11-3696(L)

11-3729; 11-3834; 11-3883; 11-3908; 11-3910; 11-3916; 11-3965; 11-3970; 11-3972; 11-4061; 11-4064

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,

v.

(Caption continued on reverse side)

On Appeal from the United States District Court
for the Southern District of New York (Baer, J.)

SIRIUS XM RADIO INC.'S BRIEF ON APPEAL

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(Caption continued)

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Objectors - Appellants,

Linda Mrosko, Lange M. Thomas,

Objectors.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee, Sirius XM Radio Inc., certifies that Liberty Radio LLC, an affiliate of the publicly held corporation Liberty Media Corporation, holds more than 10% of Sirius XM Radio Inc.'s stock.

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QUESTIONS PRESENTED

Pursuant to Federal Rule of Appellate Procedure 28(i), Defendant-Appellee Sirius XM Radio Inc. ("Sirius XM") joins in Parts I-IV of the Brief for Plaintiffs-Appellees.

Sirius XM's brief on appeal addresses the following additional issues:

1. In settling this class action, Sirius XM agreed to forego, and did forego, implementing price increases for certain programming packages from August 1, 2011 through December 31, 2011. Meanwhile, none of the appellants—who were objectors to the settlement in the District Court—sought a stay pending appeal of the final judgment approving the settlement, or sought to expedite their appeals. Now that Sirius XM has already satisfied its principal obligations pursuant to the settlement agreement—and more than seven months and counting after the District Court entered its final judgment—should this Court dismiss these objectors' appeals from the District Court's order approving the settlement under the doctrine of equitable mootness?

2. Appellants' principal arguments on appeal are that the settlement is a purported "coupon" settlement and that the District Court clearly abused its discretion in awarding attorneys' fees to plaintiffs' counsel that are purportedly disproportionate to the benefit to the class from the settlement. Should this Court affirm the District Court's order approving the settlement and the final judgment as

within the scope of the District Court's broad discretion regardless of how this Court rules on these issues that affect only the separate award of attorneys' fees to plaintiffs' counsel?

3. *Pro se* appellant Michael Hartleib objects to the scope of the release in the settlement agreement. In pertinent part, the settlement agreement provides that class members release all claims "arising out of, based on or relating to the merger that formed Sirius XM Radio Inc." (A-239 § 8).[1] Under *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005), "class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." Did the District Court properly exercise its discretion in overruling Mr. Hartleib's objection to the scope of the release in an agreement that settled claims challenging as unlawful the merger that formed Sirius XM?

---

[1] References in this brief to "A-___" are to the Joint Appendix submitted by appellants Nicolas Martin and Jeannie Miller. References to "SPA-___" are to the Special Appendix to the Brief of Appellant Nicolas Martin. Martin complains about the bulk of the appendix (Martin Br. at 1 n.1), but the pertinent record before the District Court in connection with the settlement approval for this trial-ready case—which Martin and other appellants largely ignore in their briefs on appeal—was extensive. Martin also overlooks that the appellees are using this appendix for all of the more than dozens of appeals here.

SUMMARY OF THE ARGUMENT

I. These appeals should be dismissed pursuant to the doctrine of equitable mootness. Under that doctrine, dismissal of an appeal is appropriate when the appellant has made no effort to obtain a stay of a judgment and, as a result, has permitted such a "comprehensive change of circumstances" to occur as to render it inequitable to reach the merits of the appeal.

The doctrine applies here. The principal consideration provided by Sirius XM in settling the federal antitrust claims in this class action was the company's agreement not to raise prices from August 1, 2011 through December 31, 2011. Previously, as a condition for receiving regulatory approval of the merger, Sirius XM had voluntarily committed to the Federal Communications Commission ("FCC") not to raise prices for certain programming packages for three years after consummation of the merger. That three-year prize freeze ended on July 28, 2011. Sirius XM thereafter did what it agreed to do pursuant to the settlement agreement. It did not raise prices for an additional five-month period from August 1, 2011 through December 31, 2011. (Effective January 1, 2012, Sirius XM increased the monthly price of its base subscription plan from $12.95 to $14.49—an increase of $1.54 per month. *See* A-1383.)

