UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT MICHAEL SHENK, derivatively on behalf of SIRIUS XM RADIO INC.,	:	
Plaintiff,	:	
-vs.-	:	
MELVIN ALAN KARMAZIN, GARY PARSONS, JOAN L. AMBLE, LEON D. BLACK, EDDY W. HARTENSTEIN, JAMES P. HOLDEN, JAMES F. MOONEY, JACK SHAW, GREGORY B. MAFFEI, JOHN C. MALONE, DAVID J.A. FLOWERS, CARL E. VOGEL and VANESSA A. WITTMAN,	:	Case No. 1:11-cv-02943-JSR Action No. 1 **Oral Argument Requested**
Defendants,	:	
and	:	
SIRIUS XM RADIO INC.,	:	
Nominal Defendant.	:	

JEFFREY GOE, derivatively on behalf of SIRIUS XM RADIO INC.,	:	
Plaintiff,	:	
-vs.-	:	
JOAN L. AMBLE, LEON D. BLACK, EDDY W. HARTENSTEIN, JAMES P. HOLDEN, MEL KARMAZIN, JACK SHAW, GREGORY B. MAFFEI, JOHN C. MALONE, DAVID J.A. FLOWERS, VANESSA A. WITTMAN and CARL E. VOGEL,	:	Case No. 1:11-cv-03506-JSR Action No. 2 **Oral Argument Requested**
Defendants,	:	
and	:	
SIRIUS XM RADIO INC.,	:	
Nominal Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' JOINT MOTION TO DISMISS THE VERIFIED AMENDED SHAREHOLDER DERIVATIVE COMPLAINT OF PLAINTIFF ROBERT MICHAEL SHENK AND THE AMENDED DERIVATIVE COMPLAINT OF PLAINTIFF JEFFREY GOE

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Defendants respectfully submit this memorandum of law in support of their joint motion to dismiss the Verified Amended Shareholder Derivative Complaint of Plaintiff Robert Michael Shenk (the "Shenk Complaint") and the Amended Derivative Complaint of Plaintiff Jeffrey Goe (the "Goe Complaint").[1]

PRELIMINARY STATEMENT

These Complaints fall far short of pleading the type of extraordinary facts necessary to justify allowing a shareholder to sue on behalf of Sirius XM Radio Inc. ("Sirius XM" or the "Company") without the approval of its Board of Directors. Plaintiffs Shenk and Goe rely entirely on allegations made in an antitrust action that relates to the 2008 merger of a subsidiary of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc., and that is currently pending in this Court in *Blessing v. Sirius XM Radio, Inc.*, No. 09-cv-10035(HB) (S.D.N.Y.). Plaintiffs essentially assert that a not-yet-approved classwide settlement in the *Blessing* action clears the way for Plaintiffs to re-litigate the antitrust case in the guise of shareholder "derivative" claims for breach of fiduciary duty, corporate waste, unjust enrichment, and securities fraud.

By filing purported derivative actions, Plaintiffs seek to supplant the authority of Sirius XM's Board of Directors to govern the Company, including the authority to decide whether and when to initiate litigation. Under Delaware law, it is only in rare cases that individual shareholders can assume – and take away from the company's board – the right to decide whether to bring suit on behalf of the corporation. To do so, a derivative plaintiff must either make a proper demand on the board, or establish that a demand was futile through particularized factual allegations showing that a majority of the board is not disinterested or

[1] Defendants Gary Parsons and James F. Mooney move to dismiss only the Shenk Complaint.

independent, or that a decision of the Board that is at issue is not entitled to the deference afforded by the business judgment rule. Plaintiffs have failed to do that here.

Plaintiff Shenk asserts that he was excused from making a pre-suit demand because it would have been futile. First, he alleges that the Sirius XM Board is not disinterested or independent based on the relationships among the directors; the directors' compensation; and the previous rejection of demands made by other shareholders. All of these boilerplate allegations are inadequate as a matter of well-established Delaware law.

Second, Shenk claims that the directors' alleged unlawful conduct made a demand futile. However, demand is not futile simply because the directors would be required to sue themselves or their fellow directors. Delaware law rejects this bootstrap tactic except in the rare case in which a plaintiff can establish, through particularized factual allegations, a *substantial likelihood* that the directors will be found liable for the claims asserted in the complaint. Shenk has not made such a showing here because he cannot do so. Sirius XM's Amended and Restated Certificate of Incorporation has an exculpatory clause that protects the Board from personal liability for breach of fiduciary duty claims premised on negligence or gross negligence. And, Shenk makes no particularized allegations to show that the Board faces a substantial likelihood of liability for non-exculpated claims that are based on an alleged intentional or conscious disregard of fiduciary duties. Shenk alleges that Defendants made false statements about the merger and pricing, but fails to identify the statements, the Board's involvement with them, or any red flags to show that the Board knew the statements were false. Indeed, the Shenk Complaint is devoid of any particularized allegations as to the Board members, and instead rests on formulaic statements concerning their membership on the Audit Committee or Compensation Committee, which courts routinely reject as insufficient.

Shenk also challenges Sirius XM's decision to approve a financing transaction with an affiliate of Liberty Media Corporation in 2009. However, the Board's decision with respect to that transaction is afforded deference under the business judgment rule. Shenk's conclusory allegation regarding some of the directors' supposed motive of "entrenchment" in connection with the transaction is not supported by any particularized facts to rebut the presumption under the business judgment rule that the directors acted in good faith.

The Goe Complaint fares no better. It fails to show that Goe made a proper pre-suit demand on the Board, and makes no effort to plead that he is excused from Delaware's demand requirement. Goe's purported demand, in the form of a February 25, 2011 letter, is defective because it completely lacks the required elements of a proper pre-suit demand under Delaware law. Goe's letter merely alleges that certain *unnamed* individuals breached *unspecified* fiduciary duties, and then demands that the Board commence a derivative lawsuit against *either* Mel Karmazin, the Company's Chief Executive Officer, *or* unnamed current and former executive officers and directors "as a result of the [antitrust] class action lawsuit [in *Blessing*]." Goe acknowledges that the sole purpose of his derivative suit is to attempt to provide a basis for collecting proceeds under directors' and officers' insurance policies to be used to pay for a settlement of the *Blessing* antitrust suit that has not yet been approved. This half-baked insurance scheme by a shareholder vigilante is not a proper pre-suit demand under Delaware law.

Because neither Shenk nor Goe has satisfied his burden of making a pre-suit demand on the Board or pleading that demand is excused, the Court should dismiss their Complaints under Federal Rule of Civil Procedure 23.1 and Delaware law.

Alternatively, the Court should dismiss these Complaints under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted because

they are comprised of only generalized allegations regarding the Company's merger and subsequent financing transaction and do not state a claim.

SUMMARY OF ALLEGATIONS[2]

The Shenk Complaint

The Shenk Complaint asserts claims against thirteen individual defendants ("the Individual Defendants"), eleven of whom were independent, non-management directors of Sirius XM's Board on the date the Shenk Complaint was filed. Regarding the remaining two Individual Defendants, Mel Karmazin is the Company's CEO and a director on the Board, and Gary Parsons is a former director who stepped down from the Sirius XM Board in November 2009.

Referring to the antitrust action pending in this Court in *Blessing*, the Shenk Complaint cribs directly from the pleadings filed in that action regarding alleged statements made to regulators in connection with the July 2008 merger of a subsidiary of Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. Shenk complains, just as the plaintiffs do in *Blessing*, that Sirius XM acquired monopoly power through the Sirius-XM merger and abused that power by allegedly raising certain prices after the merger, in a manner that was purportedly inconsistent with the Company's statements made to federal regulators in the course of seeking approval for the merger. Shenk Compl. ¶¶ 5, 8, 10-14, 60-62, 77-111. Although Shenk alleges that this conduct increased Sirius XM's revenue, he repeats the *Blessing* action's allegations that the Company's conduct has misled consumers (on whose behalf he is not suing) and exposed it to antitrust liability. *Id.* ¶¶ 12, 15, 62, 73, 92, 133, 166. Shenk acknowledges that the *Blessing* Court has preliminarily approved a classwide settlement agreement, pursuant to which Sirius

[2] The Defendants do not concede the accuracy of the factual assertions made in the Complaints.

