11-3696-cv(L)

11-3729-cv(CON); 11-3834-cv(CON); 11-3883-cv(CON); 11-3908-cv(CON); 11-3910-cv(CON); 11-3916-cv(CON); 11-3965-cv(CON); 11-3970-cv(CON); 11-3972-cv(CON); 11-4061-cv(CON); 11-4064-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CARL BLESSING, EDWARD A. SCERBO, JOHN CRONIN, CHARLES BONSIGNORE, ANDREW DREMAK, TODD HILL, CURTIS JONES, JOSHUA NATHAN, JAMES SACCHETTA, DAVID SALYER, SUSIE STANAJ, PAUL STASIUKEVICIUS, SCOTT BYRD, GLENN DEMOTT, MELISSA FAST, JAMES HEWITT, RONALD WILLIAM KADER, EDWARD LEYBA, GREG LUCAS, KEVIN STANFIELD, TODD STAVE, PAOLA TOMASSINI, JANEL STANFIELD, BRIAN BALAGUERA, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

SIRIUS XM RADIO INC.,

Defendant-Appellee,

(Additional Caption on the Reverse)

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLEES

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v.

MARVIN UNION, ADAM FALKNER, NICOLAS MARTIN, JILL PIAZZA, KEN WARD, RUTH CANNATA, LEE CLANTON, CRAIG CANTRALL, BEN FRAMPTON, KIM FRAMPTON, JOEL BROIDA, JOHN SULLIVAN, SHEILA MASSIE, JASON M. HAWKINS, STEVEN CRUTCHFIELD, SCOTT D. KRUEGER, ASSET STRATEGIES, INC., CHARLES B. ZURAVIN, and JENNIFER DEACHIN, RANDY LYONS, TOM CARDER, JOHN IRELAND, JEANNIE MILLER, MICHAEL HARTLEIB, BRIAN DAVID GOE, DONALD K. NACE, CHRISTOPHER BATMAN,

Objectors-Appellants,

LINDA MROSKO, LANGE M. THOMAS,

Objectors.

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PRELIMINARY STATEMENT

The issue is whether the District Court properly exercised its discretion in granting final approval to an antitrust class action settlement and awarding Class Counsel $13 million in fees and expenses where:

- The settlement was entered into on the eve of trial after nearly 18 months of hard-fought litigation, including extensive motion practice and full fact and expert discovery conducted at an accelerated pace;
- Plaintiffs' ability to recover at trial was greatly complicated by the fact that the Department of Justice ("DOJ") had concluded that the merger of Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") was not "likely to substantially lessen competition;"[1]
- Plaintiffs' state law claims, which Plaintiffs' counsel considered offered the best chance for recovery, were dismissed on pretrial motions, leaving Plaintiffs only with a difficult-to-prove antitrust claim;
- The evidence established that Defendant-Appellee Sirius XM Radio Inc. ("SXM") had contemplated and made plans to institute a significant price increase after a three-year price freeze required by the Federal Communications Commission ("FCC") expired on July 28, 2011, a cap the FCC declined to extend;

[1] S.D.N.Y. Docket Item 105-2 at 1.

- The evidence, including expert declarations, established that the settlement – the principal feature of which is an injunction-like requirement that until January 1, 2012 prevented SXM from raising prices after expiration of the price freeze required by the FCC – has an estimated value of at least $180 million;[2]
- The evidence established that only approximately 2% of SXM subscribers discontinue their subscriptions each month, so that the vast majority of class members would benefit from the price freeze without buying anything additional or doing anything differently than they would be doing in any event – renewing their subscriptions;
- Considering all of the difficulties Plaintiffs' antitrust claim faced, the District Court observed that "[o]ne might conclude that class counsel did well to reach a settlement at all in view of the questionable liability in this case." SPA-16;[3] and
- The attorneys' fees awarded amount to only approximately 56% of Plaintiffs' counsel's lodestar and less than 8% of the estimated value of the settlement.

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[2] Effective January 1, 2012, SXM increased the monthly base subscription price from $12.95 to $14.49 – an increase of $1.54 per month. *See* A-1383.

[3] References in the form "SPA-___" and "A-___" refer to the Special Appendix and Appendix, respectively, filed by Appellant Nicolas Martin.

The District Court's approval of the settlement and award of attorney's fees and expenses represents an appropriate exercise of its discretion and should be affirmed in all respects.

COUNTERSTATEMENT OF FACTS

A. THE GOVERNMENT CLEARS THE WAY FOR THE MERGER

1. The DOJ Concludes That the Merger Is Not Likely to Substantially Lessen Competition

After a lengthy investigation of the proposed merger that created SXM, on March 24, 2008 the DOJ announced its conclusion that "the evidence does not demonstrate that the proposed merger … is likely to substantially lessen competition, and that the transaction therefore is not likely to harm consumers."[4]

2. The FCC Recognizes the Value of a Price Freeze and Makes a Price Freeze a Condition for Approval of the Merger

Merging the two companies required Sirius and XM to transfer their licenses to the newly-formed SXM, which required FCC approval. On July 25, 2008, after a lengthy review, the FCC issued an 83-page order approving the transfers as being in the public interest.[5]

The FCC was concerned, however, that SXM would raise its prices to the detriment of consumers, and the FCC recognized that a price freeze would protect

[4] S.D.N.Y. Docket Item 105-2 at 1.

[5] S.D.N.Y. Docket Item 105-3.

consumers from such an action. Thus, as a condition to the approval, SXM was precluded from raising the retail prices of specified programming packages for 36 months after consummation of the merger. *See* Docket Item 105-3 ¶107. Thus, the FCC understood that there was a real likelihood of a price increase and that a price freeze was an effective way of protecting consumers.

On July 27, 2011, the FCC announced that it would not extend the 36-month price cap that had constrained SXM's prices since the merger.[6] Therefore, as of July 29, 2011, SXM was free to increase its prices (but for the settlement herein). The evidence before the District Court demonstrated that SXM contemplated and had made plans for a significant price increase upon expiration of the FCC price freeze. *See* A-569-71; A-579-626. And, as of January 1, 2012, when the price freeze provided by the settlement expired, SXM in fact implemented a price increase. A-1383.

B. THE COMPLAINT

The Second Amended Complaint (the "Complaint") alleged that the merger violated the federal antitrust laws because it lessened competition, created a monopoly, and led to increased prices for satellite radio services sold by SXM.[7]

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[6] A-881.

[7] In particular, the Complaint alleged that, after the merger, SXM increased its prices for various services including: (i) increasing the monthly charge per additional radio for multi-radio subscribers from $6.99 per month to $8.99;

(Cont'd)

The Complaint also contained state law claims, alleging that SXM breached its subscriber contract and misled subscribers in its characterization of the nature of and rationale behind the Royalty Fee. Plaintiffs sought damages and injunctive relief.

C. THE COURSE OF THE LITIGATION

Unlike some cases, which may settle soon after the complaint is filed and without extensive litigation efforts, this case was fully litigated to the eve of trial. Plaintiffs' counsel's efforts included, among other things:

- extensive investigation of the issues involved in this case, A-559-60;
- briefing in opposition to Defendant's motion to dismiss, A-561;
- preparation of extensive discovery demands on Defendant and subpoenas on third-parties, A-561-64;
- responding to Defendant's discovery requests, A-562;
- reviewing and analyzing over 1.3 million documents produced in discovery by Defendants and third parties, A-563;
- numerous submissions to Magistrate Judge Ellis concerning discovery disputes, and oral argument thereon, A-562;
- retaining experts on issues including class certification, antitrust liability (encompassing both market definition and but-for pricing), and damages,

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(ii) imposing a $2.99 monthly fee for internet streaming; and (iii) imposing a "U.S. Music Royalty Fee" (the "Royalty Fee"), which for most subscribers was set at $1.98 per month.

On December 6, 2010 – after this litigation was commenced – Defendant lowered the Royalty Fee from $1.98 to $1.40 per month. A-575-76. Plaintiffs argued below that this reduction was a benefit of this litigation and worth approximately $56 million (A-541) – a position that SXM disputed. The District Court did not address this aspect.

and working extensively with those experts in connection with the preparation of their reports and rebuttal reports, A-564;

- taking or defending 18 fact depositions, A-563;
- taking or defending 6 expert depositions, A-564;
- briefing Lead Plaintiffs' motion for class certification, and oral argument thereon, A-565;
- briefing in response to SXM's motion for summary judgment, and oral argument thereon, A-565;
- preparation of motions *in limine*, A-566;
- preparation of the trial documents, A-566-67; and
- preparing for trial, A-566-67.

Plaintiffs' counsel incurred time charges of $17,384,638.50 and out-of-pocket expenses of $3,231,244.24 − a total of $20,615,881.78. A-576-77.

During the litigation, decisions by the District Court eliminated certain of Plaintiffs' claims. Thus, on motion to dismiss, the District Court dismissed the breach of contract claim and certain of the consumer protection claims. S.D.N.Y. Docket Item 74. The Court granted class certification as to the federal antitrust damage claim but denied class certification as to the remaining state law consumer protection claims. A-214-27. And while the Court denied summary judgment as to the federal antitrust claims, it granted summary judgment as to the remaining state law consumer protection claims. S.D.N.Y. Docket Item 86. Thus, only the antitrust claim remained for trial.

