RECORD NOS.

11-3696 (L)

11-3908

11-3729; 11-3834; 11-3883; 11-3910; 11-3916; 11-3965; 11-4061; 11-4064

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Carl Blessing, Edward Scerbo, John Cronin, Charles Bonisignore, Andrew Dremak, Todd Hill, Curtis Jones, Joshua Nathan, James Sachetta, David Salyer, Susie Stanaj, Paul Stasiukevicius, Scott Byrd, Glenn Dermott, 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,

(Caption Continued Inside Cover)

Reply Brief of Appellants Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin and Jennifer Deachin

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N. Albert Bacharach, Jr, Esq..
Florida Bar Number: 209783
115 Northeast 6th Avenue
Gainesville, Florida 32601
Telephone: (352) 378-9859
Facsimile: (352) 338-1858

Counsel for Appellants, Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin and Jennifer Deachin

(Caption Continued from Outside Cover)

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AT NEW YORK CITY

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ARGUMENTS

A. The District Court Should Have Considered and Addressed the Declaration of Dr. Harvey Rosen.

Class counsel takes the position that a settlement that provides the attorneys with a $13 million payday and class members with nothing but a promise they will not have to pay more for a subscription service for six months, does not, in and of itself, demand strict scrutiny by a trial court evaluating the fairness, adequacy, and reasonableness of the Settlement. *See* Brief For Plaintiffs-Appellees ("Plaintiffs' Brief"), Doc. 479, pp. 42-43, 57. The Crutchfield Appellants disagree because the District Court's statement that it "reviewed and considered ... all papers filed and proceedings held ... all oral and written comments," (A-1350) without explicitly addressing Dr. Rosen's declaration is *ipso facto* an abuse of discretion; especially when the Settlement benefits are so minimal and the attorneys' fees are so robust. As a point of error, the Crutchfield Appellants contend that the District Court failed to consider their submission of the Declaration of Dr. Harvey Rosen regarding the Settlement's lack of value. In their Answer Brief, Plaintiffs argue that the Crutchfield Appellants have not proven that fact. Plaintiffs' Brief, Doc. 479, p. 42. This Court should note that Dr. Rosen's declaration is in the record, and is dramatically at odds with Plaintiffs' expert's valuation of the Settlement.

Based on the vast discrepancies between the valuations of Plaintiffs' expert and Dr. Rosen, the District Court should have explicitly addressed Dr. Rosen's declaration.[1]

B. The Settlement is a Coupon Settlement.

The Settlement is clearly a coupon settlement, and the cases cited by Class Counsel to counter that argument are just as clearly distinguishable. The court, in *Dupler*, never held that the settlement was not a coupon settlement, and in fact, there is no evidence in the opinion that the question of a coupon settlement was ever an issue. *See generally, Dupler v. Costco Wholesale Corp.*, 705 F.Supp.2d 231 (E.D.N.Y. 2010).

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[1]In support of the proposition that there is a strong presumption that a district court Judge considered all properly-presented arguments, Class Counsel stretches its analysis by citing a criminal case in the context of sentencing. *See U.S. v. Fernandez*, 443 F.3d 19 (2d Cir. 2006). The more complete quote than that provided by Class Counsel would read: "... we entertain a strong presumption that the *sentencing judge* has considered all arguments properly presented ...". *Fernandez*, 443 F.3d at 29 (emphasis added). Furthermore, *Fernandez* dealt with whether the sentencing Judge had to "*precisely identify* either the factors ... or specific arguments bearing on the implementation of those factors ..." regarding which the court declined to impose a requirement. *Id.* (emphasis in original). By contrast, the issue here is not whether the district court precisely identified all *arguments*, but rather whether the district court considered an expert report that directly contradicted the expert's opinions submitted by Class Counsel regarding the value of the Settlement.

Though the *In re Wireless* court did find that the settlement was not a coupon settlement, at least the relief provided in that case (including additional free wireless minutes and free minutes on a long-distance phone care, free internet service, or free text messages) was a discrete benefit actually obtained. *See In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 2004 WL 3671053, *11-12 (W.D. Missouri, April 20, 2004). In contrast, class members in this case receive nothing of value.[2] [3]

C. Class Members Always Have Standing to Challenge the Fee Award.

Although it is one of the major concerns about the fee award, Plaintiffs argue that the Crutchfield Appellants lack standing to contest the fee award because any fee not awarded to Class Counsel reverts to Sirius XM. *See* Plaintiffs' Answer Brief, pp. 49-50 ("Here, if the fee award is reduced, under the

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[2]Class counsel claims that Sirius XM's agreement not to raise prices was of substantial value. However, Dr. Rosen opined that "without any monetary give-back (other than the $13 million in attorney's fees) this proposed settlement has little or no value ..." Appendix of Crutchfield Appellant's Opening Brief, Doc. 449, p. 5.