The District Court entered its final judgment approving the settlement agreement on August 25, 2011. (SPA-20-27). Appellants neither sought nor

obtained a stay of the final judgment in the District Court or in this Court. Nor did they seek to expedite these appeals. To the contrary, they submitted their briefs on a leisurely schedule. The first brief in this appeal was not filed until more than three months after the entry of final judgment, and all appellants' briefs were not filed until more than five months after the entry of judgment, and, critically, *after* Sirius XM did what it committed to do in settling this case by not raising prices during the remainder of 2011.

In these circumstances, it is not equitable to allow appellants to proceed with these appeals challenging the settlement agreement when, as a result of their own failure to seek a stay and their own delays in prosecuting these appeals, Sirius XM has already fully satisfied its principal obligations under the settlement agreement. For this reason alone, these appeals should be dismissed.

II. Alternatively, if the Court reaches the merits, the judgment should be affirmed under the deferential abuse of discretion standard. Sirius XM joins all of the arguments in plaintiffs-appellees' brief on appeal showing that the District Court acted within the scope of its broad discretion in applying and weighing the factors in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), governing approval of a class action settlement. Among other things, the District Court did not clearly err in finding—after presiding over this case for more than a year and ruling on a motion to dismiss, motion for summary judgment, and motion for class

certification, each of which successively chipped away at plaintiffs' claims—that plaintiffs faced a "significant risk" that they could not prove their remaining antitrust claims in light of the "questionable liability in this case." (SPA-16-17). *See also* SPA-17 ("[I]t is far from certain that Plaintiffs would have prevailed on the merits.").

That finding is amply supported by the record in light of the pre-trial narrowing of this case. Indeed, as both the FCC and the U.S. Department of Justice ("DOJ") found—and appellant Nicolas Martin expressly concedes on appeal (Martin Br. at 5)—there are many alternative forms of audio entertainment available to U.S. consumers, including not only AM/FM radio, but also iPods and CDs as well as Internet-based services like Slacker, Pandora, iheartradio, and Spotify, many of which are now available in cars.[2] These competitive alternatives cannot be squared with what plaintiffs would have had to prove at trial: that Sirius XM had "monopoly" power in a relevant market.

[2] *See* A-844 (FCC July 2011 finding, in refusing to extend the three-year price freeze, that "new audio services have emerged as viable consumer alternatives," including "Internet-based services in [] vehicles"); A-631 (DOJ closing statement issued in March 2008: "[a]ny inference of competitive concern" was "limited by the fact that a number of technology platforms are under development that are likely to offer new or improved alternatives to satellite radio," including "mobile broadband Internet devices").

Rather than deal with the District Court's amply supported findings of the overall fairness of the settlement—and, in particular, the lack of merit in plaintiffs' claims as found by the District Court—appellants focus their arguments on whether the District Court abused its discretion in finding that the settlement agreement was not a "coupon" settlement because "it does not require class members to purchase something they might not otherwise purchase to enjoy its benefits." (SPA-17). But this argument, and appellants' related arguments that the settlement benefits are purportedly disproportionate to the attorneys' fee award, relate only to the award of attorneys' fees to plaintiffs' counsel. Indeed, the provision in the Class Action Fairness Act on which appellants rely, 28 U.S.C. § 1712(a), deals with the procedures for determining an "attorneys' fee award" for a settlement "in a class action that provides for a recovery of coupons to a class member." That provision does *not* describe the settlement consideration in this case. But, regardless of how this Court resolves that issue, it affects only the attorneys' fee award to plaintiffs' counsel and not the final judgment approving the settlement agreement.