Dismissal of the state law claims greatly increased the risk that there would be no recovery if the case went to trial, because in the view of Class Counsel, these

were Plaintiffs' best claims. Those claims involved facts much easier for a jury to understand than the remaining antitrust claims. The theory behind those state law claims was straightforward, *i.e.*, that the Royalty Fee was being calculated in a manner different from the way described by SXM in its contracts or other communications with subscribers. A-572. In contrast, the antitrust claims required the jury to weigh competing expert testimony regarding matters such as relevant market and competitive behavior in the absence of the merger, involving complex antitrust theories that would be difficult for a layperson to comprehend. Plaintiffs would have had to demonstrate that the relevant market for antitrust purposes is the market for satellite radio, not the broader market for audio entertainment, and that rapidly evolving audio technology (such as Internet radio and improved in-dashboard access to Internet and iPod controls) does not present a significant competitive threat to SXM. A-572. In addition, as the District Court noted, Plaintiffs faced the prospect of having to convince the jury that two government agencies were wrong when they concluded the merger would not injure competition. SPA-16; *see also* A-572-73.

A May 2, 2011 trial date was set by the District Court. The trial was thereafter postponed to permit Rule 23 notice of the action and of an opportunity to request exclusion to be provided to class members.

D. THE SETTLEMENT

Initial discussions concerning settlement took place in November 2010. After an exchange of offers, it was clear that the parties were far apart. A-567. Nevertheless, Class Counsel and counsel for Defendant continued to try to resolve the case. A wide variety of possible ways of settling the case were explored. Given the confidentiality that pertains to settlement discussions, the various demands and offers that were exchanged cannot be disclosed. It is appropriate to note, however, that SXM's counsel made it very clear, and never deviated from the position, that a settlement involving a large cash payment to the class was out of the question. Therefore, any meaningful settlement had to involve non-cash consideration. A-567.

Discovery produced strong evidence that SXM had contemplated and made plans for a significant price increase upon expiration of the three-year price freeze on which the FCC had insisted as a condition of the license transfers required for the merger. *See* A-569-71, A-579-626. Therefore, as a meaningful cash settlement was not possible, the idea of extending the FCC price freeze became a focal point of the settlement negotiations.

The negotiations continued simultaneously with preparation for trial. Finally, the parties reached agreement on a settlement providing that through December 31, 2011, SXM would not raise prices for basic subscriptions, multi-

radio subscriptions, Internet streaming, and other services, and that the Royalty Fee would remain at or below its current rate. The settlement further provided that subscribers would, irrespective of whether their subscription plans come up for renewal prior to December 31, 2011, be permitted to renew their subscriptions prior to December 31, 2011 at the rates currently in effect. The settlement allowed former subscribers to either (a) reconnect their satellite radio without paying a reactivation fee and receive one month of basic satellite radio service at no cost; or (b) receive SXM Internet streaming service for one month at no cost. In addition, the settlement required SXM to pay all of the costs of providing notice to class members, which SXM has done.

Concerned as to how to value the price freeze, Class Counsel insisted that Defendant provide representations as to its plans with respect to raising subscription prices absent the freeze and to provide a calculation of the estimated value. A-232. SXM thereafter provided a declaration estimating that the value of the settlement is at least $180 million. A-359-61. In addition, Plaintiffs' economic expert, Dr. James Langenfeld, submitted a declaration performing his own analysis of the settlement and reaching a similar conclusion. A-529-49.

After the parties had agreed on the consideration that the class would receive in the settlement, counsel negotiated and agreed on an amount of attorneys' fees that SXM would pay to Plaintiffs' counsel, subject to court approval. A-569.

SXM agreed to pay to Plaintiffs' counsel, subject to the Court's approval, up to $13 million for Plaintiffs' counsel's fees and expenses.

E. THE SETTLEMENT HEARING

By order entered May 19, 2011, as amended on June 9, 2011, the District Court approved the form and manner of giving notice to the class. Pursuant to said orders, notice was sent by e-mail and/or regular mail to approximately 15.7 million class members, notifying them of the settlement and the date of the settlement hearing and that Plaintiffs' counsel would request up to $13 million in fees and expenses to be paid by SXM, and advising them of their rights to object or to ask to be excluded. A total of 67 objections were received, from 85 class members.

On August 8, 2011, the District Court held a hearing on the motions to approve the settlement and to award attorneys' fees to Plaintiffs' counsel. Judge Baer invited all objectors or their counsel to address the Court at the hearing. Seven chose to do so.

F. THE DECISION APPROVING THE SETTLEMENT AND AWARDING ATTORNEYS' FEES

On August 24, 2011, after carefully considering the written and oral submissions, the District Court issued its opinion approving the settlement and awarding Plaintiffs' counsel $13 million in fees and expenses. The award gave

Plaintiffs' counsel only approximately 56% of their total time charges on the case.[8] It speaks volumes as to the lack of credibility of Appellant Martin's brief that while he complains bitterly that the fee award to Plaintiffs' counsel was excessive, he never once mentions that the award amounted to only 56% of Plaintiffs' counsel's lodestar.

With respect to the settlement, Judge Baer stated that he had "reviewed the Settlement's substantive terms and conclude that they demonstrate sufficient fairness, adequacy, and reasonableness" and that "each of the '*Grinnell*' factors considered by the Circuit as the path to fairness supports this conclusion." SPA-16. Specifically, noting that the DOJ and FCC had declined to try to block the merger, Judge Baer observed that "[o]ne might conclude that class counsel did well to reach a settlement at all in view of the questionable liability in this case." SPA-16.

The Court further held that the five month price freeze was meaningful because

> the evidence demonstrates that Sirius XM had every intention of raising prices beginning in August of this year, and had the go-ahead from the FCC to do so. In fact, the Settlement Agreement requires Sirius XM to forego some $180 million in fees. *See* Langenfeld Decl.; Brooker Decl. Speculation to the contrary is not grounds to

[8] Deducting Plaintiffs' out-of-pocket expenses of $3,231,244 from the $13 million award leaves $9,768,756 for time charges. This amounts to approximately 56% of Plaintiffs' counsel's $17,384,638 lodestar. *See* A-576-77.

> reject the Settlement. The declarations and other material submitted to this Court strongly suggest that the $180 million calculation is not illusory, and represents, at a conservative estimate, 40% of the Plaintiffs' estimated best possible recovery – a result that is fair and reasonable in the antitrust context.

SPA-17.

The Court rejected the objectors' contention that the price freeze was analogous to a "coupon settlement." Given that nearly all SXM subscribers continually renew their subscriptions, the Court noted that "[u]nlike coupon settlements," the settlement here "does not require class members to purchase something they might not otherwise purchase to enjoy its benefits; rather, the vast majority of class members will benefit in the course of their normal subscription payments, and former subscribers may benefit from a month of free radio or internet service." SPA-17.

With respect to the award to Plaintiffs' counsel, Judge Baer stated that after reviewing the documentation submitted, he "found nothing to suggest exorbitant rates nor double billing nor padding of any kind." SPA-19. He further stated that the award "is reasonable under both the lodestar and percentage method of calculation, and appropriate in view of the criteria established in *Goldberger v. Gleason,* 160 F.3d 858 (2d Cir. 1998). Again, the fee is a separate obligation that will not come out of the Settlement amount, and was negotiated after the terms of the Settlement had been agreed upon." SPA-19.

SUMMARY OF THE ARGUMENT

Applying the "*Grinnell*" factors, the District Court properly exercised its discretion in approving the settlement. The evidence demonstrated that SXM planned a substantial price increase when the FTC-imposed price freeze ended, and that the price freeze contained in the settlement would benefit class members by approximately $180 million. Appellants' unsupported speculation that a price increase would have had no impact on subscribers was properly rejected by the District Court.

The settlement was not a coupon settlement but rather in the nature of an injunction preventing SXM from raising its prices. The Class Action Fairness Act ("CAFA") specifically distinguishes between coupon settlements and injunctive settlements, and permits attorneys' fees in injunctive settlements to be based on lodestar. Furthermore, unlike the situation with coupon settlements, which provide benefits only if class members purchase something they would rarely purchase and may not want, the price freeze here benefits all subscribers when they renew their subscriptions. Since only 1-2% of SXM subscribers fail to renew each month, the District Court correctly held that the concern in coupon settlements that the coupons will not be used or that they require class members to purchase something they otherwise would not purchase is inapplicable.

The District Court appropriately exercised its discretion in awarding attorneys fees that amounted to only 56% of Plaintiffs' counsel's lodestar. In so concluding, the District Court appropriately considered the fact that the fee was negotiated after the terms of the settlement were agreed to, and the fact that the fee did not come out of the settlement but was a separate obligation of SXM.

Class members had adequate notice of the application for attorneys' fees. The Notice to class members, disseminated long prior to the due date for objections, informed them of the maximum amount of fees and expenses that Plaintiffs' counsel would seek. Furthermore, the motion for fees was filed prior to the due date for objections.

Judge Baer's expressed desire to see Plaintiffs' counsel staffing on the case reflect the race and gender diversity of the class provides no basis to upset the order granting class certification, especially where, as here, such expressed desire did not impact how the case was staffed and Appellant Martin cannot demonstrate that the representation of the class suffered because women and minority lawyers worked on the case.

ARGUMENT

I. THE STANDARD OF REVIEW

In trying to obtain reversal of orders approving a settlement and awarding of attorneys' fees, Appellants face a daunting task. A "district court's approval of a

settlement agreement" is reviewed by this Court under the deferential "abuse of discretion" standard. *World Trade Ctr. Props. LLC v. Certain Underwriters at Lloyd's of London*, 650 F.3d 145, 151 (2d Cir. 2011). As stated in *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 246-47 (2d Cir. 2007):

> "[A] district court's approval of the settlement of a class action is reviewable under an abuse-of-discretion standard." *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991). We review a district court's factual conclusions related to a settlement agreement under the clearly erroneous standard of review, and we review de novo a district court's legal conclusions with respect to its interpretation of the terms of a settlement agreement. *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005).