XM has agreed to forego further price increases during the remainder of 2011, but will make no cash payments to the class. *Id.* ¶¶ 85, 115. Shenk includes a conditional allegation, however, that "[i]f the settlement of the Antitrust Action is not approved and that action is tried to a verdict or settled, it is likely to give rise to enormous compensatory damages" and that such damages will allegedly be the "direct result" of conduct by the Sirius XM directors whom Shenk has sued in this case. *Id.* ¶ 116.

Shenk also alleges that, after the merger, the Company needed further financing and had hired advisors to guide it through a possible bankruptcy filing. *Id.* ¶ 117. According to Shenk, the Individual Defendants improperly rejected a 2009 financing offer made by Charles Ergen of Dish Network in favor of an alternative transaction with an affiliate of Liberty Media Corporation (the "Liberty Transaction"). *Id.* ¶¶ 117-123.

Shenk asserts claims in a derivative capacity on behalf of Sirius XM for breach of the Individual Defendants' fiduciary duty, unjust enrichment, and (as to only certain Individual Defendants) for violation of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 thereunder. Shenk concedes that he "ha[s] not made any demand on the Board of Sirius [XM]," *Id.* ¶ 134, and contends instead that demand is excused. The crux of Shenk's demand futility argument, asserted without any of the requisite particularized facts, is that "all of the Defendants face a sufficiently substantial likelihood of liability, and, thus, there is a reasonable doubt as to their disinterestedness in deciding whether pursuing legal action would be in the Company's best interests." *Id.* ¶ 156.

The Goe Complaint

The Goe Complaint asserts claims against eleven of the Individual Defendants named in the Shenk Complaint, all of whom were members of Sirius XM's Board of Directors

on the date the Goe Complaint was filed. Like the Shenk Complaint, the Goe Complaint takes its allegations almost entirely from the *Blessing* antitrust action regarding pre-merger statements that the Company allegedly made to regulators about Sirius XM's pricing expectations for satellite radio services.[3] Goe Compl. ¶¶ 43-48. Goe expressly concedes, however, that he "does not allege that the companies' statements pre-merger were untrue, or that the companies' misstated their intentions," *id*. ¶ 56; like Shenk (and the *Blessing* plaintiffs), he claims that post-merger, Sirius XM has "exercised unlawful monopoly power and engaged in improper practices." *Id*. Goe asserts claims in a derivative capacity on behalf of Sirius XM for breach of fiduciary duty, unjust enrichment, and corporate waste, and states that the purpose of his derivative lawsuit is to attempt to collect proceeds from directors' and officers' insurance policies in order to offset some of the costs that the Company will incur in connection with the settlement agreement that the Court has preliminarily approved in the *Blessing* action. *Id.* ¶ 18.

Goe asserts that a letter he wrote to the Chairman of the Sirius XM Board on February 25, 2011 constitutes a pre-suit demand. *Id.* ¶ 66. This letter, in which Goe "demand[ed] that the Board commence a derivative lawsuit against the current and former executive officers and directors of the Company as a result of the class action lawsuit filed against the Company [the *Blessing* action]," did not elaborate further on who did anything unlawful, what they did, or what claims Sirius XM should bring against them. *See* Goe Compl. Ex. A. Goe's letter states only that the purpose of his "demand" is to "trigger individual insurance coverage which will benefit the Company" because "[t]here is no individual insurance policy that covers the Company for the alleged insurance violations." *Id.*; *see also* Goe Compl.

[3] The Goe Complaint contains no allegations about the Liberty Transaction.

¶ 2 ("The settlement of the antitrust action should include monies from the Directors' and Officers' Insurance policies of Sirius XM Radio, Inc. and not just directly from the Company.").

ARGUMENT

I. The Complaints Should Be Dismissed Because Plaintiffs Failed To Make Demands On The Sirius XM Board And Have Not Adequately Pleaded Demand Futility

Rule 23.1 of the Federal Rules of Civil Procedure and Delaware law[4] require that a shareholder seeking to bring a derivative action must first make a pre-suit demand on the company's board of directors to pursue the corporate claim, or else plead facts showing that a demand upon the Board would have been futile. *See* Fed. R. Civ. P. 23.1; Del. Ch. Ct. R. 23.1. The demand requirement ensures that a shareholder is permitted to litigate on behalf of the corporation in only rare circumstances. "In most situations, the board of directors has sole authority to initiate or to refrain from initiating legal actions asserting rights held by the corporation." *White v. Panic*, 783 A.2d 543, 550 (Del. 2001). This is because "[t]he directors of a corporation and not its shareholders manage the business and affairs of the corporation . . . and accordingly, the directors are responsible for deciding whether to engage in derivative litigation." *Levine v. Smith*, 591 A.2d 194, 200 (Del. 1991) (citations omitted), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

Shenk concedes that he never made a demand on the Board, and he has failed to show that such a demand would have been futile. Goe's February 25 letter was not a proper pre-suit demand on the Board, and he has made no attempt to demonstrate demand futility. Because

[4] Because Rule 23.1 does not set forth the circumstances under which demand would be excused as futile, Delaware law – the law of the state in which Sirius XM is incorporated – provides the substance of the demand requirement. *See Kamen v. Kemper Fin. Services, Inc.*, 500 U.S. 90, 96-99 (1991).

both Plaintiffs have not fulfilled their obligations under Rule 23.1 and Delaware law, their Complaints should be dismissed in their entirety.

A. Goe Failed To Make A Proper Pre-Suit Demand On The Board

Goe's February 25, 2011 letter is not a proper pre-suit demand under Delaware law. A proper demand "must specifically state: (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw v. Talley*, Civ. A. No. 12882, 1994 WL 89019, at *7 (Del.Ch. Mar. 2, 1994); *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del. 1985) (holding that a demand must contain these three elements "[a]t a minimum"). The purpose of these criteria is to ensure that the demand puts a company's board of directors "on notice of possible wrongdoing" so that it is able to "perform its duty to make a good faith investigation of claims of alleged wrongdoing, and, where appropriate, to rectify the misconduct." *Yaw*, 1994 WL 89019, at *7 (citation omitted). A proper demand letter must also establish that the person sending it (or on whose behalf it is sent) is a shareholder of the corporation and was a shareholder at the time of the transaction or conduct about which the letter complains. *See Richelson v. Yost*, 738 F. Supp. 2d 589, 600 (E.D. Pa. 2010) (applying Delaware law).

Goe's February 25 letter entirely fails to satisfy these requirements. It states that the purpose of the requested derivative suit would be to trigger coverage of the Company's directors' and officers' insurance policies in order to cover the costs of a "potential," but not yet approved, settlement of the *Blessing* action. Goe Compl., Ex. A; *see also* Goe Compl. ¶¶ 18, 68. Indeed, the letter's requested "remedy" is to sue *either* the entire Board *or* Mr. Karmazin, the Company's CEO – in other words, any individual who could be sued to rightly or wrongly trigger insurance coverage.