III. Only one appellant objects to the scope of the release in the settlement agreement on the ground that it is purportedly "too broad." (Michael Hartleib Br. at 5). But the release here is well within the scope of permissible releases in class

action settlements, and the District Court did not abuse its discretion in overruling this objection.

In exchange for settling plaintiffs' antitrust claims, Sirius XM received as consideration a release by class members from claims "arising out of, based on or relating to the merger that formed Sirius XM Radio Inc." (A-239 § 8). In addressing Mr. Hartleib's objection—which did not cite or mention the governing legal standard—the District Court properly applied this Court's rule that "class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 107 (2d Cir. 2005). The District Court properly found that the "released claims here are limited to those claims that arise out of the merger that formed Sirius XM—a common factual predicate that defines the scope of the release with acceptable breadth." (SPA-18). In reaching its conclusion, the District Court did not abuse its discretion. Indeed, as the very objector who presses this argument on appeal acknowledged in the District Court, "[t]his case arises out of a merger between the nation's only two satellite radio providers Sirius Satellite Radio ('Sirius') and XM Satellite Radio ('XM')." (A-869).

The release in the settlement agreement here is within the scope of permissible releases in class action settlements under this Court's precedents, and

the District Court therefore did not abuse its discretion in overruling Mr. Hartleib's objection.

ARGUMENT

I. THESE APPEALS ARE MOOT BECAUSE SIRIUS XM HAS ALREADY PROVIDED THE PRINCIPAL BENEFIT AFFORDED BY THE SETTLEMENT

The District Court entered its order granting final approval of the settlement on August 25, 2011. (SPA-20-27). At no time thereafter did appellants seek either in the District Court or in this Court a stay of the final judgment or the order approving the settlement. Meanwhile, Sirius XM performed its principal obligation under the settlement agreement: it did not raise its prices for the specified programming packages from August 1, 2011 through December 31, 2011, as it had agreed. (A-232-33 § 2). Instead, and consistent with the settlement agreement, Sirius XM waited until January 1, 2012 to increase its prices by $1.54 per month on its basic subscription packages. (A-1383). In these circumstances, and pursuant to the doctrine of equitable mootness, this Court should dismiss these appeals from the District Court's order approving the parties' settlement agreement.

The law in this Circuit regarding dismissal of appeals pursuant to the equitable mootness doctrine is set forth in *In re Chateaugay Corp.*, 988 F.2d 322 (2d Cir. 1993):

> An appeal should also be dismissed as moot when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable…. Such a dismissal is appropriate when the appellant has made no effort to obtain a stay and has permitted such a comprehensive change of circumstances to occur as to render it inequitable for the appellate court to reach the merits of the appeal.

Id. at 325 (citations and quotation marks omitted). Courts have repeatedly applied this rule on appeals from orders approving settlements in bankruptcy court proceedings. *See In re PC Liquidation Corp.*, No. 06-cv-1935, 2008 WL 199457, at *6 (E.D.N.Y. Jan. 17, 2008) (dismissing appeal from settlement approval where "there has been a 'comprehensive change of circumstances' occasioned by the consummation of the Settlement Orders"); *In re Durso Supermarkets, Inc.*, No. 93-cv-5697, 1994 WL 17913, at *1, *2 (S.D.N.Y. Jan. 20, 1994) (dismissing appeal "[b]ecause it would be inequitable to 'unscramble the eggs'" where "[t]he parties have significantly changed their position since the settlement ended substantial ongoing lawsuits as well as potential litigation"). As then-District Judge Sotomayor held in *Allstate Ins. Co. v. Hughes*, "the mootness doctrine calls for the dismissal of an appeal, even though effective relief could be fashioned, when granting such relief would be inequitable." 174 B.R. 884, 888 (S.D.N.Y. 1994) (dismissing appeal from a settlement involving a permanent injunction).

