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)

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

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(Caption Continued from Outside Cover)

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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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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), and federal question jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1337, and 15 U.S.C. § 15. The case is a class action brought, inter alia, nationwide class, the amount in controversy exceeds the sum of $5 million, and no statutory exception to 28 U.S.C. § 1332 (d)(2) applies. The district court issued its final judgment on August 25, 2011. Joint Appendix ("A")-1349-56. The Crutchfield Appellants (Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin, and Jennifer Deachin; collectively, "Crutchfields") timely filed their Notice of Appeal on September 23, 2011. A-1372-73. This Court has appellate jurisdiction because this is a timely-filed appeal from a final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it declined to consider the offered Declaration of Harvey Rosen, the Crutchfields' expert, on the Settlement's lack of value.
2. Whether the district court committed an error of law when it found that this coupon settlement was not governed under the Class Action Fairness Act.
3. Whether the district court erred as a matter of law when it failed to apply the required heightened scrutiny to a coupon settlement that contained a clear-

sailing provision, a fee reversion, and no monetary distribution to the class while awarding counsel $13 million in fees; and stunningly found that the Settlement actually required "reduced" scrutiny.

STANDARD OF REVIEW

Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008). A district court's approval of a class action settlement is reviewed for abuse of discretion. *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000). The fee award is also reviewed for abuse of discretion. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

STATEMENT OF THE CASE

The Crutchfields adopt the Statement of the Case set forth at pages 4 through 5 of Appellant Nicholas Martin's Opening Brief filed on or about December 14, 2011 in case No. 11-3696. The Crutchfields supplement that statement as follows:

The Crutchfields timely objected to the Settlement. A-791-99. The Crutchfields timely appealed the district court's approval of the Settlement and attorneys' fees request. A-1372-73.

STATEMENT OF FACTS

The Crutchfields adopt the Statement of Facts set forth at pages 5 through 10 of Appellant Nicholas Martin's Opening Brief filed on or about December 14, 2011 in case No. 11-3696. The Crutchfields supplement that statement as follows:

The Crutchfields filed their objections to the Settlement Agreement ("Settlement," A-228-80) on July 18, 2011. A-791. To rebut the declaration of James Langenfeld (A-528-49), filed by Class Counsel in support of their fee award, the Crutchfields filed the Declaration of Harvey S. Rosen as to Lack of Value of Sirius XM Radio Settlement Consideration ("Rosen Declaration," Supplemental Appendix ("SPA")-4-11). The district court never addressed, and apparently did not consider, Dr. Rosen's Declaration. *See generally*, A-1344-48; A-1349-56; A-1357-59. On September 23, 2011 the Crutchfields filed their Notice of Appeal to the district court's Opinion and Order (A-1344-48), Final Order and Judgment ("Final Order" A-1349-56), and Order Awarding Attorneys' Fees and Expenses ("Fee Award" A-1357-59). A-1372-73.

SUMMARY OF THE ARGUMENT

The district court abused its discretion when it declined to consider the declaration of the Crutchfields' expert, Harvey Rosen, Ph.D. regarding the value of the Settlement. On its face Dr. Rosen's Declaration completely refutes Class

Counsel's valuation of the Settlement; as Dr. Rosen opined that without monetary relief for the Class, the Settlement "has little or no value". Yet, it is unclear from the record whether the district court even considered Dr. Rosen's opinions.

The Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712(d) permits the district court to receive expert testimony on the actual value to the class members of coupons that are redeemed. 28 U.S.C. § 1712(d). And Congress intended that Courts should "hear expert testimony from a witness on the actual value of redeemed coupons to assist the court in determining the proper contingent fee." The district court failed to consider that in the context of a class action settlement, it is in the economic interest of both the class counsel and defendant to have the settlement be approved, which creates a "community of interest" between class counsel and defendants.

Furthermore, Due Process requires that Class Members be provided an opportunity to be heard. And that opportunity to be heard requires the district court to consider evidence, such as the Rosen affidavit, presented against the approval of the Settlement.