Similarly, this Court's "review of an award of attorneys' fees is 'highly deferential to the district court.'" *Crescent Publ'g Grp., Inc. v. Playboy Enters., Inc.*, 246 F.3d 142, 146 (2d Cir. 2001). The District Court's determination as to the "reasonableness" of the fee is within that Court's discretion. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). An award of attorneys' fees "will [be] reverse[d] on appeal only for an abuse of discretion." *Crescent*, 246 F.3d at 146.

Appellants' self-serving characterization of the matters on appeal as questions of law that are reviewed *de novo* does not make it so. The District Court did not formulate or purport to apply any novel principles of law. Rather, the Court carefully examined the facts and concluded that the settlement was fair and

reasonable in light of the risks of the litigation, the range of results that a trial might produce, and all of the other factors that *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), instructs a District Court to consider in evaluating a proposed settlement. Similarly, the District Court's decision to award attorneys' fees was based on the Court's consideration of the results achieved, the time and effort devoted to the case, and all of the other relevant factors set out in *Goldberger*, 209 F.3d at 50.[9]

II. THE *GRINNELL* FACTORS SUPPORT APPROVAL OF THE SETTLEMENT

A. THE DISTRICT COURT APPROPRIATELY CONCLUDED THAT THE *GRINNELL* FACTORS SUPPORT APPROVAL OF THE SETTLEMENT

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), set forth the considerations relevant to approval of class action settlements:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the

[9] Authority relied on by Appellants demonstrates that the issues they raise are reviewed for abuse of discretion. For example, Appellants argue that in *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935 (9th Cir. 2011), the Ninth Circuit viewed with disfavor a common provision whereby a defendant agrees not to contest an award of fees for plaintiffs' counsel up to a certain amount. *See, e.g.*, Martin Br. at 35. Contrary, however, to Martin's assertion that this raises "legal question" that is reviewed *de novo*, in *Bluetooth* the Ninth Circuit applied the abuse of discretion standard. 654 F.3d at 940. Making it clear that what is involved was discretion, not a question of law, the Ninth Circuit stated flatly: "[C]lear sailing provisions are not prohibited." *Id*. at 949.

> risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

(Citations omitted)

The District Court carefully analyzed the *Grinnell* factors and correctly found that they support approval of the settlement. SPA-16. Thus, the record demonstrated that the case was highly complex, and a long and expensive trial would have been necessary; there were only 85 objectors out of over 15 million class members; discovery was complete, so that the parties had sufficient information to make an informed decision about settlement; there were enormous risks of establishing liability and damages; SXM's ability to withstand a large judgment was questionable in light of its financial difficulties; and the settlement was within the range of reasonableness given the likely maximum recovery at trial and the risks. *See* A-563-64, A-569-74.

Appellants avoid discussing the *Grinnell* factors and do not show that they weigh against approval of the settlement. In particular, while Appellants argue that the price freeze imposed by the settlement has little or no value, they do not argue that Plaintiffs' antitrust claim was strong or that a better settlement could have or should have been obtained. Nor do they argue that Plaintiffs would have prevailed at trial.

Appellant Ireland argues that the District Court erred in concluding that the fact that there were 85 objectors out of 15.7 million class members (.0005% of the class) (SPA-16 n.2) indicates class endorsement of the settlement. Ireland Br. at 15-16. Ireland fails to cite even one case suggesting that numbers such as these do not satisfy this *Grinnell* factor, and the caselaw overwhelmingly supports Judge Baer's conclusion.[10]

B. THE *GRINNELL* FACTORS SHOULD NOT BE ABANDONED

Cognizant that the *Grinnell* test supports approval of the settlement, Appellant Martin argues that this Court should jettison the *Grinnell* factors in favor of a test formulated by the American Law Institute. Martin Br. at 30-31 & n.7.[11]

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[10] *See In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices & Prods. Liab. Litig.*, No. 09-MD-2102, 2010 WL 3422722, at *6 (S.D.N.Y. Aug. 24, 2010) (20 objections in class over 350,000 constitutes "a miniscule percentage," weighing in favor of approval); *Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 563, 574 (D.N.J. 2010) (203 objections and 1,119 opt outs in a class of 5 million is a "small number of objections … [that] may be indicative of endorsement"); *In re Western Union Money Transfer Litig.*, No. 01-cv-0335, 2004 WL 3709932, at *7 (E.D.N.Y Oct. 19, 2004) (small number of objectors favors approval, with 38 objections out of more than 17.9 million notices mailed); *In re Excess Value Ins. Coverage Litig.*, No. MDL-1339, 2004 WL 1724980, at *11 (S.D.N.Y. July 30, 2004) (finding class reaction favored approval where only 18 of 2.6 million class members objected); *In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262, 2002 WL 31663577, at *23 (S.D.N.Y. Nov. 26, 2002), *aff'd sub nom. Adams v. Rose*, No. 03-7011, 2003 WL 21982207 (2d Cir. Aug. 20, 2003) (objections filed by less than 18% of 1,350 class members viewed as low enough to support settlement).

[11] Martin specifically objects to the *Grinnell* factor that a small number of objections is a factor in favor of settlement approval. Martin Br. at 40. Contrary to Martin's view, this Court has emphasized that in some cases "the favorable

(Cont'd)

Martin does not cite any Circuit that has adopted that test, and it is respectfully submitted that there is no basis for this Court to abandon the *Grinnell* factors, which have stood the test of time for over 30 years and have been adopted or emulated by numerous other Circuits.[12]

C. APPELLANT IRELAND'S ARGUMENT THAT A FEW CLASS MEMBERS MAY NOT BENEFIT FROM THE SETTLEMENT PROVIDES NO BASIS TO DENY APPROVAL

Ireland complains that the settlement provides no relief to two small subsets of class members: (i) those with prepaid lifetime subscriptions, and (ii) those who have cancelled their subscriptions and do not want to use the free month of SXM service to which they are entitled under the settlement. Ireland cites no case that rejected a settlement because a small group of class members might not benefit from it. Judge Baer did not abuse his discretion in finding the settlement fair and reasonable notwithstanding this argument.

First, because Ireland did not have a prepaid lifetime subscription, A-1127, he lacks standing to object on that aspect. *See In re AOL Time Warner, Inc. Sec. &*

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reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in our *Grinnell* inquiry." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005).

[12] *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 317 (3d Cir. 1998); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *Officers for Justice v. Civil Service Comm'n of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982).

ERISA Litig., MDL No. 1500, 2006 U.S. Dist. LEXIS 17588, at *52 n.17 (S.D.N.Y. Apr. 6, 2006).

Second, a court should "not disapprove the settlement based on a small number of class members who may not benefit from [it] when to do so would deny all the benefits of the settlement to the entire class." *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, No. MDL 633, 1986 U.S. Dist. LEXIS 24435, at *63-64 (E.D. Pa. June 10, 1986); *see Hoffman Elec., Inc. v. Emerson Elec. Co.*, 800 F. Supp. 1289, 1294 (W.D. Pa. 1992) (approving settlement even if "some of the class members will not benefit from this settlement"); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 352 (E.D.N.Y. 2010) (approving settlement notwithstanding that some class members "receive no benefit from the settlement").

Third, the fact that some class members may decline to take advantage of a settlement does not make the consideration valueless. This is true even in cash settlements where some class members choose not to file a claim or not to cash the check. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 934 (8th Cir. 2005) (cell phone subscribers who terminate service before receiving benefit of free service provided pursuant to settlement "are no different from other members in a settlement who elect not to claim their settlement benefits").

III. THERE IS NO BASIS IN THE RECORD FOR APPELLANTS' ASSERTION THAT MOST OF THE 15 MILLION CLASS MEMBERS COULD RECEIVE SXM SERVICE FOR $3.99 PER MONTH AND THAT, THEREFORE, A LARGE SXM PRICE INCREASE WOULD NOT HAVE HAD ANY MATERIAL IMPACT ON CLASS MEMBERS

Nearly every aspect of Martin's argument is based on his contention, which he repeats *ad nauseam*, that a price increase by SXM would not have had any impact on subscribers, and hence that freezing SXM's prices is worthless, because all "class members already had the ability to purchase the same service for $3.99/month." Martin Br. at 3. Martin's position is based on one paragraph of his objection (A-821), where his lawyer states that Martin was able to take advantage of a special promotional price of $3.99/month, and where he references a couple of Internet sites where other subscribers talk about various discounts that SXM offers from time to time. On nothing more than this so-called evidence, Martin asks the Court to "infer … that the set of class members who are receiving discounts … is a materially large number." Martin Br. at 24. Analysis of the alleged factual basis for Martin's argument reveals that the argument is totally speculative and unsupported.