This doctrine and its rationale apply with full force here, in the context of a settlement of a class action where the defendant has substantially performed its

obligations pursuant to the settlement while the objectors have not undertaken to diligently prosecute their appeals. Indeed, both of the circumstances referred to in *Chateaugay*—a comprehensive change of circumstances and the appellants' failure to seek a stay—are plainly satisfied here. First, the record before the District Court established—and the District Court did not clearly err in finding (SPA-17)—that Sirius XM contemplated and had made plans for a price increase when the FCC's order precluding such an increase expired at the end of July 2011. *See* A-567-71, A579-626. The settlement agreement, however required Sirius XM to postpone any price increase at least until January 1, 2012. (A-232-33 § 2). And Sirius XM abided by that agreement: it did not raise its prices from August through December 2011, notwithstanding that the three-year prize freeze to which Sirius XM voluntarily committed as a condition to approval of the merger had expired in July 2011. (A-1383). Sirius XM therefore performed a substantial portion of its obligations under the settlement agreement in exchange for ending this litigation; and, if this Court were to now unwind the settlement, it is not possible to "'unscramble the eggs'" due to Sirius XM's already-effected change in position. *In re Durso Supermarkets, Inc.*, 1994 WL 17913, at *1.

Second, none of the appellants made any effort to obtain a stay of the District Court's judgment approving the settlement. "[A]s [appellant] admittedly did not seek a stay of execution of the orders approving the Settlements, and it

would be inequitable to now reverse the orders appealed from, the doctrine of equitable mootness bars [the] instant appeals." *In re PC Liquidation Corp.*, 2008 WL 199457, at *7; *see also Allstate*, 174 B.R. at 888 ("When a party appeals a judgment but seeks no stay, and implementation of the judgment results in a 'comprehensive change of circumstances,' equity also may call for a dismissal of the appeal as moot."). Nor did any appellant seek to expedite this appeal. To the contrary, most of them delayed in submitting their initial forms after they commenced these appeals; they all thereafter proposed leisurely schedules for submitting their principal briefs and refused appellees' requests to coordinate the submission of the appellants' briefs in this Court, such that the last brief was not submitted until more than a month after Sirius XM had already performed its principal obligations pursuant to the settlement agreement.[3]

In these circumstances, this Court should dismiss these appeals. Appellants have unduly delayed in prosecuting their appeals, without requesting a stay, while in the meantime Sirius XM provided its principal consideration pursuant to the

[3] The first brief on appeal was not submitted until December 14, 2011, nearly four months after the District Court entered the final judgment on August 25, 2011. *See* SPA-20-27; *see also* Appeal No. 11-3696, Doc. No. 338. The last brief was not submitted until February 3, 2012. *See id.*, Doc. No. 450. Appellants also refused appellees' multiple requests to coordinate the submission of the appellants' briefs for these appeals. *See, e.g.*, *id.*, Doc. No. 222.

settlement agreement in a manner that cannot be undone. It would be inequitable to vacate the settlement agreement now.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT

On the merits, the District Court also did not abuse its discretion in approving the settlement agreement.

Pursuant to Federal Rule of Appellate Procedure 28(i), Sirius XM joins in the arguments set forth in Points I-IV of the Brief for Plaintiffs-Appellees. Sirius XM also underscores that, as plaintiffs-appellees point out, no appellant comprehensively analyzes the factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), or even attempts to show any abuse of discretion by the District Court in weighing these factors; making appropriate findings pursuant to them; and ultimately finding the settlement agreement to be fair, reasonable, and adequate. (SPA-15-19). Indeed, one of the appellants, Nicolas Martin, criticizes the Court's binding precedent in *Grinnell* and suggests (improperly) that this panel overrule that authority, but then ultimately acknowledges that the Court "need not" reach that issue here. (Martin Br. at 30-31).

