Page 2

Pursuant to the Supreme Court’s guidance, the Comptroller respectfully submits that the evidence of fair value that Sirius XM Radio Inc. (“Sirius XM”) adduced at trial was legally insufficient to support the trial court’s judgment. Evidence is legally insufficient if “the evidence is insufficient to allow reasonable, fair-minded people to conclude” the facts supported Sirius XM’s position on fair value. *McAllen Hosps., L.P. v. Lopez*, 576 S.W.3d 389, 397 (Tex. 2019).

In short, and as the Comptroller argued to this Court and to the Supreme Court in briefs it incorporates by reference here, Sirius XM presented legally insufficient evidence to support its refund claim. Specifically, (1) Sirius XM cannot rely on costs of performance to establish the fair value of its services that are rendered in Texas, and (2) Sirius XM’s fair-value evidence cannot justify the refund it seeks. Either of these grounds would require reversing the judgment of the trial court and rendering judgment for the Comptroller. *See* Appellants’/Cross-Appellees’ Br. 23-31; Reply/Response Br. 23-30.

First, apportionment would depend on the “fair value of the services that are rendered in Texas,” 34 Tex. Admin. Code § 3.591(e)(26), and neither the franchise-tax statute nor the Comptroller rule authorizes Sirius XM’s reliance on “cost of performance.” *E.g.*, Reply/Response Br. 23-25. This Court should hold that cost-based sourcing did not, as a matter of law, reflect fair value. *E.g., id.* at 27.

Second, reasonable and fair-minded people could not reach the conclusion that Sirius XM carried its burden to obtain a refund. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827-28 (Tex. 2005); *Calvert v. Union Producing Co.*, 280 S.W.2d 241, 243 (Tex. 1955). Sirius XM assigned no value to its most valuable asset (its essential FCC licenses), disregarded millions of dollars in performance royalties it paid for content it did not produce or own and excluded hundreds of millions of dollars it spent to subsidize the installation of the equipment necessary to hear Sirius XM’s programming in Texas. Indeed, the Supreme Court’s opinion in this case casts further doubt on Sirius XM’s approach. Some of the costs on which Sirius XM relies do not provide a “benefit [to] the customer” or constitute “useful work,” which the Supreme Court articulated in describing the performance of a service under Texas law. *Sirius XM*, 643 S.W.3d at 408, 411. For example, customers are not paying Sirius XM for its research and development costs. Research and development might

Letter to Mr. Kyle, Clerk
June 22, 2022
Page 3

potentially benefit future customers, but it is not done for the benefit of the customers who were paying subscription revenues for that period. *See* 5 R.R., Joint Ex. 49, Attach. B. And Sirius XM has admitted that the component parts of its service are “inseparable.” Sirius XM Br. on the Merits 16. Insofar as any cost or revenue was relevant to fair value, the Comptroller correctly relied on the ratio of Texas Sirius XM subscribers to nationwide subscribers. Appellants’/Cross-Appellees’ Br. 34-35.

Because Sirius XM’s cost-based approach cannot support the trial court’s fair value finding, the trial court erred as a matter of law in rendering judgment for Sirius XM. The ordinary remedy for failure to meet the burden of proof for legally insufficient evidence would be the rendition of a take-nothing judgment. *See, e.g., Nabors Drilling Techs. USA, Inc. v. Hegar*, No. 03-17-00284-CV, 2018 WL 2709201 (Tex. App.—Austin June 6, 2018, pet. denied). Although the Comptroller raised that prospect in Supreme Court briefing, *e.g.*, Comptroller Merits Br. 14-20, the Supreme Court declined to decide the issue in the first instance. The Comptroller respectfully requests that this Court now reverse the judgment of the trial court and render a take-nothing judgment against Sirius XM.

If this Court disagrees, however, then the Court should remand this case to the trial court in the interests of justice under Texas Rule of Appellate Procedure 43.3. At trial, Sirius XM relied on a study that did not accurately determine fair value for the reasons previously discussed. *See, e.g.*, Response/Reply Br. 28-29. The Comptroller’s contrary audit assessment, however, incorporated the now-discredited receipt-producing, end-product act theory. *See id.* at 27-29. Insofar as costs of performance were appropriately considered, *but see supra* p. 2, Sirius XM may be entitled to some refund amount, albeit less than claimed and less than awarded in the judgment.

In that event, the Comptroller should have the opportunity to present the trial court with evidence concerning fair value based on the new guidance provided by the Supreme Court regarding the nature of Sirius XM’s service. *See Sirius XM*, 643 S.W.3d at 410-12. It is well-established that remand is appropriate “when a case was tried on a wrong theory and it appear[s] to [a court] that the justice of the case demanded another trial.” *Morrow v. Shotwell*, 477 S.W.2d 538, 541 (Tex. 1972). And

Letter to Mr. Kyle, Clerk
June 22, 2022
Page 4

this Court has remanded in the interest of justice when, as here, the record is “largely undeveloped” on unsettled questions. *7-Eleven, Inc. v. Combs*, 311 S.W.3d 676, 696 (Tex. App.—Austin 2010, pet. denied).

Respectfully submitted.

/s/ Ari Cuenin
Ari Cuenin
Deputy Solicitor General

CERTIFICATE OF SERVICE

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/s/ Ari Cuenin
Ari Cuenin

CERTIFICATE OF COMPLIANCE

According to Microsoft Word, the body of this letter contains 999 words.

/s/ Ari Cuenin
Ari Cuenin

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