In addition, the February 25 letter does not identify any alleged wrongdoers as required by Delaware law, and instead claims only generally that "certain current and former executive officers and directors of the Company" have breached their fiduciary duties. Goe Compl. Ex. A. The letter also contains no factual allegations of any wrongful acts committed by these unnamed current and former officers and directors, and no factual allegations of any harm caused to the Company as a result. *Id*. Instead, the letter requests the Board to commence a derivative lawsuit against unidentified "current and former executive officers and directors of the Company" to "remedy" unspecified "breaches of fiduciary duties . . . *as a result of* the class action lawsuit." *Id*. (emphasis added); *see Cottle v. Standard Brands Paint Co*., Civ. A. No. 9342, 1990 WL 34824, at *7 (Del. Ch. Mar. 22, 1990) (holding that a letter was not a proper demand because "[i]t follows from the purpose of a demand that there must be an alleged wrong before demand is made" and the letter at issue "[did] not identify any act or omission by the . . . directors that is allegedly wrongful").

Finally, the February 25 letter was not a proper demand because Goe did not adequately show he was a shareholder of Sirius XM at the time of the conduct giving rise to his demand. Plaintiff Jeffrey Goe's only showing in his February 25 letter that he was a shareholder at the time of the Sirius-XM merger was a statement indicating that an entity identified as Infinity Trading Group had traded in Sirius XM shares during April 2008. *See* Goe Compl., Ex. A. But Jeffrey Goe also attached a statement dated October 17, 2007 indicating that *Brian Goe* was the "Sole Proprietor" of Infinity Trading Group, although "Jeff Goe" was listed as an "authorized trader" for the account. *Id.* Accordingly, Goe did not adequately show that he had any right to make a demand on the Board, even assuming that his February 25 letter was a proper demand (and it was not). *See Richelson*, 738 F. Supp. 2d at 599-600 (holding that "a non-

shareholder has no right to make demand on the board," and that a purported demand is inadequate where the putative shareholder's status as a shareholder is not confirmed).

Accordingly, because Goe's February 25 letter does not contain any of the elements required under Delaware law, it is not a proper pre-suit demand.[5]

B. Plaintiffs Are Unable To Establish Demand Futility Because The Board Was Disinterested And Independent

Shenk concedes he did not make a pre-suit demand on the Board, but claims that such a demand was "futile." However, the Shenk Complaint does not meet the rigorous tests for alleging futility of a pre-suit demand. The Goe Complaint does not even try to satisfy these tests.

Delaware law provides two standards for determining demand futility: the "*Rales*" test applies to challenges based on a board's alleged omissions or failures to act, while the "*Aronson*" test applies to challenges to affirmative decisions of a board. *See Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984). Both tests require a court to assess whether a plaintiff has alleged particularized facts raising a reasonable doubt as to whether a majority of the board is disinterested and independent as of the date the complaint was filed. *See Rales*, 634 A.2d at 934; *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996); *Levine*, 591 A.2d at 205. In addition, the second part of the *Aronson* test requires a plaintiff to allege particularized facts that raise a reasonable doubt that a challenged

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[5] Even if Goe's February 25 letter were deemed an adequate demand on the Sirius XM Board, the Goe Complaint's allegations of wrongful refusal of the demand fail to satisfy Delaware law's strong presumption against such a finding. By making his purported demand, Goe conceded the disinterestedness and independence of a majority of the Board and its capability to consider a demand, *see Spiegel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990), and the Goe Complaint's general allegation that "[t]he board's refusal to take action and reject the pre-suit demand is not a product of rational business judgment," Goe Compl. ¶ 76, falls far short of satisfying Goe's substantial burden of pleading particularized facts that the Board's decision was made in bad faith. *See Baron v. Siff*, No. 15152, 1997 WL 666973, *2-3 (Del. Ch. Oct. 17, 1997) (dismissing complaint containing conclusory allegation that demand was wrongfully rejected).

transaction was the product of a valid exercise of business judgment. *See Aronson*, 473 A.2d at 814.

Particularized allegations are necessary to satisfy these rigorous tests. *Brehm*, 746 A.2d at 254. "[C]onclusory allegations of facts or law which are not supported by allegations of specific fact may not be taken as true." *Loveman v. Lauder*, 484 F. Supp. 2d 259, 265 (S.D.N.Y. 2007). Indeed, Rule 23.1 "imposes a pleading standard *higher* than the normal standard applicable to analysis of a pleading challenged under Rule 12(b)(6)." *In re Morgan Stanley Deriv. Litig.*, 542 F. Supp. 2d 317, 321 (S.D.N.Y. 2008) (emphasis added). For this reason, courts have recognized that demand will not be excused absent "*extraordinary conditions*" or "*exceptional situations*." *Kamen*, 500 U.S. at 95 (emphasis added).

Shenk's assertion that a pre-suit demand was futile is based on his boilerplate allegations that the Board is not disinterested or independent for the following reasons:

- Certain directors are members of the Board's Audit Committee or Compensation Committee;
- The directors receive compensation, bonuses, and benefits by virtue of their Board membership;
- Certain directors are "close associates" of Karmazin, and Karmazin himself is "involved" with Defendant Malone "on a personal and social basis";
- Defendant Karmazin and/or Defendant Malone dominate and control the Board;
- The Board has previously rejected demands made by other shareholders; and
- The directors committed unlawful acts and would be required to sue themselves and their fellow directors.

See Shenk Compl. ¶¶ 134-158. Courts applying Delaware law have routinely rejected such excuses for failing to make a pre-suit demand.

1. Allegations Of Board Committee Membership Are Insufficient To Excuse Demand

Shenk's notion that certain of the directors are conflicted because they serve on the Audit and Compensation Committees does not excuse a pre-suit demand. *See* Shenk Compl. ¶¶ 26, 29-32, 38, 137, 141, 143-47. These generalized allegations of culpability fall far short of establishing that a majority (or any) of the directors faces a substantial likelihood of liability for the claims alleged, and Delaware law is clear that allegations of mere membership on a board committee are insufficient to excuse a pre-suit demand. *See, e.g., La. Mun. Police Employees Ret. Sys. v. Blankfein*, No. 08 Civ. 7605, 2009 WL 1422868, at *7 (S.D.N.Y. May 19, 2009) ("Numerous cases have held that board committee membership, without more, cannot establish demand futility."); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Lundgren*, 579 F. Supp. 2d 520, 532 (S.D.N.Y. 2008) (same).

2. Allegations That Directors Receive Fees For Their Service On A Board Are Insufficient To Excuse Demand

Shenk's assertion that the directors are conflicted because they receive compensation for their services as members of the Board is also legally insufficient to show demand futility. The unremarkable fact that board members receive compensation for their services, or that such compensation creates a purported "incentive" to retain their position, do not create a reasonable doubt that the directors are disinterested or independent, particularly where, as here, 12 of the 13 members of the current Board are independent non-management directors. "If it did, every director who receives a director's fee would [be] biased. Such a rule would . . . strip [the requirement for a pre-suit demand] of all meaning." *In re E.F. Hutton Banking Practices, Litig.*, 634 F. Supp. 265, 271 (S.D.N.Y. 1986).

3. Allegations That Certain Directors Have Personal And Business Relationships With Each Other Are Insufficient To Excuse Demand

Shenk's burden of showing that a majority of the directors lack independence due to personal and business relationships is exceptionally high in this case because the Board is dominated by outside directors. *See In re Western Nat. Corp. S'holders Litig.*, 2000 WL 710192, at *15 (Del. Ch. 2000). Mel Karmazin is the *only* management director on the 13 member Board. The other *12 out of 13 directors* of the current Board are outside directors who are not employed by Sirius XM or otherwise dependent on it for their livelihood. These outside directors are presumptively independent, and the Shenk Complaint fails to allege particularized facts to rebut that presumption. *See Grobow v. Perot*, 526 A.2d 914, 924 (Del. Ch. 1987); *Aronson*, 473 A.2d at 815 (holding that to excuse demand, "[t]here must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the [interested] person").