Most significantly, no appellant confronts the District Court's well-supported findings that plaintiffs had a "significant" risk that they would be unable to prove liability on their federal antitrust claims, the sole claims that were certified

for class treatment and that survived Sirius XM's pre-trial motions to dismiss and for summary judgment. *See* SPA-16 ("The risk of establishing liability was significant."); *id.* ("One might conclude class counsel did well to reach a settlement at all in view of the questionable liability in this case."); SPA-17 ("Most of the objectors complain that the Settlement provides no meaningful relief. This assumes they suffered a meaningful injury."). In particular, plaintiffs would have been hard-pressed to prove to a jury that Sirius XM—which merged two companies that, combined, had lost billions of dollars prior to their merger (A-574 ¶ 74)—was a "monopolist" in the market for audio entertainment services. Indeed, as objector Mr. Martin himself candidly acknowledges, Sirius XM's satellite radio service "competes with a wide range of alternative entertainment," including "terrestrial radio, portable music devices that carry dozens of hours of more personalized music playlists and podcasts, not to mention free Internet services like Pandora and Last.fm or premium music-on-demand services like Spotify that allow a customer to personalize a playlist from a choice of thirteen million songs." (Martin Br. at 5). That admission alone, which recites facts that Sirius XM would have made a focal point of its defense at trial and that would have been readily accessible to many jurors, would foreclose plaintiffs' federal antitrust claims.

The District Court's finding of "questionable" liability on the merits of plaintiffs' antitrust claims is further supported by the FCC's conclusion, in July

2011, that it was not necessary to extend the three-year price freeze (which was a condition for the FCC's approval of the merger) because "new audio services have emerged as viable consumer alternatives, including smartphone Internet streaming applications that can be used in mobile environments such as automobiles . . . ." (A-884). The DOJ similarly found, in closing its investigation of the merger in March 2008, that competitors were "likely" to emerge to "offer new or improved alternatives to satellite radio," including "next-generation wireless devices networks capable of streaming Internet radio to mobile devices," which, as noted, the FCC subsequently found did in fact emerge. (A-631). Accordingly, as the District Court properly observed: "Plaintiffs' case would have at least in part required convincing a jury that two federal agencies were wrong." (SPA-16). Appellants do not assert that this finding was unsupported by the record or otherwise beyond the scope of the District Court's broad discretion in approving a settlement agreement.

Rather than take issue with these findings and the District Court's other carefully reasoned findings pursuant to its weighing of the *Grinnell* factors, appellants principally focus on their notion that the settlement provides the class with a purported "coupon" and that the attorneys' fee award is disproportionate to the benefits to the class under the settlement. Sirius XM disagrees, for reasons set forth in plaintiffs-appellees' brief. But, even if the Court were to determine that

the District Court abused its discretion in overruling appellants' objections that the settlement provides a "coupon" benefit and in awarding attorneys' fees to plaintiffs' counsel, those are not grounds for reversing the District Court's final judgment approving the settlement. *See, e.g.*, *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437, 439 (2d Cir. 2007) (affirming approval of class action settlement and vacating district court's ruling on attorney's fees); *Mba v. World Airways, Inc.*, 369 Fed. Appx. 194, 196 (2d Cir. 2010) (summary order affirming district court's order approving settlement and vacating its orders granting class counsel's fees); *cf. Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1299 (2d Cir. 1990) (affirming district court's approval of the class action settlement and reversing district court's denial of Suffolk's application for attorneys' fees).

The provision of the Class Action Fairness Act ("CAFA") that appellants invoke in support of their arguments, 28 U.S.C. § 1712(a), sets out a procedure for approving an award for an attorneys' fee when a settlement "provides for recovery of coupons to class members." *Id.* Namely, the statute provides that any portion of an attorneys' fee award "that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." *Id.*; *see also* 28 U.S.C. § 1712(b) (setting out procedure for awarding attorneys' fees when proposed settlement "provides for a recovery of coupons," but award is not based

on a "portion of the recovery of the coupons"); *id.* § 1712(c) (procedure for "[a]ttorneys' fee award calculated on a mixed basis in coupon settlements"). According to appellants, the District Court should have followed this statutory procedure because it purportedly abused its discretion in finding that the settlement relief here was not a "coupon."