Martin cites http://is.gd/sirius_discount for the proposition that anyone who calls up can get SXM service for $3.99 per month, and he cites http://is.gd/sirius_discount77 for the proposition that subscribers can get SXM service for $77/year. A-821. Neither of these sites, however, appears to exist;

instead, you get redirected elsewhere. Martin also cites fatwallet.com, but that site merely references some blogger posts, most several years old. Martin's effort to transform these dubious Internet sites into proof that a price freeze is meaningless because all 15 million class members can get SXM service for $3.99 per month is preposterous.[13]

More importantly, "anonymous e-mails from an internet message board … are inadmissible hearsay evidence." *Gentieu v. Tony Stone Images/Chicago, Inc*.,

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[13] The fact that the record fails to support Martin's assertions regarding the price at which Class Members could obtain SXM service is symptomatic of a fundamental flaw that pervades Martin's brief: He and his counsel simply play fast and loose with the record. For example:

- Martin (and Goe/Hartleib) claim that Judge Baer "repeatedly" criticized Plaintiffs' counsel for "overlays in time or duplication in work." Martin Br. at 39 (citing A-98-99); Goe/Hartleib Br. at 13. In fact, Judge Baer never did so. The order Martin cites was the order appointing lead counsel, which contained Judge Baer's standard caution to avoid duplication. The order was entered at the very start of the case, before Plaintiffs' counsel had done much work, and therefore was not, and could not have been, a criticism of Plaintiffs' counsel. (And, as noted above, Judge Baer found at the end of the case that Plaintiffs' counsel had not engaged in double billing or padding time. SPA-19.) How Martin or Goe/Hartleib could cite this order for the proposition that Judge Baer repeatedly criticized Plaintiffs' counsel for duplication is inexplicable.
- Martin notes that Judge Baer indicated that time spent briefing the opposition to SXM's first motion to dismiss should not be included in the lodestar. Martin Br. at 7. Martin's counsel will have a difficult time explaining why he neglected to tell this Court that all of such time was expressly ***excluded*** from the lodestar information provided by Plaintiffs' counsel to the District Court. A-576 n.4.

Given how Martin freely mis-cites the record, the Court may well have concerns about the credibility of any assertions he makes in his brief.

255 F. Supp. 2d 838, 869 (N.D. Ill. 2003); *see Elston v. UPMC - Presbyterian Shadyside*, No. 06-cv-329, 2007 U.S. Dist. LEXIS 78531, at *23 n.8 (W.D. Pa. Oct. 23, 2007) ("statements [in a] blog are inadmissible hearsay"); *Engers v. AT&T*, No. 98-cv-3660, 2005 U.S. Dist. LEXIS 41682, at *6 (D.N.J. Sept. 8, 2005) (Internet survey is inadmissible hearsay); *Loussier v. Universal Music Group, Inc*., No. 02-cv-2447, 2005 U.S. Dist. LEXIS 37545, at *11 (S.D.N.Y. July 14, 2005) ("printouts from the eBay website are inadmissible hearsay, because they constitute out-of-court statements being offered to prove that the mix tapes were being sold on eBay"); *Jones v. Hirschfeld*, No. 01-cv-7585, 2003 U.S. Dist. LEXIS 10370, at *16 (S.D.N.Y. June 19, 2003) ("website printouts or similar hearsay will not suffice"); *Woods v. Slater Transfer & Storage, Inc*., No. 08-cv-948, 2010 U.S. Dist. LEXIS 95959, at *11 (D. Nev. Aug. 27, 2010) ("internet complaints constitute inadmissible hearsay"); *St. Clair v. Johnny's Oyster & Shrimp, Inc*., 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999) ("any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules").

Nor is there any valid evidentiary support for Martin's allegation that he himself paid only $3.99/month. A-821 contains merely the inadmissible statement by Martin's lawyer about what Martin purportedly paid. Similarly unsupported by ***any*** record cite is the assertion by Appellants Goe and Hartleib that they receive

offers from SXM to renew their subscriptions for less than the listed price. Goe/Hartleib Br. at 11. Martin, Goe and Hartleib could have submitted declarations or documentary evidence with their objection, but they chose not to do so. Furthermore, Martin's objection states that he paid $46 for his "first" 10 months of service, A-821, but does not say what he paid after that, and by the time he made the objection that "first" 10 month period would have expired (because Martin started his subscription in June 2010, and he made his objection in July 2011). Therefore, Martin's own brief appears to indicate that Martin benefitted from the foregone price increase; at a minimum, the record does not establish that Martin will not benefit from it.

Moreover, nearly every business occasionally offers promotions and discounts. The availability of some discounts or introductory offers for a limited period of time is hardly proof that listed prices are meaningless, or that a significant increase in list prices would not have a material impact on what customers pay. Appellants' suggestion that all or most of the 15 million class members could have obtained SXM service for $3.99/month or some similar price is baseless. SXM could have discontinued such discounts at any time, and surely would have done so if millions of subscribers started requesting such discounts.

SXM's financial reports indicate that such widespread discounting is not SXM's practice. SXM tracks and publishes data on its average monthly revenue

per user ("ARPU").[14] For the year ending December 31, 2011, SXM's monthly ARPU was $11.58.[15] If all or substantially all of SXM's subscribers were able to pay only $3.99 per month as Martin alleges, there is no way the monthly ARPU would be as high as $11.58. The facts completely eviscerate Martin's assertions.

Indeed, if a large increase in the subscription price would not impact subscribers because they all can get enormous discounts any time they want, then the FCC engaged in a meaningless act when it insisted on a three-year price freeze as a condition to approving the license transfers.

There is simply no basis for Appellants' assertion that a price increase would have had no impact on SXM subscribers and that a continuation of the FCC price freeze was meaningless.

IV. THE DISTRICT COURT'S CONCLUSIONS AS TO THE VALUE OF THE SETTLEMENT ARE NOT CLEARLY ERRONEOUS

A. JUDGE BAER'S CONCLUSION THAT IT WAS LIKELY THAT SXM WOULD HAVE RAISED PRICES ABSENT THE SETTLEMENT IS SUPPORTED BY THE RECORD AND IS NOT CLEARLY ERRONEOUS

The evidence in the record demonstrated that SXM had contemplated and made plans for a large price increase after the FCC-imposed price increase expired on July 28, 2011. *See* A-569-71, A-579-626. Appellants presented no evidence to

[14] *See* Sirius XM Radio Inc. 2011 Form 10-K at 13 (Feb. 9, 2012), http://files.shareholder.com/downloads/SIRI/1707785779x0x542108/4A6FB33D-0153-498A-85BE-86AE1EF3C1BF/SIRI_10K.pdf.

[15] *Id.*

the contrary. The District Court correctly concluded that "the evidence demonstrates that Sirius XM had every intention of raising prices beginning in August of [2011], and had the go-ahead from the FCC to do so." SPA-17. And, in fact, SXM raised its base subscription price on January 1, 2012 by $1.54/month. A-1383.

B. JUDGE BAER'S CONCLUSIONS AS TO THE VALUE OF THE PRICE FREEZE ARE SUPPORTED BY THE RECORD AND ARE NOT CLEARLY ERRONEOUS

Appellees submitted a declaration of an economic expert, Dr. Langenfeld, and the declaration of a SXM employee, Brooker, both of whom analyzed the record and concluded that the price freeze had a projected value of approximately $180 million. The District Court properly credited these analyses. SPA-17.[16]

Martin argues that if Plaintiffs and SXM value the price freeze at $180 million, the settlement is unreasonable because a cash settlement of $150 million would have been preferable to both sides: He then speculates that because they did not settle on these terms, one side or the other must not believe that the price freeze is really worth $180 million.

This conclusion is wrong. First, non-cash settlements can benefit a class precisely because the defendant is typically "willing to provide substantially more

[16] Ireland's criticisms of Dr. Langenfeld's analysis (*see* Ireland Br. at 20) were each answered by Dr. Langenfeld in the submissions in the District Court. *See* A-1278-81.

value in a [non-cash] settlement than it ever would have agreed to pay in a cash settlement." *Western Union*, 2004 WL 3709932, at *12.[17]

Second, the cash settlement that Martin would have preferred – which was never available – would not have been a greater benefit to class members. Given the substantial administrative and postage costs of sending checks to class members[18] and the fact that there are 15 million class members, even a large cash settlement would have resulted in each class member receiving very small checks. The uncontradicted evidence in the record is that when check amounts are this small, many class members do not even bother to cash their checks. A-1283-84; *see* SPA-17. In *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463 (S.D.N.Y. 2004), then-District Judge Lynch agreed that "settlements that distribute checks for less than $10 require disproportionately more follow-up, have a

[17] *See also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1018-19 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001) (same); Geoffrey P. Miller & Lori S. Singer, *Non-pecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 112 (1997) ("The efficiencies of nonpecuniary settlements arise because of benefits such settlements can offer either to the plaintiff, the defendant, or both – benefits that can be shared between the parties, making everyone better off.").

[18] *See* A-1283; *see also New York v. Nintendo of Am. Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (in assessing adequacy of settlement comprised primarily of $5.00 coupons, court noted that "[t]he coupons, while not an ideal form of compensation, are adequate.... [T]he cost of a check reimbursement scheme would approach $5.00 per check.").

disproportionately high number of uncashed checks, require more checks to be reissued, and often involve second or third distributions of settlement funds."

Third, "the fact that some objectors would have preferred cash cannot be determinative of the issue whether the settlement before the court is reasonable." *In re Cuisinart Food Processor Antitrust Litig.*, No. MDL 447, 1983 WL 153, at *7 (D. Conn. Oct. 24, 1983) (Cabranes, D.J.). Plaintiffs were not given the option of ***any*** cash settlement, and Judge Baer was not given a choice between a cash settlement and a price freeze. Had Class Counsel insisted on a cash recovery for all Class members, no settlement at all would have been possible. *See Myers v. Medquist, Inc.*, No. 05-cv-4608, 2009 WL 900787, at *12 (D.N.J. Mar. 31, 2009) ("[T]he Court notes that ... Plaintiffs were unable to prevail upon [the defendant] to consent to a settlement that provided for direct payments to class members, and that no settlement could have been reached if Plaintiffs insisted upon such terms."); *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372, 377-78 (E.D.N.Y. 2004) (approving voucher settlement where defendants rejected demand for cash settlement and alternative was likely no relief at all). Recognizing the risks of proceeding to trial, Class Counsel viewed the settlement that was achievable as preferable to running the risk of zero recovery. Faced with these options, Judge Baer appropriately exercised his discretion in concluding that the settlement was the preferable option.