Shenk alleges generally that "Karmazin exercised his domination and control over other Board members" or that "other director's [sic] [are] beholden[] to Karmazin." Shenk Compl. ¶¶ 24, 122. However, conclusory allegations of outside business or personal relationships among directors, without more, fail as a matter of law to raise a reasonable doubt that the directors are independent. *Beam v. Stewart*, 845 A.2d 1040, 1051-52 (Del. 2004). In addition, this boilerplate allegation is neutralized by Shenk's opposite allegation (also with no particularized allegations in support) that Karmazin, himself, is beholden to four of the independent directors by virtue of their positions on the Board's Compensation Committee. *See* Shenk Compl. ¶ 139.

Shenk's allegation that Karmazin, Amble, Black, Holden, Mooney, Shaw, Gilberti and Hartenstein are "beholden to the Malone nominees" likewise does not carry his

pleading burden. *Id.* ¶ 149. Shenk claims that, under the terms of the Liberty Transaction, the directors appointed by an affiliate of Liberty Media Corporation are permitted to appoint another director to the Board, and that this fact alone makes the remaining directors on the Board beholden to those Liberty-designated directors. *Id*. Even assuming the truth of this allegation, it is irrelevant because the Shenk Complaint fails to allege, let alone plead any facts to show with particularity, that these Liberty-designated directors are interested. *See In re Dow Chem. Co. Deriv. Litig.*, Civ. A. No. 4349-CC, 2010 WL 66769, at *8 (Del. Ch. Jan. 11, 2010) ("[W]ithout an interested director the independence of the remaining directors need not be examined. Plainly put, the beholdenness or dominance of any director is irrelevant because there is no fear that the dominating director, without a personal or adverse interest, will do anything contrary to the best interest of the company and its stockholders."); *Kahn v. Roberts*, Civ. A. No. 12,324, 1994 WL 70118, *5 (Del. Ch. Feb. 28, 1994) (same).

Shenk also asserts that the directors appointed by an affiliate of Liberty Media Corporation are loyal to that entity and not to Sirius XM. Shenk Compl. ¶ 148. But any argument that directors were "nominated by or elected at the behest of the controlling person adds nothing" to the analysis of whether demand is excused, since "[t]hat is the usual way a person becomes a corporate director." *See In re IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d 574, 602 (S.D.N.Y. 2007) (quoting *Aronson*, 473 A.2d at 816); *Beam*, 845 A.2d at 1054 (rejecting allegation that a shareholder's "overwhelming" 94% voting control compromised the independence of directors she appointed).

4. Allegations That The Board Failed To Take Corrective Action And Refused Demands Purportedly Made By Other Shareholders Are Insufficient To Excuse Demand Here

Shenk's allegation that the "Board has already failed, in the face of several pending lawsuits, to address the transactions challenged herein" does not excuse demand. *See*

Shenk Compl. ¶ 154. It is well-settled that an alleged failure to take corrective action is inadequate to demonstrate demand futility. *See Lewis v. Graves*, 701 F.2d 245, 249 (2d Cir. 1983) ("bald charges of a mere failure to take corrective action are [] inadequate to demonstrate futility"); *Allison*, 604 F. Supp. at 1113 ("Board's knowledge of wrongs and failure to institute suit, without more, is inadequate to excuse demand."). Shenk's contention that it would have been futile for him to make a demand because the Board has previously rejected purported demands made by other shareholders is contrary to Delaware law. Even assuming that the supposed demands Shenk alludes to (without describing what they demanded or why) included the same allegations that are in the Shenk Complaint, this Court has held that it is well-established that a Board's rejection of a prior demand "does not demonstrate futility unless plaintiff can demonstrate that the first refusal was wrongful." *In re Merrill Lynch & Co., Inc., Sec., Deriv. and ERISA Litig.*, No. 01 Civ. 9633, 2011 WL 1134708, at *10 (S.D.N.Y. Mar. 28, 2011). Shenk does not even try to make this showing, let alone with particularity.

5. Shenk Fails To Plead With Particularity That The Directors Face A Substantial Likelihood Of Liability

Shenk's allegation that demand is excused because the directors of Sirius XM would have to sue themselves fails as a matter of law. *See* Shenk Compl. ¶ 152. The Delaware Supreme Court has described this notion that "you can't expect directors to sue themselves" as a "discredited refrain." *Seminaris v. Landa*, 662 A.2d 1350, 1355 (Del. Ch. 1995). Indeed, courts have repeatedly rejected plaintiffs' efforts to overcome the demand requirement by naming a majority of directors as defendants and then declaring that they would not sue themselves. *See Aronson*, 473 A.2d at 818 (the argument that "demand is excused because the directors otherwise would have to sue themselves" has been "made to and dismissed by other courts"); *In re Morgan Stanley*, 542 F. Supp. 2d at 325. Likewise, Shenk's claim that the directors will not authorize

suit because it would likely reveal wrongdoing by such directors and expose them to liability has no merit under Delaware law. *See Seminaris*, 662 A.2d at 1355 (rejecting such an allegation as "a slightly altered version of the discredited refrain – 'you can't expect directors to sue themselves'").

A director's alleged wrongdoing can only support demand futility in the rare case in which a plaintiff can establish, through particularized factual allegations, a substantial likelihood that the director will be found liable for conduct alleged in the complaint. To make such a showing, Shenk must allege with particularity that a majority of the Board faces a "substantial likelihood of personal liability" on the basis of the claims asserted in the Shenk Complaint. *Rales*, 634 A.2d at 936. "[T]he mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors." *Aronson*, 473 A.2d at 815.

Here, in accordance with Delaware law, Sirius XM's Amended and Restated Certificate of Incorporation exculpates the Company's Board from personal liability for breaches of their fiduciary duty of care. *See* Angiolillo Decl. Ex. A.[6] This includes any liability based on negligence or "gross negligence." *Stone v. Ritter*, 911 A.2d 362, 367, 369 (Del. 2006); *see also, e.g., Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins*, No. Civ. A. 20228 NC, 2004 WL 1949290, at *9 n.37 (Del. Ch. Aug. 24, 2004) ("[A]ctions taken that are even grossly negligent, so long as not falling within one of the exceptions contained in § 102(b)(7), will be shielded by a § 102(b)(7) provision.").

Shenk attempts but fails to circumvent the protections afforded the Board under Delaware law and the Company's Amended and Restated Certificate of Incorporation by

[6] This Court may take judicial notice of Sirius XM's Amended and Restated Certificate of Incorporation in deciding a motion to dismiss. *See Ferre v. McGrath*, No. 06 Civ. 1684, 2007 WL 1180650, at *8 (S.D.N.Y. Feb. 16, 2007).

mischaracterizing the Complaint's breach of duty of care claims as breaches of the duties of loyalty and good faith. A violation of the duty of "good faith" requires a showing of "intentional dereliction of duty [or] a conscious disregard for one's responsibilities." *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 66 (Del. 2006). The same "conscious disregard" standard applies to a duty-of-loyalty claim. *See Stone*, 911 A.2d at 370. *See also Rahbari v. Oros*, 732 F. Supp. 2d 367, 379 (S.D.N.Y. 2010) ("[W]here a defendant is exculpated in the absence of bad faith, the Delaware Supreme Court has required that plaintiff sufficiently allege actual or constructive knowledge of illegal behavior on the part of the defendants."). Shenk's generalized allegations are insufficient to satisfy these standards and do not give rise to a substantial likelihood of liability, especially in light of the exculpation provisions in the Company's Amended and Restated Certificate of Incorporation.