Regardless of how that issue is resolved on abuse-of-discretion review on appeal, it does not impact the order approving the settlement, but only the award of attorneys' fees to plaintiffs' counsel. Specifically, Section 1712(a) addresses the procedure for awarding attorneys' fees in a "coupon" settlement; it does not affect a court's exercise of its discretion in approving a settlement.[4] *See* 28 U.S.C. § 1712(a). Indeed, Section 1712(a) makes clear that an order awarding attorneys' fees is distinct from an order approving a settlement, because it provides that an attorneys' fee may be awarded only after determining the value to class members of the coupons that are actually redeemed pursuant to a settlement (*see id.*)—and that will of course ordinarily happen only after the settlement is first approved by a district court.

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[4] Section 1712(e) provides that a court may approve a "coupon" settlement only after a hearing and making a written finding that the settlement is "fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). But the District Court of course followed that procedure here, in accordance with Federal Rule of Civil Procedure 23(e). (SPA-15-19).

Moreover, by its express terms the settlement agreement here as approved by the District Court in the final judgment remains in effect even if the award of attorneys' fees is reversed or modified:

> [A]ny reversal, vacatur or modification on appeal or other form of review of any amount of Class Counsel's fees and expenses awarded by the Court, or any determination by the Court to award less than the amount requested in attorneys' fees or costs to Class Counsel, shall not give rise to any right of termination or otherwise serve as a basis for termination of this Settlement.

(A-241 ¶ 9). The final judgment similarly provides: "Any order entered regarding any motion for attorneys' fees and expenses filed by Class Counsel shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement." (SPA-27 § 11). And attorneys' fees were awarded to plaintiffs' counsel pursuant to a separate order, not in the final judgment that formally approved the settlement agreement and gives effect to it. (SPA-28-30).

Accordingly, even if this Court were to rule that the District Court abused its discretion in rejecting the objectors' principal contentions that the settlement was a "coupon" settlement and that the attorneys' fee award was purportedly not reasonable relative to the benefits to the class, the District Court's final judgment and the order on the motion to approve the settlement agreement should be affirmed.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING AN OBJECTION AS TO THE SCOPE OF THE RELEASE IN THE SETTLEMENT AGREEMENT

Finally, the District Court did not abuse its discretion in overruling Mr. Hartleib's objection as to the scope of the release in the Settlement Agreement. As the District Court properly found, "[t]he scope of the release is consistent with the parameters established in this Circuit." (SPA-18).

This Court has established the framework for evaluating the scope of a release in a class action settlement agreement in two decisions, neither of which Mr. Hartleib cites in his argument: *Wal-Mart Stores, Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005); and *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982). In *Wal-Mart*, the Court rejected an objector's argument that a release in a settlement agreement was overbroad and noted at the outset: "Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." 396 F.3d at 106. As the Court explained, "Practically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'" *Id.* (quoting *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254 (2d Cir. 2001), *aff'd in part by an equally divided court and vacated in part*, 539 U.S. 111 (2003)).

This lawsuit well-illustrates the practical force underlying this rule. The District Court consolidated no fewer than five putative class action lawsuits filed against Sirius XM (A-94-99); and, over Sirius XM's objection, certified a nationwide class of Sirius XM consumers challenging the merger, the company's post-merger pricing, and a range of other conduct alleged to be anti-competitive as a result of the merger. (SPA-1-14). Once these claims were certified, Sirius XM wanted to either try what it regarded as meritless allegations to a resolution in its favor, or effect a global resolution; but a settlement that would have left the company exposed to a barrage of still more claims arising out of the merger would bring no meaningful relief.