C. THERE IS NO BASIS FOR THE SPECULATION BY THE CRUTCHFIELD APPELLANTS THAT JUDGE BAER DID NOT CONSIDER THE DECLARATION OF THEIR PURPORTED EXPERT, DR. ROSEN

The centerpiece of the brief submitted by the Crutchfield Appellants is their repeated assertion that the District Court "declined to consider" the declaration they submitted from a purported economic expert, Dr. Harvey Rosen. Crutchfield Br. at 1; *see id*. at 3, 7-12. This argument is meritless.

First, Appellants' unseemly insinuation that the District Court ignored material presented to it is baseless. The mere fact that the Court's opinion did not refer to the Rosen declaration hardly proves the Court did not consider it; there is no requirement that a court opinion specifically mention every item in the record that the court considered. The District Court's opinion stated that the Court had "considered" the "oral and written submissions" by the objectors (SPA-15), and there is no basis for this Court to disbelieve that statement. There is a "strong presumption" that a District Judge "considered all arguments properly presented to her, unless the record clearly suggests otherwise." *United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

Second, counsel for the Crutchfield Appellants attended the final approval hearing and addressed the District Court, but he did not even mention the Rosen declaration at that time. *See* A-1323-26. If the Rosen declaration was such a crucial item in this case, why didn't counsel draw it to Judge Baer's attention?

Third, the Rosen declaration provides no serious economic analysis at all. He does not purport to have ever served as an expert in an antitrust case, and his declaration reflects his lack of relevant expertise.[19]

V. AS THIS WAS NOT A COUPON SETTLEMENT, THE DISTRICT COURT WAS NOT REQUIRED TO DEFER ITS AWARD OF ATTORNEYS' FEES

Appellants argue that the settlement is a coupon settlement, and that pursuant to CAFA, determination of the attorneys' fee must be postponed until the redemption rate for the so-called coupons is known. This argument fails.

The relief provided here is not comparable to a coupon but rather, as certain Appellants recognize,[20] the price freeze is akin to an injunction. In cases involving

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[19] For example:

- Dr. Rosen says that he is "not aware of any published or actual price increases that had occurred after July 28, 2011." Crutchfield A-5. The settlement had already been entered into as of that date. It would have been absurd to implement a price increase on July 28 and then roll it back a few weeks later when the settlement was approved.
- Dr. Rosen says that there is no way to know for sure if the planned price increase would have been instituted. Crutchfield SPA-6. This argument would render all injunctions valueless, as it is always possible that the defendant might not have done what it was enjoined from doing. In any event, SXM in fact implemented a price increase upon expiration of the price freeze. A-1383.
- Dr. Rosen says nothing prevents SXM from implementing a very large price increase after the price freeze expires on December 31, recouping its losses from the freeze. Crutchfield SPA-6. But that would be true even if there were a large cash settlement. In any event, the price increase that went into effect on January 1, 2012 was not as Dr. Rosen feared. A-1383.

[20] *See* Crutchfield Br. at 18; *see also* A-1122.

antitrust claims, courts look favorably upon settlements based on injunctive relief only.[21] Indeed, allowance of attorneys' fees to an antitrust plaintiff who substantially prevails in an action for injunctive relief "is mandatory." *Union of Needletrades, Indus. & Textile Emps. v. INS*, 202 F. Supp. 2d 265, 269 n.3 (S.D.N.Y. 2002), *aff'd*, 336 F.3d 200 (2d Cir. 2003); *see* 15 U.S.C. §26.

CAFA distinguishes between coupons and injunctions. *See* 28 U.S.C. §1712(c).[22] Where a settlement includes injunctive aspects, CAFA does not require the court to wait in order to award attorneys' fees with respect to those aspects. Instead, the fee attributable to the injunction "shall be based upon the amount of time class counsel reasonably expended working on the action." 28 U.S.C. §§1712(b)(1), (b)(2), and (c)(2). Several Appellants agree that "fees incurred in pursuit of the injunctive relief must be calculated based on counsel's hours reasonably incurred," Ireland Br. at 21; *see* Crutchfield Br. at 5, 15, 18, but

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[21] *See, e.g., Callahan v. Commonwealth Land Title Ins. Co.*, No. 88-cv-7656, 1990 U.S. Dist. LEXIS 14524, at *54-55 (E.D. Pa. Oct. 30, 1990).

[22] In discussing coupon settlements and other "non-pecuniary" settlements, Professor Geoffrey Miller specifically distinguishes settlements providing for injunctive relief as requiring a different analysis. *See* Miller, *Non-pecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. at 101 ("A nonpecuniary settlement is a settlement of a class action lawsuit in which the defendant, in exchange for a release of legal claims, provides consideration other than an immediate cash payment to defined members of the class. We exclude from consideration traditional injunctive remedies, which, although nonpecuniary in nature, present considerations different from the ones addressed here.").

then ignore that the District Court specifically applied a lodestar analysis and concluded the fee – barely half of Plaintiffs' counsel's lodestar – was reasonable under that approach. SPA-19.

Similar cases have concluded that settlements impacting the terms for renewing subscriptions and memberships are not coupon settlements. *Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231 (E.D.N.Y. 2010), addressed renewal practices for defendant's warehouse stores, which are only open to members. There, pursuant to the settlement, the defendant provided free membership, with class members automatically receiving either additional months on existing memberships or temporary membership (for those who were no longer members). 705 F. Supp. 2d at 237. The court in *Dupler* did not treat the settlement as if it were a coupon settlement; it simply looked at the "direct economic benefit of additional membership terms," which was calculated by multiplying the number of class members in each of the various categories by the value of the free membership. *Id.* at 241.[23] The court then evaluated the fee request in relation to the estimated value of $38.8 million, *id.* at 243-44, and used a lodestar cross-check, *id.* at 244-45, as if it were a common fund case.

[23] The court accepted the plaintiffs' calculations that multiplied the number of months received by one-twelfth of the annual fee for each membership type. 705 F. Supp. 2d at 241 n.7; *see* A-903-07.

Similarly, *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559, 2004 WL 3671053 (W.D. Mo. Apr. 20, 2004), *aff'd*, 396 F.3d 922 (8th Cir. 2005), approved a settlement providing free minutes of cell phone service to current subscribers; free service with activation fee waived or calling card for long distance calls for former subscribers; and rebates to former subscribers who paid early termination fees when terminating contracts due to the federal cost recovery fee at issue in the litigation. The court stated: "This is not a 'coupon' settlement. Class members will not be required to purchase any ***additional*** services or items to receive a benefit"). 2004 WL 3671053, at *4 (emphasis added).[24]

As the District Court recognized, here as in *Dupler* and *Wireless*, the settlement "does not require class members to purchase something they might not otherwise purchase to enjoy its benefits; rather, the vast majority of class members will benefit in the course of their normal subscription payments." SPA-17. The relationship between SXM and its subscribers is by nature a continuing one. The critical fact here, which Appellants fail to mention, is that the "churn rate" – the percentage of subscribers who decline to renew their SXM subscriptions – is only

[24] In a separate opinion issued the same day, the *Wireless* court granted attorneys' fees and did not delay ruling on the fee motion to see how many subscribers took the benefits of the settlement. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, No. MDL 1559, Docket Item 247 at 2-5 (W.D. Mo. Apr. 20, 2004).

about 2% per month.[25] Thus, class members do not need to buy anything that they would not otherwise be buying in order to benefit from the settlement. Because the renewal rate is so high, the concerns in coupon cases cited by Appellants that redemption rates would be low because the product was an item that consumers do not frequently buy,[26] or do not want,[27] are inapplicable. Thus, there was no reason for Judge Baer to wait to see what percentage of class members renew their subscriptions and thereby take advantage of the settlement; that percentage is

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[25] *See* A-531 n.3, A-909. Given the evidence presented to the District Court concerning the churn rate, the Crutchfield Appellants' assertion that the District Court did not "consider[] … the rate at which Class Members would partake of the Settlement 'benefits'" (Crutchfield Br. at 17) is meritless.

[26] *See, e.g.*, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 807-88 (3d Cir. 1995) (Martin Br. at 18, 22) (criticizing coupon settlement where only 14% were likely to use it); *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1074 (C.D. Cal. 2010) (Crutchfield Br. at 13) (noting that plaintiffs' experts' estimate that 6%-7% would redeem was likely too high).

[27] *See, e.g., Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010) (Ireland Br. at 14) ("benefits afforded to class members will never be realized, since class members are provided with a future discount on a product or service with which they were previously dissatisfied").

known: 98% per month.[28] None of the coupon cases cited by Appellants involve price freezes for subscriptions with this kind of renewal rate.[29]

The settlement allows former subscribers to get one free month of service over the Internet for free. Misstating the record, Martin claims that in order to obtain this benefit, these class members are required "to purchase something they might not otherwise purchase." Martin Br. at 19 ("class members who have already canceled their Sirius subscriptions cannot benefit from the settlement unless they agree to reconnect their service"). He neglects to mention that under

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[28] This low churn rate continued while the price freeze was in effect. The churn rate was 1.9% for the quarter ending Sept. 30, 2011 (*see* http://www.prnewswire.com/news-releases/siriusxm-reports-record-third-quarter-2011-results-132984918.html) and 1.9% for the quarter ending Dec. 31, 2011 (*see* http://investor.siriusxm.com/releasedetail.cfm?ReleaseID=647499).