The district court also erred as a matter of law when it failed to apply CAFA to the settlement. A cursory review of Congressional intent with regard to CAFA shows Congress wanted CAFA to apply to settlements wherein class members do not

receive money damages while at the same time class counsel receive large attorneys' fees paid in real money. The district court erred by not finding that the benefits provided under the Settlement are, for legal purposes, coupons, or are so similar to coupons, that the CAFA coupon provisions should apply. The district court failed to note that the benefits in the Sirius Settlement are not transferrable, and allow Defendant to retain or sign up additional subscribers instead of forcing Defendant to disgorge its gains from its alleged improper conduct; major indicia of a coupon settlement. The CAFA case law does not take the word coupon literally and instructs that even if settlement relief is not "identical to a coupon," it should be treated like a coupon when it is "in-kind compensation" that "shares characteristics" with coupons. Therefore, it can be seen that the district court erroneously found that the Settlement did not qualify as a coupon settlement because the Settlement did not "require class members to purchase something they might not otherwise purchase." Clearly, the district court should have been thinking in terms of sophisticated litigators getting around the CAFA coupon settlement restrictions. In this matter because the nature of the settlement the district court was required to award attorneys' fees according to either the value of the Settlement "benefits" actually used by class members or the lodestar method. The failure to do so was reversible error, and the

award of attorneys' fees should be reversed and remanded with instructions to apply CAFA.

The district court erred as a matter of law when it found the settlement required less scrutiny when it required heightened scrutiny. In discussing the attorneys' fees award, the district court noted that the fee award is "a separate obligation that will not come out of the Settlement amount. . .," and suggested that thus its "'fiduciary role in overseeing the award is greatly reduced. . .'" This finding is simply not supported by the record. Courts should always remember that the defendants in class actions are interested in minimizing the total sum of the damages they pay the class and the fees they pay the class counsel, and so they are always willing to trade small damages for high attorneys' fees. That is why the Committee Notes for Rule 23(h) advises that settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class; and the pre-CAFA case law regarding coupon settlement provisions shows that courts have adjusted the value of "common fund" settlements that provided non-monetary relief to reflect redemption rates when considering attorneys' fee awards. Additionally, the Settlement in question also deserves a higher scrutiny in that it includes a clear-sailing provision by which the Defendant agreed not to contest any request for attorneys' fees that did not exceed $13 million. The Settlement makes no reference

to what happens to any unawarded portion of the agreed-upon $13 million to be paid by Defendant as attorneys' fees. Therefore, the district court should have seen that class counsel made no provision for the class to benefit if they did not receive the $13 million and agreed attorneys' fees. The district court failed to provide the heightened scrutiny required by the presence of disproportionate attorneys' fees, the clear sailing agreement, and the lack of reversion of unawarded fees.

ARGUMENT

A. The District Court Abused Its Discretion When It Failed To Consider The Declaration of Harvey Rosen, Ph.D. Submitted By The Crutchfields Regarding The Value Of The Settlement.

The district court abused its discretion when it declined to consider the declaration of the Crutchfields' expert, Harvey Rosen, Ph.D. (SPA-4-11), regarding the value of the Settlement. As set forth in Appellant Martin's Opening Brief (p. 38), Class Members had only one business day before their objections were due to respond to the attorneys' fees motion, which included Plaintiffs' expert James Langenfeld's Declaration (A-528-49) on value of the settlement. The fee request also included a declaration from Sirius XM's Vice President of the Finance Department (A-359-61) attesting to Defendant's intention to raise its prices upon the expiration of the FCC's three-year price restriction. Dr. Langenfeld derived his inflated Settlement value

from a "house of cards" analysis that assigned value where little or no value existed.[1] A-529.

Conversely, Dr. Rosen's Declaration completely refutes Class Counsel's valuation of the Settlement. Dr. Rosen opined that without monetary relief for the Class, the Settlement "has little or no value" because: (1) none of the monetary charges that were levied to the Class are being returned in the Settlement; (2) there is no way of knowing whether a contemplated price increase would be an actual price increase, *i.e.*, whether the market would have supported such a price increase; and (3) there is no prohibition after December 31, 2011 against Defendant raising prices much higher than the "contemplated" $2.00, thereby allowing the Defendant to make a mockery of the Settlement by recapturing and rescinding any value provided in the Settlement. SPA-5-6. Consistent with numerous cases, Dr. Rosen concluded that because the Settlement is non-monetary, its actual value is far below its nominal value, if it is not altogether valueless. SPA-5-6; *see Synfuel Techs., Inc. v. DHL Express*, 463 F. 3d 646, 654 (7th Cir. 2006) (compensation in kind is worth less than