(a) No substantial likelihood of liability for breach of fiduciary duty in connection with the Sirius-XM merger

Shenk asserts that the "Defendants" breached fiduciary duties by "allow[ing]" or "caus[ing]" the Company "to improperly misrepresent the pricing expectations of the Company" in pre-merger statements to regulators and shareholders, as well as in unspecified post-merger statements, and by "lying" to shareholders "that the Company intended to observe" these same pricing expectations when in reality, Defendants allegedly knew that the Company planned to increase prices post-merger. Shenk Compl. ¶¶ 179-182.[7] But Shenk does not support these bald conclusions with any particularized facts of what the Individual Defendants knew and when, and thus entirely fails to satisfy the rigorous standard of showing that a majority of the directors faces a "substantial likelihood of liability" for an intentional dereliction of their duties. Indeed, Shenk

[7] Count I of the Goe Complaint does not even specify which duties are alleged to have been breached.

makes almost no reference to the role or knowledge of any individual director, instead referring repeatedly, and without elaboration, to what all "defendants" allegedly knew. This sort of "group pleading" cannot give rise to a "substantial likelihood" of liability on the part of an individual director. *See Rattner v. Bidzos*, No. Civ. A. 19700, 2003 WL 22284323, at *10 n.53 (Del. Ch. Oct. 7, 2003) (rejecting as "conclusory" allegations "treat[ing] the [i]ndividual [d]efendants as a group for pleading purposes").

Shenk claims (also with no individualized allegations) that the Individual Defendants failed to exercise adequate oversight in connection with Sirius XM's pre-merger conduct and post-merger pricing decisions. But to state a claim for a director's failure of "oversight," which is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment," a derivative plaintiff must allege specific facts showing that they *consciously* disregarded their fiduciary obligations. *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). "[O]nly a sustained or systematic failure of the board to exercise oversight – such as an utter failure to attempt to assure a reasonable information and reporting system exists – will establish the lack of good faith that is a necessary condition to liability." *Id.* at 971. "[A] showing of bad faith conduct is essential to establish director oversight liability," *see Stone*, 911 A.2d at 370, and "bad faith cannot be averred generally," but rather "must be supported by particularized factual pleading," *IAC/InterActiveCorp Sec. Litig.*, 478 F. Supp. 2d at 605.

The Shenk Complaint utterly fails to meet this stringent test. Shenk submits *no* particularized allegations specifying "how the board's oversight mechanisms were inadequate or how the director defendants knew of these inadequacies and consciously ignored them." *In re Citigroup Inc. S'holder Deriv. Litig.,* No. 07 Civ. 9841, 2009 WL 2610746, at *6 (S.D.N.Y. Aug.

25, 2009) (citations omitted). To the contrary, Shenk specifically notes the existence of the Company's Audit Committee and its duties and responsibilities under its corporate charter. *See* Shenk Compl. ¶¶ 167-69. Nor does Shenk assert that the Individual Defendants ignored any particular "red flags" revealing the alleged inaccuracy of the Company's representations in connection with the Sirius-XM merger. *See Stone*, 911 A.2d at 370; *see also Guttman v. Huang*, 823 A.2d 492, 507 (Del. Ch. 2003) (dismissing an oversight claim where "the complaint does not plead a single fact suggesting specific red – or even yellow – flags were waved at the outside directors").

Instead, Shenk's bad faith allegation amounts to a supposition that, because Sirius XM allegedly raised prices post-merger, the directors must have breached their fiduciary duties in allowing the Company to represent pre-merger that it would not raise prices. But this only *assumes* what Shenk is required to plead with particularity. Because Shenk has not pleaded any particularized facts showing that the directors had "clear notice" of any alleged inaccuracies in a company's public statements, and that the directors knowingly failed to address them, his Complaint should be dismissed. *See In re First BanCorp Deriv. Litig.*, 465 F. Supp. 2d 112 (D. Puerto Rico, 2006); *Fink v. Komansky*, No. 03 Civ. 0388, 2004 WL 2813166, at *4 (S.D.N.Y. Dec. 8, 2004).

Plaintiffs also fail to adequately allege that the majority of directors face a substantial likelihood of liability for breach of fiduciary duties relating to any disclosures made in connection with the Sirius-XM merger. As a preliminary matter, the Complaints fail to identify *which* post-merger disclosures were purportedly false or inadequate as the basis for the breach of fiduciary duty claims, and do not indicate what other disclosures should have been made but were not. *See In re Pfizer Inc. S'holder Deri. Litig.*, 722 F. Supp. 2d 453 (S.D.N.Y.

2010) (granting motion to dismiss derivative action where "plaintiffs have failed to identify any actionable omission in the 2007, 2008, or 2009 Proxies and accompanying financial reports.").

The Complaints are, in any event, devoid of any specific allegations that the directors were involved in the preparation of these allegedly misleading disclosures.[8] *See In re Citigroup*, 2009 WL 2610746, at *7 ("[T]he complaint does not contain specific factual allegations that reasonably suggest sufficient board involvement in the preparation of the disclosures. The complaint alleges only that the directors 'participated in the preparation of improper financial statements' or 'authorized' or 'permitted the false statements.' Those allegations are unsupported conclusions, not particularized facts, and thus plaintiffs fail to meet the stringent requirements of factual particularity necessary to allege board involvement in the preparation of disclosures.") (internal citations omitted). Instead, Shenk tries to satisfy his pleading burden by saying that the Individual Defendants knew about alleged misrepresentations regarding Sirius XM's pricing expectations "by virtue of their positions" on the Board. Shenk Compl. ¶¶ 137, 160, 162, 165-166. However, Delaware law is clear that this kind of generalized allegation that directors "participated in the preparation of improper financial statements" or "authorized" or "permitted false statements" does not give rise to a substantial likelihood of personal liability for a company's disclosures.[9] *In re Citigroup*, 2009 WL 2610746, at *7; *see also Wood v. Baum*, 953 A.2d 136, 143 (Del. 2008).

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[8] Five of the directors on the current Board were not directors of either Sirius Satellite Radio Inc. or XM Satellite Radio Holdings Inc. during the time of the Sirius-XM merger.

[9] In addition, boards are protected from liability when they rely in good faith on the reports of officers or experts. *Brehm*, 746 A.2d at 261. Both Sirius Satellite Radio Inc. and XM Satellite Radio Holdings Inc. received fairness opinions from their respective advisors in connection with the merger, and these opinions were attached to the proxy statement filed in connection with the merger. *See* Angiolillo Decl. at Ex. B. Shenk does not allege that the directors were alerted to any inaccuracies in the opinions that were provided by their advisors.

(b) No substantial likelihood of liability for breach of fiduciary duty in connection with the Liberty Transaction

The Shenk Complaint alleges generally that Defendants breached their fiduciary duties by approving the Liberty Transaction and rejecting an alternative, purportedly more favorable offer of financing from Charles Ergen of Dish Network in order to retain their positions on the Board. As discussed below in Section I.C., however, a disinterested and independent Board approved the Liberty Transaction. Shenk's assertion that the Board approved the Liberty Transaction based on an entrenchment motive is conclusory and legally insufficient to raise a reasonable doubt that the decision is entitled to the deference afforded by the business judgment rule. Shenk has therefore failed to adequately plead that a majority of the directors face a substantial likelihood of liability for breach of fiduciary duties in connection with the Liberty Transaction.