[29] The Crutchfield Appellants falsely suggest that cases such as *Synfuel Techs., Inc. v. DHL Express*, 463 F.3d 646 (7th Cir. 2006), and *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052 (C.D. Cal. 2010), held that a price freeze is equivalent to a coupon. *See* Crutchfield Br. at 13. In fact, neither case involved a price freeze but rather consideration in-kind that many class members would never use. *See Synfuel*, 463 F.3d at 654; *True*, 749 F. Supp. 2d at 1074. Similarly misplaced is the Crutchfield Appellants' reliance on *Wilson v. DirectBuy, Inc.*, No. 09-cv-590, 2011 U.S. Dist. LEXIS 51874 (D. Conn. May 16, 2011). The case did not involve a price freeze but rather a settlement involving only free months of membership of the defendant's service, and the court explicitly did not reach the question of whether CAFA applied. *Id*. at *18. The settlement was disapproved principally because only minimal discovery had occurred and the plaintiffs' claims appeared strong. *Id*. at *18-19, 37-44. At bar, of course, discovery was complete and Judge Baer noted that the claims were problematic. SPA-16. Finally, in *Parker v. Time Warner Entm't Co.*, 631 F. Supp. 2d 242 (E.D.N.Y. 2009), which also did not involve a price freeze but rather some free services, the court ***approved*** the settlement.

the settlement they can reconnect ***for free***, without paying the usual reconnection fee, and they can discontinue after the one free month if they like. A-233 ¶2(g).

VI. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AWARDING PLAINTIFFS' COUNSEL ATTORNEYS' FEES AMOUNTING TO BARELY HALF OF THEIR LODESTAR

Relying on cases outside this Circuit, law review articles and other commentary, Appellants argue that the award of attorneys' fees should be vacated because of alleged signs of self-dealing. This theoretical argument, however, ignores the actual facts of this case as well as the law in this Circuit. Thus, Appellants ignore that the fee award amounted to only 56% of the lodestar by Plaintiffs' counsel. In addition, they brush aside the fact that the fee was not agreed on until all of the substantive terms of the settlement had already been negotiated and fixed. A-569; SPA-19. Perhaps even more telling, Martin fails to even mention *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), *Blatt v. Dean Witter Reynolds Intercapital, Inc*., 732 F.2d 304 (2d Cir. 1984), or *McBean v. City of N.Y.*, 233 F.R.D. 377 (S.D.N.Y. 2006) (Lynch, D.J.), the key cases in this Circuit concerning the issues that Martin raises. In this context, Appellants' argument not only lacks validity, it lacks credibility as well.

A. APPELLANTS LACK STANDING TO CONTEST THE FEE AWARD

In order to have standing to contest the fee award, Appellants must demonstrate that their purported grievance "will be redressed by a favorable

decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *accord United States v. Twenty MILJAM-350 IED Jammers*, No. 10-1781, 2011 U.S. App. LEXIS 25435, at *31 (2d Cir. Dec. 22, 2011). Here, if the fee award is reduced, under the Settlement Agreement the reduction reverts to SXM, not to the Class. A-236. Since "modifying the fee award would not 'actually benefit the objecting class member,' the class member lacks standing because his challenge to the fee award cannot result in redressing any injury." *Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011) (citation omitted); *see also Birkeland v. Peter J. McNulty Law Firm*, No. 11-1414 (1st Cir. Oct. 12, 2011) (dismissing appeal from *In re Volkswagen & Audi Warranty Extension Litig.*, 784 F. Supp. 2d 35 (D. Mass. 2011)).[30]

B. THE FEE AWARD IS REASONABLE UNDER THE PERCENTAGE METHOD

Judge Baer accepted the position, amply supported by the evidence in the record, that the price freeze was worth approximately $180 million. SPA-17. The fees and expenses he awarded amount to about 7% of this amount – far lower than

[30] A class member might have standing to complain about a fee award in these circumstances if he or she could demonstrate collusion between the defendant and plaintiff's counsel to reduce the settlement consideration in exchange for a larger fee. *Glasser*, 645 F.3d at 1089. At bar, however, Appellants explicitly disclaim any assertion of collusion, Martin Br. at 14, and Judge Baer found there was none. SPA-18.

the percentages typically awarded in this type of case.[31]

Furthermore, the $180 million figure does not even include a component for former subscribers who take advantage of the offer of a free month's service. There are approximately 6 million former subscribers in the class. If only 10% of them were to take advantage of this aspect of the settlement, the additional value would be over $16 million. *See* A-530-31. Nor does the $180 million figure include a component for the reduction in the Music Royalty Fee that occurred during the course of the litigation, which Plaintiffs' expert valued at $56 million. A-541.[32] Including the benefits to the class from these additional aspects makes

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[31] *See, e.g.*, *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 U.S. Dist. LEXIS 27013, at *48 (D.N.J. Nov. 9, 2005) (33⅓%); *Nichols v. SmithKline Beecham Corp.*, No. 00-cv-6222, 2005 U.S. Dist. LEXIS 7061, at *79 (E.D. Pa. Apr. 22, 2005) (30%); *In re Buspirone Antitrust Litig.*, No. MDL 1413, 2003 U.S. Dist. LEXIS 26538, at *11 (S.D.N.Y. Apr. 11, 2003) (33⅓%); *In re Medical X-Ray Film Antitrust Litig.*, No. 93-cv-5904, 1998 U.S. Dist. LEXIS 14888, at *20 (E.D.N.Y. Aug. 7, 1998) (33⅓%). In particular, in cases involving non-cash consideration, courts typically award a percentage of the estimated value of the settlement well above the award in this case. *See, e.g.*, *Sony*, 2010 WL 3422722, at *8-9 (8.8%); *Dupler*, 705 F. Supp. 2d at 243-44 (14%); *McBean*, 233 F.R.D. at 393 (18%); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003) (15.6%).

[32] *See United Handicapped Fed'n v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (the "chronological sequence of events is an important factor in determining whether or not it can be inferred that the defendants guided their actions in response to plaintiffs' lawsuit"). Even if Plaintiffs' suit was not the only or even primary cause of Defendant's price reduction, if the suit was "in part as a catalyst which prompted the defendant to take action," Plaintiffs may be credited with playing a role in the outcome. *Id.* at 346-47.

the fee an even smaller percentage of the settlement value.

Judge Baer did not abuse his discretion in finding that the fee awarded is reasonable under the percentage method. SPA-19.

C. THE FEE AWARD IS REASONABLE UNDER THE LODESTAR METHOD

Plaintiffs' counsel collectively expended more than 37,000 hours of professional time on this litigation (excluding time spent on the fee application or in briefing the opposition to SXM's first motion to dismiss) on a fully contingent fee basis. A-576. Plaintiffs' counsel's total lodestar, derived by multiplying these hours by each firm's current hourly rates[33] for its attorneys, paralegals, and other professional staff, amounts to $17,384,638.50. A-576. Deducting from the requested $13,000,000 the $3,231,244.24 in out-of-pocket expenses that Plaintiffs' counsel incurred leaves a fee award of $9,768,755.76, which amounts to only 56% of the lodestar. Since courts frequently award fees equal to a ***multiple*** of class counsel's lodestar in complex class actions,[34] a fee representing such a large

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[33] This Court has approved the use of current rates rather than historic rates, *see Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998), as this helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (internal quotations and citation omitted). The hourly rates of Plaintiffs' counsel compare favorably with those normally charged for similar work by attorneys in this Circuit. A-577, A-758-88.

[34] *See*, *e.g.*, *Wal-Mart Stores*, 396 F.3d at 123 (multiplier of 3.5); *In re Bisys Sec. Litig.*, No. 04-cv-3840, 2007 WL 2049726, at *3 (S.D.N.Y. July 16, 2007)

(Cont'd)

discount to counsel's lodestar is clearly reasonable. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010); *Sony*, 2010 WL 3422722, at *8-9; *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009).

Judge Baer did not abuse his discretion in finding that the fee awarded is reasonable under the lodestar method. SPA-19.

D. THE FEE AWARD IS REASONABLE UNDER THE *GOLDBERGER* CRITERIA

Whether a court uses the percentage method or the lodestar approach, it should also consider the following traditional criteria: (1) the time and labor expended by counsel; (2) the risks of the litigation; (3) the magnitude and complexity of the litigation; (4) the requested fee in relation to the settlement; (5) the quality of representation; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50.

(multiplier of 2.99); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *5 (E.D.N.Y. June 24, 2010) (multiplier of 2.78); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, No. 03-md-1529, 2006 WL 3378705, at *2-3 (S.D.N.Y. Nov. 16, 2006), *aff'd*, 272 F. App'x 9 (2d Cir. 2008) (multiplier of 2.89); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 354 (S.D.N.Y. 2005) (multiplier of 4); *Remeron*, 2005 U.S. Dist. LEXIS 27013, at *48 (multiplier of 1.8 is on the "low end of the spectrum"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (multiplier of 3.97).

Appellants do not appear to challenge factors (1), (2), (3) or (5), nor could they in light of the facts discussed above.[35] Furthermore, as discussed above, the fee is reasonable in relation to the settlement achieved. Lastly, with respect to public policy considerations, the goal of Martin and his counsel, Mr. Frank, appears to be to make class actions so unrewarding for lawyers that such actions are no longer prosecuted. This Court, however, took a contrary view in *Wal-Mart Stores,* 396 F.3d at 122: "[I]t is especially important to provide appropriate incentives to attorneys pursuing antitrust actions because public policy relies on private sector enforcement of the antitrust laws."