The law does not discourage defendants from seeking such certainty through a settlement. Rather, as this Court held in *Wal-Mart*, the law is "well established" that "class action releases may include claims not presented and even those which could not have been presented as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." 396 F.3d at 107 (quoting *TBK Partners*, 675 F.2d at 460). The District Court did not abuse its discretion in determining that the release in this settlement agreement readily meets that standard.

The "released conduct" in the settlement agreement is all claims by class members "arising out of, based on or relating to the merger that formed Sirius XM

Radio Inc." (A-239-40 § 8(a)). The federal antitrust claims certified by the District Court for class treatment and that plaintiffs thereafter resolved pursuant to the settlement agreement plainly arose out of the merger that formed Sirius XM. Indeed, the merger was the critical event underpinning plaintiffs' claim of a "merger to monopoly" and Sirius XM's subsequent alleged abuses of that claimed monopoly power. *See, e.g.*, A-106 ¶ 3 (plaintiffs' complaint, alleging under the heading "nature of the action" that "[t]he merger of Sirius and XM has substantially lessened competition in the SDARS market in the United States, and in fact, has resulted in the creation of a monopoly"). The principle in *Wal-Mart* and *TBK Partners* therefore permitted the parties to enter into a settlement agreement that released all claims based on the same factual predicate that gave rise to the settled claims, *i.e.*, the merger that formed Sirius XM.

Mr. Hartleib does not seriously dispute this. To the contrary, in his objection to the District Court, he expressly conceded: "This case arises out of a merger between the nation's only two satellite radio providers Sirius Satellite Radio ('Sirius') and XM Satellite Radio ('XM')." (A-869). Nevertheless, without acknowledging this admission or invoking the governing legal standard, Mr. Hartleib simply asserts in his brief on appeal that "the Settlement Release is overly broad and may extinguish claims that have nothing to do with this Action." (Hartleib Br. at 5). That is wrong as a matter of fact, and the District Court did not

abuse its discretion in rejecting this argument. As the District Court properly found, "[t]he released claims here are limited to those claims that arise out of the merger that formed Sirius XM—a common factual predicate that defines the scope of the release with acceptable breadth." (SPA-18).

Mr. Hartleib also complains that the District Court abused its discretion because the settlement agreement releases claims that, in his view, "fall outside" the "boundaries of the pleadings." (Hartleib Br. at 6). This argument, too, is wrong. In *Wal-Mart* and *TBK Partners*, this Court made clear that a class action settlement may release not only claims that are actually pleaded in the complaint, but also "those which *could not have been presented* as long as the released conduct arises out of the 'identical factual predicate' as the settled conduct." *Wal-Mart*, 396 F.3d at 107 (emphasis added; quoting *TBK Partners*, 675 F.2d at 460); *see also id.* at 108 ("Class actions may release claims, even if not pled, when such claims arise out of the same factual predicate as settled class claims."). Indeed, *TBK Partners* expressly rejected an objector's argument, like that made by Mr. Hartleib here, that a class action settlement improperly released claims that, according to the objector, could not have been asserted in the class action. The Court held that, "to achieve a comprehensive settlement," a district court "may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action *even though the claim was not*

presented and might not have been presentable in the class action." *TBK Partners*, 675 F.2d at 460 (emphasis added). There was, accordingly, no abuse of discretion in overruling Mr. Hartleib's objection on this basis.