(c) No substantial likelihood of liability for securities fraud in connection with the Sirius-XM merger

Shenk has not pleaded specific facts showing that the Board faces any prospect of liability, much less a "substantial likelihood" of liability, for securities fraud arising out of the Sirius-XM merger. As set forth below in Section II.A, Shenk's broad-brush securities claim falls flat under the heightened pleading standards of both the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2) ("PSLRA"), and Rule 23.1. But, Shenk's assertion of demand futility in respect of his Section 10(b) claim fails for an even more elementary reason: the Complaint alleges securities fraud against only *five of the thirteen* directors on the Board.[10] Thus, even if Shenk had adequately pleaded a substantial likelihood of liability for securities

[10] Shenk asserts the Section 10(b) claim against Gilberti, but does not identify Gilberti as a defendant in this action and, in fact, specifically notes that Gilberti is not named as a defendant. Shenk Compl. ¶¶ 38, 194. Thus, according to Shenk's own Complaint, only five of the thirteen directors could be subject to Section 10(b) liability.

fraud against these five directors, there is still a disinterested and independent majority of the Board that could have evaluated a demand if he had made one.

* * *

Shenk has therefore failed to adequately plead with particularity that a pre-suit demand was excused here on the ground that a majority of the Board faces a substantial likelihood of personal liability for the claims asserted in his Complaint.

C. The Board's Approval Of The Liberty Transaction Was A Valid Exercise Of Business Judgment

Shenk's failure to make a pre-suit demand is also fatal to his case because the Board's decision regarding the Liberty Transaction is entitled to great deference under the business judgment rule. *See Brehm*, 746 A.2d at 263. Under the business judgment rule, directors are entitled to "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812.

To raise a reasonable doubt that a board's decision was a valid exercise of business judgment, a plaintiff must allege particularized facts showing that the directors failed to discharge their fiduciary duties in making the decision because they were grossly negligent in failing to consider available information, or because they acted in bad faith by "consciously and intentionally" disregarding their duties. *Brehm*, 746 A.2d at 259; *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 289 (Del. Ch. 2003). Where, as here, "the challenged transaction is approved by a board, the majority of whom are outside, non-management directors, a 'heavy burden falls on [plaintiffs] to avoid pre-suit demand." *Levine*, 591 A.2d at 207.

The Shenk Complaint does not meet this heavy burden. It asserts that the Board's authorization of the Liberty Transaction is not entitled to business judgment deference because

the Board's decision was not made in good faith, but rather was motivated by goals of entrenchment. Shenk Compl. ¶¶ 119, 122. To adequately plead bad faith due to "entrenchment," a complaint must allege facts sufficient to demonstrate that the "*sole or primary purpose*" of the challenged board action was to perpetuate the directors in control of the corporation. *Kahn*, 1994 WL 70118, *6

The Shenk Complaint contains no specific factual allegations to support its conclusion that the Individual Defendants rejected an investment proposal made by Charles Ergen and approved the Liberty Transaction instead in order to protect their positions on the Board.[11] Indeed, putting to one side the fact that five of the directors on the current Sirius XM Board were not members of the Board that approved the Liberty Transaction, Shenk fails to allege particularized facts sufficient to demonstrate that the decision by each of the other remaining directors to proceed with the Liberty Transaction "was driven solely or primarily by the desire of the [Sirius XM] board to perpetuate its own control." *Id*. "If a derivative plaintiff could show self-interest in a transaction by mere conclusory allegations that the defendant directors approved a business acquisition simply to secure their own positions, without providing any logical or factual nexus between the transaction and the asserted entrenchment, the demand requirement of Rule 23.1 would again become virtually meaningless." *In re Morgan Stanley*, 542 F. Supp. 2d at 323 (quoting *Lewis*, 701 F.2d at 250); *Kahn*, 1994 WL 70118, at *6 ("[A]n

[11] Shenk alleges that the Liberty Transaction served as a "poison pill" approved by the Board in order to prevent other "suitors," such as Ergen, from making unsolicited tender offers. This grossly mischaracterizes the transaction. Neither the proposal made by Charles Ergen nor the Liberty Transaction constituted a traditional "tender offer" in which the bidders contacted Sirius shareholders directly offering them to tender their stock for sale at a specified price during a specified time. Nonetheless, even if the Ergen proposal did constitute a "tender offer," the Board's "[o]pposition to an unsolicited tender offer does not, of itself, indicate a primary purpose to retain control." *Silverzweig v. Unocal Corp*., Civ. A. No. 9078, 1989 WL 3231, at *2 (Del. Ch. Jan. 19, 1989).

entrenchment theory based on supposition rather than alleged fact does not excuse a pre-suit demand.").

Moreover, demand is not excused if it appears from the complaint that the challenged Board action "could, at least as easily, serve a valid corporate purpose as an improper purpose, such as entrenchment." *In re Chrysler Corp. S'holders Litig*., Civ. A. No. 11873, 1992 WL 181024, at *4 (Del. Ch. July 27, 1992). Here, the Shenk Complaint affirmatively alleges facts showing that the Board could have (and did have) rational business reasons for proceeding with the Liberty Transaction. *Kahn*, 1994 WL 70118, at *6. The Complaint concedes that in February 2009, Sirius XM faced "a possible filing of a petition under Chapter 11 of the Bankruptcy Code," and the Company needed "an investor who could provide" the funds needed to cover the debt payments that were "immediately coming due." Shenk Compl. ¶¶ 117-119. The Complaint further concedes that *both* of the investment proposals submitted to the Board by Charles Ergen of Dish Network and John Malone of Liberty would have provided sufficient immediate financing to allow the Company to pay these imminent debts. *Id*. ¶¶ 118, 120. Although the Shenk Complaint critiques the Liberty Transaction for granting an affiliate of Liberty Media Corporation preferred shares of Sirius XM stock that were convertible into 40 percent of the common stock, it conspicuously fails to note the controlling stake that Mr. Ergen demanded as part of *his* proposal. *Id*. ¶ 120. Because "[e]ach aspect of the [Liberty Transaction] that is attacked by [Shenk] could, at least as easily, serve a valid corporate purpose as an improper purpose, such as entrenchment," there is "no reasonable doubt . . . raised as to the business judgment rule's applicability." *Cottle*, 1990 WL 34824, at *7; *see also In re Dow*, 2010 WL 66769, at *9 (holding that "substantive second-guessing of the merits of a business decision, like what plaintiffs ask the Court to do here, is precisely the kind of inquiry that the business

judgment rule prohibits" (citing *In re Citigroup Inc. S'holder Deriv. Litig.,* 964 A.2d 106, 122 (Del. Ch. 2009)).

Because Shenk fails to adequately allege that the Board "consciously and intentionally" disregarded its duties to act in the Company's interest, *see Walt Disney*, 825 A.2d at 289, the Board's approval of the Liberty Transaction is entitled to the protections of the business judgment rule, and Shenk's failure to make a pre-suit demand on the Board is not excused.

II. The Complaints Should Be Dismissed For Failure To State A Claim

Alternatively, the Court should dismiss the Complaints for failure to state a claim. To survive a Rule 12(b)(6) motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility where the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). By contrast, a pleading that only "offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly,* 550 U.S. at 570). If the plaintiff "ha[s] not nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed." *Twombly*, 550 U.S. at 570.[12] Plaintiffs have failed to meet their burden on each claim asserted.[13]

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[12] When deciding a motion to dismiss, the Court must accept as true all well-pleaded allegations in the Complaint, but "need not feel constrained to accept as truth conflicting pleadings . . . that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001). In addition to the allegations in the complaint, the court may also consider "any written instrument attached to [the complaint] as an exhibit," "any statements or documents incorporated in it by reference," and any document not incorporated but that is, nevertheless, "integral" to the complaint because the complaint "relies heavily upon its terms and effect." *Yung v. Lee*, 432 F.3d 142, 146 (2d Cir. 2005).

A. Shenk Fails To State A Derivative Claim For Violations Of Section 10(b) Of The Exchange Act And Rule 10b-5

To state a claim under Section 10(b) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, the plaintiff "must establish that 'the defendant, in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff.'" *ECA v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009). The PSLRA "insists that securities fraud complaints 'specify' each misleading statement, that they set forth the facts 'on which [a] belief' that a statement is misleading was 'formed'; and that they 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005)); *see also* 15 U.S.C. § 78u-4(b)(2). Shenk fails to state a securities fraud claim on several grounds.