Judge Baer did not abuse his discretion in finding that the fee awarded is reasonable under the *Goldberger* criteria. SPA-19.

E. THE NINTH CIRCUIT'S *BLUETOOTH* DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN *BLATT* AND PROVIDES NO BASIS TO UPSET THE AWARD HERE

Martin argues that under a Ninth Circuit decision, *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), the fee award should be vacated and remanded. *Bluetooth*, however, is inconsistent with this Court's decision in

[35] In particular, the absence of a governmental case and consent decree greatly increased the risks that counsel would recover nothing. "[T]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill. They did all the work on their own." *In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992).

Blatt and with other cases in this Circuit, and even if *Bluetooth*'s reasoning were applied, the facts here do not support reversal.

1. ***Bluetooth* Is Plainly Distinguishable**

Bluetooth was a very different case than that at bar. The *Bluetooth* settlement merely provided for additional disclosures of safety information about the product and a *cy pres* payment to non-profit organizations. The settlement also called for the payment of $800,000 in attorneys' fees to the plaintiffs' counsel. The District Court approved the settlement, and the Ninth Circuit vacated and remanded for further consideration.

At the heart of the Ninth Circuit's opinion is its dissatisfaction with the lack of detail in the record, which made it impossible to evaluate the adequacy of the settlement or the appropriateness of the fee award: First, the Ninth Circuit concluded that it could not apply a lodestar method of evaluating the fee because the record failed to disclose precise information as to what the lodestar was. *Id*. at 943. In contrast, at bar Plaintiffs submitted detailed firm-by-firm and lawyer-by-lawyer information as to the hours devoted to the case and the billing rates of each lawyer, demonstrating that the lodestar was approximately $17,000,000 and expenses exceeded $3,000,000. A-576-77, A-718-57, A-789-90. Second, the Ninth Circuit stressed that neither the plaintiffs nor the District Court had purported to provide any estimate of the value of the settlement. *Id*. at 944-45. At

bar, Plaintiffs submitted declarations providing detailed analysis as to the value of the price freeze that is part of the settlement herein. A-359-61, A-529-49. Moreover, whereas at bar, Plaintiffs litigated aggressively for nearly two years and brought the case to the eve of trial, in *Bluetooth* the plaintiffs settled after very little litigation activity, which provided another reason for extra scrutiny of the settlement and fee request.

2. Separating the Settlement Consideration From the Payment of Attorneys' Fees Provides No Basis to Upset the Award

After the settlement for the class was negotiated, Plaintiffs' counsel negotiated a separate fee agreement, with payment coming not out of the settlement consideration but directly from SXM. Martin argues that this is inappropriate under *Bluetooth*, and that the fee and the settlement consideration should be considered one settlement fund. Because Martin claims the injunctive relief is worth zero, he asserts counsel is receiving a disproportionate share (i.e., all) of the settlement. Since, as shown above, the assertion that the injunctive relief has no value is fallacious and unsupported, his argument must fail.

Furthermore, courts in this Circuit look favorably on settlements where the fee is a separate obligation of the defendant not coming out of the settlement fund, and it is negotiated after the terms of the settlement have been agreed upon, as happened here. *Blatt* is directly on point. In that case, in addition to the settlement

consideration, the defendant agreed to pay plaintiffs' attorneys' fees as awarded by the court and agreed not to oppose an application for fees up to $300,000, with any portion of the $300,000 not awarded reverting to the defendant. Affirming the District Court's fee award, this Court observed that "payment of fees directly by the defendant in an amount to be determined by the court actually benefits the shareholder class because the settlement package is not reduced by the payment of counsel fees." 732 F.2d at 308.

Similarly, in *McBean*, then-District Judge Lynch approved a settlement that provided certain consideration for class members and a separate amount in attorneys' fees for class counsel. Judge Lynch noted that this type of an arrangement is preferable to the situation where the fees are taken out of settlement fund: "If … money paid to the attorneys is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members." *McBean*, 233 F.R.D. at 392. Numerous courts in this Circuit agree. *See Ebbert v. Nassau County*, No. 05-cv-5445, 2011 U.S. Dist. LEXIS 150080, at *37-38 (E.D.N.Y. Dec. 22, 2011); *Steinberg v. Nationwide Mut. Ins. Co.*, 612 F. Supp. 2d 219, 224 (E.D.N.Y. 2009); *In re Sony SXRD Rear Projection TV Class Action Litig.*, No. 06-cv-5173, 2008 U.S. Dist. LEXIS 36093, at *43-44 (S.D.N.Y. May

1, 2008); *Cavalieri v. General Elec. Co.*, No. 06-cv-315, 2009 U.S. Dist. LEXIS 68693, at *11 (N.D.N.Y. Aug. 5, 2009); *Thompson*, 216 F.R.D. at 71.

In *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766 (N.D. Ohio 2010), the objector, represented by the same lawyer (Mr. Frank) who represents Martin, argued as Martin does here that it was improper to have two separate funds – one for the payment to the class and one for a potential fee award. *Id*. at 785. The court explicitly rejected this argument, noting that Mr. Frank's brief was "'long on ideology and short on law.'" *Id*. The court further found that class counsel's arguments in opposition to Mr. Frank's position "are both legally and factually more sound than those of" Mr. Frank. *Id*. at 786.[36]

If the Court were to adopt Martin's approach, the class would be far worse off. If there were no price freeze[37] and the settlement were viewed as involving

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[36] Distinguishing the same cases cited by Martin here, the *Lonardo* court found that "the cases Mr. Frank cites in support of his proposal that independent attorneys' fee agreements should be per se unfair merely stand for the proposition that the Court must review all aspects of a class action settlement agreement, including independent agreements between class counsel and the defendants regarding attorneys' fees…. These cases do not suggest that a settlement agreement is unfair, unreasonable, or inadequate simply because the defendants and class counsel negotiate an independent fund as the source of any attorneys' fee award." 706 F. Supp. 2d at 790-91 (discussing *General Motors*, 55 F.3d at 820-21; *Johnston v. Comerica Mortgage Corp.*, 83 F.3d 241, 246 (8th Cir. 1996); *Lobatz v. U.S. West Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000)).

[37] As Martin values the price freeze at zero, presumably it would make no difference to him whether or not the settlement included a price freeze.

just $13 million, which was the maximum amount of cash SXM was willing to pay, the settlement would amount to less than one dollar per class member, which would be reduced further for attorneys' fees and administrative expenses in cutting and mailing checks. Class members would have received such small checks that a large percentage would not have bothered to even cash them. A-1283-84; *see* SPA-17.

3. The So-Called "Clear Sailing" Clause Provides No Basis to Upset the Award

Equally without merit is Martin's criticism of the settlement agreement clause providing that SXM would not oppose an award of attorneys' fees and expenses up to $13 million,[38] and that any portion of the $13 million not awarded reverts to SXM. The law in this Circuit and elsewhere is inconsistent with Martin's positions.

"[C]lear sailing agreements are routinely accepted" in federal courts. *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 n.6 (S.D. Cal. 2011). Far from being disfavored, agreements as to the amount of attorneys' fees to be received by plaintiffs' attorneys in class actions are generally well-received. As this Court stated in *Malchman*, 761 F.2d at 905, "settlements of disputes must be encouraged"

[38] Martin stops short of arguing that a "clear sailing" provision is *per se* improper, as even the case he principally relies on, *Bluetooth*, stated flatly: "[C]lear sailing provisions are not prohibited." 654 F.3d at 949.

and "[a]bsent special circumstances, … the negotiation of attorneys' fees cannot be excluded from this principle" (citations omitted). Indeed, Fed. R. Civ. P. 23(h) provides that in a class action the court may award attorneys' fees that are authorized "by the parties' agreement," and the Advisory Committee's 2003 notes on Rule 23(h) state: "The agreement by a settling party not to oppose a fee application up to a certain amount … is worthy of consideration." Of course, as the Advisory Committee notes further recognize, a court is not bound by such an agreement and can award such fees as it finds fair and reasonable. *Id*.[39]

This Court addressed these issues in *Malchman*, an antitrust case where the settlement provided a separate amount for plaintiffs' attorneys' fees and included a "clear sailing" clause. This Court upheld the District Court's award of attorneys' fees. With respect to "clear sailing" provisions, Judge Oakes, the author of the Court's majority opinion, stated that "an agreement 'not to oppose' an application for fees up to a point is essential to completion of the settlement, because the

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[39] *See also* 5 NEWBERG ON CLASS ACTIONS § 15:34 (4th ed. 2002) (footnote omitted):

> [A]n agreement by the defendant to pay such sum of reasonable fees as may be awarded by the court, and agreeing also not to object to a fee award up to a certain sum, is probably still a proper and ethical practice. This practice serves to facilitate settlements and avoids a conflict, and yet it gives the defendant a predictable measure of exposure of total monetary liability for the judgment and fees in a case. To the extent it facilitates completion of settlements, this practice should not be discouraged.

defendants want to know their total maximum exposure and the plaintiffs do not want to be sandbagged." 761 F.2d at 905 n.5. While Judge Newman expressed concern about clear sailing provisions, *id*. at 907-08, he nevertheless concurred in Judge Oakes' opinion. *Id*. at 906.[40]

Moreover, Martin's complaint about the "clear sailing" provision in this case is ironic, given that numerous objectors submitted extensive briefing attacking the attorneys' fee request. The case did not suffer from a lack of an adversary process regarding attorneys' fees. *See In re Texaco, Inc*., 90 B.R. 622, 630 (Bankr. S.D.N.Y. 1988) (clear sailing provision did not provide clear sailing where numerous other persons and entities can and did object to the fees).