Next, Mr. Hartleib claims that the District Court abused its discretion in approving the release because "the due process rights of absent plaintiffs have not been adequately represented." (Hartleib Br. at 7). According to Mr. Hartleib, "all absent plaintiffs have a right to object and be heard." (*Id.* at 9). But all absent class members *were* provided with an opportunity to object to the settlement and to appear at the settlement approval hearing. Indeed, Mr. Hartleib himself both objected to the settlement agreement and appeared at the hearing. (A-868; A-1313-19). Mr. Hartleib's brief suggests that what he really wanted was a right *both* to exclude himself from the settlement *and* object to its terms. *See* Hartleib Br. at 9 (complaining that "the settlement notice told recipients that they could not object to the Proposed Settlement if they requested exclusion"). But that is not a deprivation of due process; a class member has no interest in the settlement if the putative member chooses to be excluded from it.[5] Due process affords class

[5] If Mr. Hartleib was worried that either his direct claims against Sirius XM or the shareholder derivative claims he asserted on behalf of Sirius XM (in a state court lawsuit that he has still not served on Sirius XM's Board of Directors) might be released for consideration that he believed was inadequate, he could have opted out of the settlement here, but he elected not to do so. Indeed, a plaintiff in another

members a right to opt out or object, but not both. *See generally Bondi v. Capital & Fin. Asset Mgmt. S.A.*, 535 F.3d 87, 93 (2d Cir. 2008) ("class members [ ] must decide whether to object to the proposed settlement or possibly opt out of it") (citing Fed. R. Civ. P. 23(e)(5)).

Mr. Hartleib also expresses concern that the class representatives in this lawsuit are "inadequate" or "unauthorized" to prosecute claims for people like him who are Sirius XM subscribers and also shareholders in the company. This argument is predicated on the mistaken notion that claims asserted derivatively on behalf of Sirius XM (a Delaware corporation) *belong* to Mr. Hartleib and other Sirius XM shareholders. It is black-letter law, however, that "[a] derivative claim belongs to the corporation, not to the shareholder plaintiff who brings the action." *In re MAXXAM, Inc. / Federated Dev't S'holders Litig.*, 698 A.2d 949, 956 (Del. Ch. 1996); *see also In re M & F Worldwide Corp. S'holders Litig.*, 799 A.2d 1164, 1174 (Del. Ch. 2002) (denying motion to disqualify counsel made by certain parties who commenced shareholder derivative action and thereafter disagreed with settlement proposed by plaintiff's counsel; "the Objectors' most central claim of unfair dealing belonged to [the corporation], not to them individually").

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shareholder derivative case that Mr. Hartleib mentions in his brief, *Goe v. Amble*, No. 11-cv-3506 (S.D.N.Y.), *did* elect to opt out of the settlement. (A-923).

Accordingly, contrary to Mr. Hartleib's notion, neither he nor any other class member has any "right" to a recovery on a shareholder derivative claim. By definition, any such claim—and the right to recovery on any such claim—belongs to Sirius XM, not to Mr. Hartleib or any other shareholder or class member. *See In re MAXXAM, Inc.*, 698 A.2d at 956; *see also Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004) ("Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation.").[6]

[6] Mr. Hartleib also states as an issue, but never argues, that the District Court purportedly abused its discretion in finding that the meaning of the term "released claims" in the settlement agreement is "clear from the text" and "refers to those claims described in paragraph 8(a)" of the settlement agreement. (SPA-18). Mr. Hartleib did not make this objection in the District Court (A-868-78), and the only objector who did raise this issue in the District Court had his appeal dismissed for failure to comply with Court-ordered deadlines. *See* Appeal No. 11-3696, Doc. Nos. 281, 317. In any event, even assuming Mr. Hartleib had not waived this argument and that he had properly pressed it in his brief on appeal, the District Court did not clearly err in finding that the meaning of "released claims" is clear from the text of the settlement agreement. (SPA-18).

CONCLUSION

The District Court did not abuse its discretion in approving the parties' agreement to settle this class action, and the judgment should therefore be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 5,813 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: April 2, 2012

Todd R. Geremia

CERTIFICATE OF SERVICE

I certify that on April 2, 2012, I filed the foregoing brief on the Court's electronic case filing (ECF) system. Pursuant to Cir. Rule 25.1(h), the resulting Notice of Docket Activity generated by the ECF system constitutes service on counsel for the parties.

Todd R. Geremia