First, while Shenk recites various statements regarding the merged company's pricing expectations that were purportedly made both before and after the merger, he fails to specify which of these statements form the basis of his fraud claim or how any of the statements mentioned in the Shenk Complaint was false or misleading. Shenk speculates, with no supporting allegations, that "Defendants" were "in a position to and did control all of the false and misleading statements and omissions made on behalf of the Company." Shenk Compl.

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[13] In addition to the claims addressed below, Shenk vaguely references without asserting derivative claims for aiding and abetting, gross mismanagement, and abuse of control. However, Delaware law does not recognize independent causes of action for any of these claims. Accordingly, the Court should dismiss these claims to the extent that Shenk may claim he is asserting them. *See Midland Grange No. 27 Patrons of Husbandry v. Walls*, No. 2155-VCN, 2008 WL 616239, at *12 (Del. Ch. Feb. 28, 2008); *Continuing Creditors' Comm. Of Star Telecomms., Inc. v. Edgecomb*, 385 F. Supp. 2d 449, 464 (D. Del. 2004).

¶ 195. But, under well-settled law, such generalized suppositions are inadequate to state a securities fraud claim. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007) ("A securities fraud complaint based on misstatements must . . . explain why the statements were fraudulent. Allegations that are conclusory . . . are insufficient.").

Second, Shenk fails to state "with particularity" facts giving rise to "a strong inference" that Defendants Karmazin, Black, Holden, Mooney and Shaw acted with fraudulent intent.[14] 15 U.S.C. § 78u-4(b)(2); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2508-09 (2007); *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000). Shenk fails to make specific allegations either "(1) showing that the defendants had both motive and opportunity to commit the [alleged] fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness." *ATSI Commc'ns*, 493 F.3d at 99. Shenk has not alleged, and cannot allege, that any of the Individual Defendants "benefitted in some concrete and personal way from the purported fraud." *ECA*, 553 F.3d at 198. Shenk's allegation that "Karmazin had the motive to commit fraud because of his desire to entrench himself in the CEO position and continue to receive titanic grants of options which he could cash out for hundreds of millions of dollars," Shenk Compl. ¶ 192, is insufficient to allege scienter. *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54 (2d Cir. 1995) ("the existence, without more, of executive compensation dependent upon stock value does not give rise to a strong inference of scienter").

Likewise, Shenk's generalized allegations of motive with respect to "each of the remaining 10(b) defendants" are inadequate. Shenk Compl. ¶ 192. The Complaint opines that these "remaining 10(b) defendants" collectively had the motive to commit fraud because "they sought to maintain positions of power and perquisites and would do anything to hold on to them,

[14] Count III of the Shenk Complaint names Gilberti as a "10(b) Defendant" but does not name Gilberti as a defendant in the action. Shenk Compl. ¶¶ 38, 194.

were Karmazin's long-time associates and would blindly follow his lead on any issue, were dominated and controlled by him and thus committed primary fraud." *Id*. The bald pronouncement—that because of their "positions of control and authority" Defendants acted "knowingly or recklessly," *id*. ¶¶ 195-96—does not make "the inference of scienter cogent." *In re Citigroup*, 2009 WL 2610746, at *10 (quoting *Tellabs*, 551 U.S. at 324); *see also South Cherry Street, LLC v. Hennessee Group LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (holding it is not sufficient to allege goals that are "possessed by virtually all corporate insiders," to show that a defendant had fraudulent intent); *Kalnit v. Eichler*, 264 F.3d 131, 139 (2d Cir. 2001) ("To allege a motive sufficient to support the inference of [fraudulent intent], a plaintiff must do more than merely charge that executives aim to prolong the benefits of the positions they hold.").

Third, the Shenk Complaint does not plead facts showing that the allegedly false and misleading statements or omissions caused Sirius XM any loss. To survive a motion to dismiss a Section 10(b) claim, a plaintiff must plead "that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005). The Shenk Complaint lacks any such allegation. Although Shenk asserts that "Defendants' misconduct was revealed" upon the commencement of the *Blessing* action in December 2009, *see* Shenk Compl. ¶ 112, Shenk does not allege that Sirius XM's stock price fell upon the filing of the complaint in that action, or otherwise indicate that the purported misrepresentations and omissions that were supposedly "revealed" by the *Blessing* action had inflated the price of Sirius XM's stock. *See Dura Pharm*, 544 U.S. at 347 (noting failure to allege that "[the] share price fell significantly after the truth became known"); *Lentell*, 396 F.3d at 173. To the contrary, Shenk concedes that, as a result of the Individual Defendants' alleged violations, Sirius XM has not suffered any

losses, but rather is earning an additional $90 million annually since the merger was effectuated. Shenk Compl. ¶ 12.

For each of these reasons, Shenk's claim under Section 10(b) and Rule 10b-5 must be dismissed.

B. The Complaints Fail To State A Claim For Breach Of Fiduciary Duty Arising Out Of The Sirius-XM Merger

To plead a claim under Delaware law for breach of fiduciary duty based on an alleged failure of oversight, a plaintiff must plead specific facts indicating that "the board knew that internal controls were inadequate, that the inadequacies could leave room for illegal or material harmful behavior, and that the board chose to do nothing about the control deficiencies that it knew existed." *King v. Baldino*, 648 F. Supp. 2d 609, 621 (D. Del. 2009); *Stone*, 911 A.2d at 370. The Complaints do not meet this standard.

The Goe Complaint simply assumes that the Individual Defendants can be held liable for the alleged, unproven antitrust violations at issue in the *Blessing* action. *See* Goe Compl. ¶ 56 (sole allegation about the Individual Defendants' role in the alleged antitrust violation is a parenthetical conclusion that they "directed or permitted such open misconduct"). Shenk vaguely pleads that "because of their positions with the Company, and their access to material non-public information," Shenk Compl. ¶ 166, the Individual Defendants "caused or allowed Sirius XM to lack requisite internal controls, and, as a result, the Company's ability and willingness to maintain stable or provide reduced prices for its SDARs were materially misstated." *Id*. ¶ 180. But the Shenk Complaint, like the Goe Complaint, lacks any specific facts to support these conclusions. In addition, the Shenk Complaint itself confirms that Sirius XM had reporting systems and controls in place, and does not allege that the Individual Defendants consciously ignored any "red flags" warning of any misrepresentations or omissions.

The Complaints therefore fail to state a claim for breach of fiduciary duty based on an alleged failure of oversight.

Plaintiffs likewise fail to plead a claim under Delaware law for breach of an alleged "duty of disclosure" in connection with the Sirius-XM merger. The duty of disclosure is not an independent duty, but derives from the duties of care and loyalty. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 746, n. 400 (Del. Ch. 2005). To state a claim for breach of fiduciary duty based on disclosures, a plaintiff must plead that a defendant made "a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading." *Pfeffer v. Redstone*, No. Civ. A. 2317-VCL, 2008 WL 308450, at *8 (Del. Ch. Feb. 1, 2008). As discussed above, *see supra* Sections I.B.5 and II.A, neither Shenk nor Goe has alleged how Sirius XM's disclosures were inaccurate or misleading. To the contrary, Goe expressly states that he "*does not allege that the companies' statements pre-merger were untrue*." Goe Compl. ¶ 56 (emphasis added). That Sirius XM is settling the *Blessing* antitrust class action does not establish that the representations made to regulators and shareholders in connection with the Sirius-XM merger were somehow inaccurate.