4. The Fact That Money Not Awarded for Fees Reverts to SXM Provides No Basis to Upset the Award

It is not uncommon for settlements to provide that if the court were to award less than the amount agreed on, the excess reverts to the defendant. In *Blatt*, this Court stated that there is "nothing unfair to absent stockholders in the court's approval of the agreement permitting the defendants to retain the … difference between the [maximum fees the defendant agreed to pay] and the … attorney's fee

[40] *See also Blatt*, 732 F.2d at 306-07, where this Court affirmed a fee award where the defendant had agreed it would not object to a fee application up to a specified amount; *Excess Value*, 2004 WL 1724980, at *10 ("Nor does the so-called 'clear sailing agreement' by Defendants not to oppose Class Counsel's Fee Application bar approval of the Settlement, where, as here, the Court has strictly scrutinized both the process and substance of the Settlement.").

allowed by the court." 732 F.2d at 307 n.1; *see also Schneider*, 324 F. Supp. 2d at 379.

If the settlement had provided that any portion of the $13 million not awarded to Plaintiffs' counsel reverted to the class, it would not have made a bit of difference. First, the District Court found that the entire $13 million was reasonable given the result achieved and the $20 million in time and expenses that Plaintiffs' counsel devoted to the case, so there was nothing left over. Second, if a few million had been left over, Class members would have received checks for perhaps ten cents each – which virtually no one would have cashed.

5. The Approach to Settlement Negotiations Advocated by Appellant Martin Would Be Highly Undesirable

In contrast to the way in which settlement and fee discussions typically occur in class actions in this Circuit, which is the way it was done at bar, the radically different regime advocated by Martin would be contrary to good public policy. Under Martin's approach, negotiations as to the settlement consideration would occur simultaneously with negotiations concerning class counsel's fee; the fee would always come out of the settlement consideration; and if the Court were to award a smaller fee than the parties had agreed on, the difference would revert to the class. Numerous undesirable consequences flow from this approach.

First, because under Martin's proposal the discussions as to the fee percentage would occur simultaneously with the discussions as to the overall

settlement consideration, class counsel might be incentivized to trade away more consideration for the class, in exchange for a higher percentage fee agreement. At bar, as the District Court found, that risk did not exist, as the settlement consideration was negotiated before any fee was agreed on. SPA-19; *see* A-569.

Indeed, because Plaintiffs' counsel was committed to the terms of the Settlement before the fee was agreed on, they were at risk that they would be obliged to submit the Settlement to the Court with no fee agreement whatsoever. This possibility forced them to be reasonable in the fee negotiations.

Second, if the fee always comes out of the settlement consideration, and any difference between the fee negotiated and that awarded reverts to the class, the defendant has no incentive whatsoever to negotiate a lower percentage. Regardless of what the negotiated maximum fee is, and regardless of the amount the court awards, the amount the defendant pays doesn't change at all. *See Malchman*, 761 F.2d at 907 (Newman, J., concurring). In contrast, at bar, because the fee was separate from the consideration to the class, SXM had every reason to, and did, negotiate fiercely to keep the fees as low as possible. Thus, rather than causing defendants to negotiate lower fees or to argue in court against large fee awards, Martin's approach would likely cause negotiated fee percentages to rise dramatically and would not result in defendants contesting the fees in court.

VII. THE NOTICE WAS SUFFICIENT AND COMPLIED WITH RULE 23(H)

The notice to class members, emailed to class members in May and June 2011, set forth the terms of the settlement, informed class members how to obtain a copy of the settlement agreement, and disclosed that Class Counsel would seek an award of attorneys' fees and expenses up to $13 million. On July 15, 2011, Class Counsel filed the motion for final approval of the settlement and the application for an award of attorneys' fees. Objections were due on July 19, 2011.

Appellants claim that this did not comply with Fed. R. Civ. P. 23(h). The only case they cite, however, a case from the Ninth Circuit,[41] merely held that notice was insufficient if the motion is made ***after*** the date for objections. Notice is sufficient where, as here, the motion is filed shortly before the objection deadline. *See In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 969 (N.D. Ill. 2011). Appellants cite no authority supporting their position that notice is insufficient where the motion is filed several days prior to the date for objections.

Furthermore, in this Circuit, even if the motion is made after the date for objections, Rule 23(h) is satisfied if the notice sent to class members informs them

[41] *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010).

of the amount of fees that will be sought. *See, e.g.*, *Carlson v. Xerox Corp.*, 355 F. App'x 523, 525 (2d Cir. 2009) (summary order); *Bisys*, 2007 WL 2049726, at *1.[42]

In any event, if Appellants felt that they needed more time to submit objections to the motion for a fee award or the motion for final approval of the settlement, they could have asked the District Court to postpone the date for objections. They elected not to make any such request.

Equally without merit is Martin's contention that he lacked the opportunity to rebut the expert declaration of Dr. Langenfeld. In the case on which Martin relies, *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001), the expert declarations were filed ***after*** the date for objections. *Id.* at 130 n.4. At bar, they were served ***before***. Moreover, the Crutchfield Appellants did in fact submit an opposing expert declaration in the District Court.[43] Martin never explains why he was unable to do what they did. Furthermore, Martin could have asked the District Court for more time to submit an expert declaration or, even if he did not submit an

[42] Courts in other Circuits have similarly held that disclosure in the class notice of the amount of fees that will be sought is sufficient, even if the formal motion for fees is filed after the objection date. *See In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, No. 08-cv-1999, 2010 U.S. Dist. LEXIS 121684, at *18-21 (E.D. Wisc. Oct. 28, 2010); *cf. Bessey v. Packerland Plainwell, Inc.*, No. 06-cv-95, 2007 U.S. Dist. LEXIS 79606, at *11 (W.D. Mich. Oct. 26, 2007).

[43] Crutchfield A-4.

expert declaration, Martin could have asked the District Court to take testimony from Martin's expert at the final approval hearing. Martin chose not to do so.

VIII. THE CLASS CERTIFICATION DECISION SHOULD NOT BE REVERSED

Betraying the political agenda that his counsel, the self-proclaimed "Center for Class Action Fairness," is advancing, Martin urges that the District Court's decision certifying the class should be reversed, because the District Court expressed its desire that Class Counsel's staffing on the case reflect the race and gender diversity of the class.[44] There is no merit to this argument.

First, the objection is procedurally improper. An objection to a settlement is not the appropriate vehicle for challenging the adequacy of class counsel.

Furthermore, Martin lacks standing to complain. If there were unlawful discrimination here violative of equal protection, the only ones who could possibly complain might be other law firms who might contend that they were not chosen to represent the class because they lack diverse work forces. But no such firm is complaining.

[44] The attitude of Martin's lawyer, Mr. Frank, toward diversity is not surprising. Donors Trust Inc., which of which Mr. Frank's Class Action Fairness Center is a part, also funds the Project on Fair Representation (*see* A-964), which devotes its efforts to opposing affirmative action and trying to invalidate provisions of the Voting Rights Act. *See* A-981.

While Martin asserts that "adequacy of representation is of constitutional import," Martin Br. at 46, he does not argue, let alone demonstrate, that Class Counsel was inadequate because they did not staff the case exclusively with white males, as Martin and his lawyer apparently prefer, rather than having some women and minorities on the team. Which women or minorities on Plaintiffs' legal team does Martin think were inferior to white men? Martin does not say.

Martin does not argue, nor could he demonstrate, that Class Counsel's staffing on the case was impacted by the District Court's expressed desire for diversity.[45] The fact is that the firms representing Plaintiffs in this case have very diverse workforces, and many of their best lawyers are women and minorities. Plaintiffs' counsel assembled the best legal team they could, which meant including numerous women and minorities. There is nothing in the record to suggest that the expressed desire of the District Court played any role.

Moreover, what relief could be granted at this juncture? Are Plaintiffs' counsel supposed to redo the case, only this time with a legal team composed exclusively of white men, and see if they get a better result?

Finally, far from being unconstitutional, the District Court's view that Class Counsel ought to reflect the class appears consistent with the instruction in the

[45] The District Court did not "order" any particular composition for the legal team, but merely indicated that it expected Class Counsel to take steps to have the legal team reflect the diversity of the class. SPA-14.

MANUAL FOR COMPLEX LITIGATION (Fourth) § 10.224 that in selecting lead counsel, a court should assess "whether designated counsel fairly represent the various interests in the litigation."

IX. THE RELEASE IS PROPER

Plaintiffs respectfully refer the Court to the discussion of this issue contained in SXM's brief.

X. THE APPEALS SHOULD BE DISMISSED UNDER THE EQUITABLE MOOTNESS DOCTRINE

Plaintiffs respectfully refer the Court to the discussion of this issue contained in SXM's brief.

CONCLUSION

Plaintiffs respectfully submit that the Order and Final Judgment of the District Court granting final approval to the settlement and awarding attorneys' fees to Plaintiffs' counsel should be affirmed in all respects, with costs.

Dated: April 2, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 13,837 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2012 the foregoing Brief for Plaintiffs-Appellees was filed with the United States Court of Appeals for the Second Circuit via the appellate CM/ECF system. I certify that all parties registered with appellate CM/ECF system have been served with this filing. In addition I have served the pro-se appellants Michael Hartlieb and Brian David Goe via overnight mail at the following addresses:

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