[3]Plaintiffs emphasize the significance of the "churn rate," or the rate at which subscribers to Sirius XM's services fail to renew, which they claim is about 1-2%. *See* Plaintiffs' Brief, Doc. 479, p. 46-47. However, the important question is not historically how many persons have renewed their subscription, but how many subscribers *would have renewed* had the purportedly planned price increase gone into effect (absent the Settlement).

Settlement Agreement the reduction reverts to SXM, not to the Class."). If that were true, no one could challenge class counsel's fees. The reverter clause does not destroy class members standing to object to fees. Especially so when the issue has been preserved and challenged on appeal. "The unique relationship between plaintiffs' counsel, plaintiffs, and defendants in class actions imposes a special responsibility upon appellate courts to hear challenges to fee awards by class members," even where the class members will not benefit from a reduction in the fees. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001). *In re Cendant*, members of the class had standing to appeal the attorneys' fees even though any reduction in the amount of fees would not benefit the class. *Id.* at 728. Furthermore, *In re Bluetooth*, where the appellant challenged both the approval of the settlement and of the attorneys' fees, and the court vacated both orders, the court found that it "need not address whether Objectors have independent standing to challenge the Fee Order alone were the Approval Order to remain intact." *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 949 n. 9 (9th Cir. 2011). The *Glasser* case, cited by Plaintiffs regarding the Crutchfield Appellants' standing, is distinguishable in that the Glasser Objector had "expressly disavow[ed] any financial interest in the fee the defendant was ordered to pay to Plaintiff's counsel..." *Glasser v. Volkswagen Of America, Inc.*, 645 F.3d 1084,

1085 (9th Cir. 2011). Thus, class members, including the Crutchfield Appellants, who have not otherwise explicitly waived their interest have standing to challenge the fee award.

D. The Settlement Required Heightened, Not Reduced, Scrutiny.

It not only strains credulity, it is disingenuous to argue that a $13 million attorney fee paid by the Defendant did not qualify as a significant factor in the decision by the Defendant to settle with the class when $13 million is the only cost to the Defendants because the class itself received no tangible compensation.[4] The case of *McBean v. City of New York*, which Plaintiffs cite for the proposition that the fiduciary role of the district court is reduced when the defendant pays fees independently of the award to the class, is easily distinguishable. Although the McBean class members received a cash payment, the Court acknowledged that it could "imagine a situation where exorbitant attorneys' fees awarded as part of a settlement, even if separate from money paid to the class, would give rise to a suspicion that the attorneys had persuaded named plaintiffs to agree to a settlement that was not in the class's interest ..." *McBean v. City of New York*, 233

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[4] The Crutchfield Appellants acknowledge that the chronology of this Settlement demonstrated that the "class benefits", or perhaps better phrased, "resolution," preceded the agreed fee amount. However, it does not pass the smell test to contend that Defendants were not cognizant that a substantial multi-million-dollar fee cost would be paid when negotiating the disposal of the class claims.

F.R.D. 377, 392 n. 9 (S.D.N.Y. 2006). Given the $13 million disparity between the attorneys fees and the relief provided in this case, it seems that the *McBean* court was imagining just this situation.

Plaintiffs' arguments that the clear sailing provision and the reversion of any excess fee do not render the attorneys' fees unfair misses the point of the Crutchfield Appellants' arguments regarding both provisions. The Crutchfield Appellants have not argued that such provisions are *per se* impermissible, but that their presence in the Settlement requires a heightened scrutiny, which the District Court clearly failed to provide. Instead, the District Court found that its fiduciary duty in reviewing the Settlement was greatly reduced. *See* Crutchfield Appellants' Opening Brief, Doc. 448, pp. 26-34. The language from *In Re Excess Value Insurance* quoted by Plaintiffs actively supports the Crutchfield Appellants' arguments: "Nor does the so-called 'clear sailing agreement' ... bar approval of the Settlement, where, as here, the Court ***strictly scrutinized*** both the process and substance of the Settlement." *In re Excess Value Insurance Coverage Litigation*,2004 WL 1724980, *10 (S.D.N.Y. 2004) (emphasis added). Clearly the strict scrutiny which kept the clearly sailing provision from being a bar to the settlement in the *In re Excess Value* case was not present in this case. *See* A-1348.