C. The Shenk Complaint Fails To State A Claim For Breach Of Fiduciary Duty Arising Out Of The Liberty Transaction

The Shenk Complaint also fails to state a claim for breach of fiduciary duty arising out of the Liberty Transaction. To survive a motion to dismiss on this claim, Shenk must plead sufficient facts to overcome the presumption of the business judgment rule "that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812. Plaintiffs must rebut this presumption by alleging facts that, if accepted as true, demonstrate the "board was either interested in the outcome of the transaction or lacked the

independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).

The Shenk Complaint fails to allege facts to overcome this presumption because a disinterested and independent Board approved the Liberty Transaction. In 2009, when the Liberty Transaction was approved, the Board consisted of twelve directors.[15] Shenk's only effort to allege "interest" and "lack of independence" of the directors on that Board is to claim generally that "Defendants, fearful of losing their positions, compensation and perquisites as officers and directors of Sirius [XM]" rejected Ergen's financing offer in order to "keep[] their Board seats and their titles and positions as officers." Shenk Compl. ¶ 119. As set forth above, this allegation does not come close to showing an entrenchment motive or any other bad faith conduct by the Board. *See supra* Section I.C.

Shenk also accuses the Board of improperly invoking an exemption under NASDAQ's rules that would allow the Company to bypass a shareholder vote on proceeding with the Liberty Transaction, and failing to give shareholders proper and adequate notice of the decision to invoke this NASDAQ exemption. *See* Shenk Compl. ¶¶ 125, 183(e). However, because Shenk fails to adequately plead any entrenchment motive by the Board, the Board's decision to invoke the NASDAQ exemption (as part of the decision to approve the Liberty Transaction) is entitled to business judgment deference. Further, any claim that the Board's process in distributing notice was flawed amounts only to an alleged breach of the fiduciary duty

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[15] In the duty of loyalty context, the court examines the interest or independence of the directors who were "in office at the time the challenged decision was made," while in the demand futility context, the court focuses on the "directors in office at the time a plaintiff brings a complaint." *In re Tyson Foods, Inc. Consol. S'holder Litig*., 919 A.2d 563, 582 (Del. Ch. 2007).

of care, from which the directors are exculpated under Sirius XM's Amended and Restated Certificate of Incorporation.[16] *See supra* Section I.B.5.

D. The Complaints Do Not State A Claim For Unjust Enrichment

To plead a cause of action for unjust enrichment under Delaware law, a complaint must allege: "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law." *Total Care Physicians, P.A. v. O'Hara*, No. 99C-11-201-JRS, 2002 WL 31667901, at *10 (Del. Super. Ct. Oct. 29, 2002).

Here, the Complaints assert that the Individual Defendants were unjustly enriched to the detriment of the Company because they "received millions of dollars in salary, fees, stock and options awards, and other largesse" during the time that "the Company's market capitalization was eviscerated." Shenk Compl. ¶ 190, Goe Compl. ¶ 82. However, a board's decision on compensation is "entitled to great deference," *Elkins*, 2004 WL 1949290, at *17, and Delaware law does not regard ordinary officer or director compensation with suspicion, *see In re Pfizer*, 722 F. Supp. 2d at 466.

Further, Plaintiffs do not allege specific facts indicating that the Individual Defendants obtained any personal economic benefit as a result of the conduct alleged in the Complaints, or that such enrichment was at the expense of Sirius XM. *See id.* (holding that "[g]iven the lack of non-conclusory allegations that defendants' compensation was profligate or paid for an improper purpose, the allegations of unjust enrichment fail to 'state a claim to relief

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[16] As a factual matter, NASDAQ granted the Company's request to invoke the exemption on February 18, 2009, the Company notified shareholders of the decision to proceed with the Liberty Transaction without a shareholder vote in accordance with the NASDAQ exemption in a letter dated February 19, 2009, and the Company issued a news release to that effect on the same day. *See* Angiolillo Decl. Exs. C, D.

that is plausible on its face'"); *Sills v. Smith & Wesson Corp.*, No. Civ. A. 99C-09-283-FSS, 2000 WL 33113806, at *7 (Del. Super. Ct. Dec. 1, 2000) (holding that plaintiffs' failure to allege enrichment was "fatal" to their unjust enrichment claim). Nor do Plaintiffs allege the requisite relationship between any purported enrichment of the Individual Defendants and any losses to the Company. *See In re Amaranth Natural Gas Commodities Litig.*, No. 07 Civ. 6377, 2008 WL 4501247, at *21 (S.D.N.Y. Oct. 6, 2008) (dismissing plaintiffs' unjust enrichment claim as "excessively attenuated" where complaint alleged no direct trading relationship between defendants and plaintiffs).

Finally, Plaintiffs' unjust enrichment claims are duplicative of their claims for breach of fiduciary duty, which have already been shown to be meritless. *See Diversified Grp., Inc. v. Daugerdas*, 139 F. Supp. 2d 445 (S.D.N.Y. 2001) (holding that "to the extent [plaintiff's] claim for unjust enrichment is based upon [defendants'] alleged breach of fiduciary duties, this claim is duplicative" and dismissal is appropriate); *Teachers' Ret. Sys. Of Louisiana v. Aidinoff*, 900 A.2d 654, 671 n.24 (Del. Ch. 2006) (holding that unless certain payments resulted from "fiduciarily-deficient behavior . . ., then the unjust enrichment theory would likely fail as well").

E. The Goe Complaint Does Not State A Claim For Corporate Waste

The basis of Goe's claim of corporate waste is that "[i]n causing the company to pay approximately $200 million to settle the Federal [Antitrust] Action," Defendants "committed a wanton and reckless waste of Sirius XM's corporate assets."[17] Goe Compl. ¶ 85. This assertion of corporate waste from litigation costs and a legal settlement in the antitrust action is

[17] Shenk does not assert a claim for waste, despite multiple references to "waste of corporate assets" throughout his Complaint. *See* Shenk Compl. ¶¶ 1, 127, 173, 187. To the extent that Shenk alleges that Defendants committed waste by entering into the Liberty Transaction, such a claim would fail because the Liberty Transaction had a valid business purpose. *See supra* Section I.C.; *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

conclusory and circular, and does not state a plausible claim of corporate waste under Delaware law. *Twombly*, 550 U.S. at 570.

To state a claim for corporate waste, a complaint must plead "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm*, 746 A.2d at 263. A waste claim will lie only upon a finding that a challenged transaction "either served no purpose or was so completely bereft of consideration that the transfer is in effect a gift." *Criden v. Sternberg*, No. Civ. A. 17082, 2000 WL 354390, at *3 (Del. Ch. Mar. 23, 2000) (quotation omitted). In fact, Delaware courts characterize it as "obviously an extreme test, very rarely satisfied by a shareholder plaintiff." *Steiner v. Meyerson*, No. Civ. A. 13139, 1995 WL 441999, at *1 (Del. Ch. 2000).

Goe does not even try to satisfy this test. To the contrary, he expressly states that Sirius XM "has concluded, despite its belief that it is not liable for the claims asserted in [the *Blessing* action] and that it has good defenses thereto, that it is in the best interests to enter into this [settlement] Agreement to avoid further expense, inconvenience, and the distraction and uncertainty of burdensome and protracted litigation and thereby to resolve this controversy." Goe Compl. ¶ 64. Thus, Goe's own allegation shows that the settlement consideration cannot be characterized as corporate "waste"—which served "no purpose"—and Goe pleads no other facts that give rise to a corporate waste claim.

CONCLUSION

Defendants therefore respectfully request that the Court dismiss both the Shenk Complaint and the Goe Complaint with prejudice pursuant to Rule 23.1 of the Federal Rules of Civil Procedure for failure to make a pre-suit demand and failure to adequately plead demand futility. In the alternative, Defendants respectfully request that the Court dismiss the Complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.

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Respectfully submitted,

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