E. The Fee Award Impacts the Fairness of the Settlement.

Sirius XM argues that the issue of attorneys' fees should not impact the approval of the Settlement. *See* Sirius XM Radio Inc.'s Brief On Appeal ("Sirius Brief"), Doc. 482, pp. 21-22. However, the cases cited by Sirius for this argument do not hold that the fairness of the fee award is never relevant to the fairness of a class action settlement. *See generally, Masters v. Wilhelmina Modeling Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (overturning the award of attorneys' fees because the District Court did not award fees based on the entire fund, but only on the basis of claims made against the fund); *see also Mba v. World Airlines*, 369 Fed. Appx. 194 (2d Cir. 2010); *Cnty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990). As the *In re Bluetooth* case clearly reflects, the award of attorneys' fees can have a significant effect on the fairness of the settlement itself, and the disapproval of the fee award can lead a court to deny the settlement. *See In re Bluetooth*, 654 F.3d at 949 (vacating the order approving settlement and the fee award, given the "questionable features of the fee provision" and the District Court's lack of explanation as to why the fee was justified and not contrary to the interests of the class).

F. The Equitable Mootness Doctrine is Inapplicable.

Sirius XM's equitable mootness argument is totally inapplicable. The

doctrine of equitable mootness is peculiar to the context of bankruptcy. *See In re Continental Airlines*, 91 F.3d 553, 559 (3d Cir. 1996) (the doctrine of equitable mootness "focuses on concerns unique to bankruptcy proceedings" (quotations omitted)); *see also In re Best Products Co., Inc.*, 68 F.3d 26, 29 (2d Cir. 1995). In this matter, there has been no "comprehensive change of circumstances," as required by equitable mootness. *In re Chateaugay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993).[5] The Settlement, by its own terms, is not even final.[6] Thus, Sirius XM cannot be heard to complain that it voluntarily performed its obligations under an agreement that by its own terms was not yet final.

CONCLUSION

The District Court erred when it failed to explicitly address the Declaration of Dr. Harvey Rosen, given the wide divergence between Dr. Rosen's expert opinion on the value of the Settlement and that of Plaintiffs' expert. This Court should find that the Settlement is a coupon settlement, and that Plaintiffs' arguments regarding the historical "churn rate" are unavailing; and that the "churn

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[5]In *Chateaugay*, beneficiaries had already received disbursement of, and presumably used, the funds. *Id.* at 326. By contrast, there has been no change to Sirius XM's pricing; all Sirius XM has done is refrain from acting.

[6]The Settlement will only become final after any appeal from the order and final judgment has been dismissed before its resolution or has resulted in full affirmance of the order and final judgment. A-235.

rate" does not answer the questions necessary to appropriately determine the attorneys' fees. The District Court failed to apply the heightened scrutiny required by the fee award and the Settlement, which included both a clear-sailing provision and a reversion clause. The Crutchfield Appellants clearly have standing to challenge the attorneys' fees award. Sirius XM's argument that the fee award has no effect on the Settlement approval is unavailing, as is its argument that the appeal should be dismissed on grounds of "equitable mootness." The District Court's approval of the Settlement and fee award should be reversed and remanded with appropriate instructions.

Respectfully submitted,

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N. Albert Bacharach, Jr.
Florida Bar Number: 209783
Attorney for The Crutchfield Appellants
N. ALBERT BACHARACH, JR. P.A.
115 Northeast 6th Avenue
Gainesville, Florida 32601-3416
(352) 378-9859(FAX) 338-1858
N.A.Bacharach@att.net

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Second Circuit using the CM/ECF system and six bound copies by U.S. Mail, which will provide notification of such filing to all counsel of record, with the exception of the following parties, whom I caused to be served by first-class mail.

Donald K. Nace
1000 Suffolk Court
Cedar Park, TX 78613

Brian David Goe
P.O. Box 7078
Laguna Niguel, CA 92677

Michael Hartleib
P.O. Box 7078
Laguna Niguel, CA 92677

Respectfully submitted,

____

N. Albert Bacharach, Jr.
Florida Bar Number: 209783
Attorney for The Crutchfield Appellants
N. ALBERT BACHARACH, JR. P.A.
115 Northeast 6th Avenue
Gainesville, Florida 32601-3416
(352) 378-9859(FAX) 338-1858
N.A.Bacharach@att.net

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This reply brief complies with the type-volume limitation of Fed.R.App. P.32(a)(7)(B) excluding the parts of the Reply Brief exempted by Fed.R.App. P.32(a)(7)(B)(iii); complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. App. P. 2(a)(6) because this reply brief has been prepared in a 14 point, proportionally spaced typeface using Times New Roman in WordPerfect X5.

Dated this 16th day of April, 2012.

____
N. Albert Bacharach, Jr.