[1] Dr. Langenfeld assumed that the Defendant would have been able to increase and increase the cost of its services by $2 per month after the expiration of the FCC price restriction. *id*. Even if that speculative market view withstood a rigorous review, leaping to assign an aggregate dollar value to that change of circumstance is a leap from reality. Class members are not receiving any money. Dr. Rosen did not find any meaningful support underlying the assumption that Defendant had contemplated a price increase prior to December 31, 2011. SPA-5.

cash of the same nominal value); *In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) (same); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 321-22 (N.D. Ga. 1993) (disagreeing with testimony from credible experts that value of coupons for travel was the same as the face value and finding that "the true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them."); *Wilson v. DirectBuy, Inc.*, 2011 WL 2050537, *6 (D. Conn. May 16, 2011) (finding that as with most in-kind benefits, the dollar amount ascribed to the benefit did not represent its actual cost to defendant). The district court never addressed Dr. Rosen's opinions regarding the Settlement's lack of value. See generally, A-1344-48; A-1349-56; A-1357-59.[2] The failure to consider and address Dr. Rosen's declaration was an abuse of discretion.

A "district court ha[s] a fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). The district court "must carefully scrutinize the settlement to ensure fairness, adequacy, and reasonableness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). Part of that determination, especially when attorneys' fees are justified under a percentage

[2] It is unclear from the record whether the district court even considered Dr. Rosen's opinions. *Id.*

analysis, is accurately assessing the value of the Settlement to Class Members. *See Parker v. Time Warner Entertainment Co., L.P.*, 631 F.Supp.2d 242, 264 (E.D.N.Y. 2009) ("To discharge its responsibility to the Class, the Court must discern the value of the settlement in order to avoid providing Class Counsel with outsized fees that are not commensurate with the small benefit provided to Class Members as compensation for the small harm they allegedly suffered.").

The Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712(d) permits the district court to receive expert testimony on the actual value to the class members of coupons that are redeemed. 28 U.S.C. § 1712(d).[3] Courts should "hear expert testimony from a witness on the actual value of redeemed coupons to assist the court in determining the proper contingent fee." Committee Report, 109th Congress (2005-2006), Senate Report 109-014, p. 31. Clearly, in the context of a class action settlement, it is in the economic interest of both the class counsel and defendant to have the settlement be approved. In the class action context settlement creates a "community of interest" between class counsel and defendants (*see Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 744-45 (7th Cir. 2008)), and unlike typical adversarial proceedings where the district court is an "umpire," in the class action

[3] As described in more detail below, CAFA's attorneys' fees provisions, including 1712(d), apply to this Settlement because it qualifies as a coupon settlement.

settlement context the court is the guardian of absent class members. *See In re Global Crossing Securities and ERISA Litig.*, 225 F.R.D. 436, 455 S.D.N.Y. 2004). Thus, CAFA's encouragement to district courts to hear expert testimony regarding a settlement's value cannot be read as permitting the court to consider only testimony presented by the parties in the non-adversarial environment of settlement. Section 1712(d) must be read in the context of encouraging courts to consider the expert testimony of either independent experts or those presented in an adversarial context. In *Brennan v. New York City Bd. of Educ.*, the Court was critical of the district court for relying on expert reports in approving a settlement without providing appellants a fair opportunity to rebut those reports. 260 F.3d 123, 130 n. 4 (2d Cir. 2001). Following *Brennan,* the district court should not have relied solely on Dr. Langenfeld's declaration to approve the Settlement. Rather, remembering that objector were not proponents of the Settlement, the court should have given more weight of the declaration of Dr. Rosen.

Due Process requires that Class Members be provided an opportunity to be heard. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 798 (1985). "Absent class members must receive notice and an opportunity to be heard and to participate in the litigation, whether in person or through counsel." *Perez v. Asurion Corp*., 501 F.Supp.2d 1360, 1377 (S.D. Fla. 2007). That opportunity to be heard and to

participate in the litigation must mean more than just *presenting* evidence. The district court, in order to discharge its independent fiduciary duty to Class Members and render effective their right to be heard and participate, must *consider* evidence, such as the Rosen affidavit, presented against the approval of the Settlement just as it considered the evidence presented in favor of the Settlement. On this record, it was an abuse of discretion for the district court to accept the declarations from Class Counsels' expert and those of an officer of Defendant regarding the value the Settlement, and not to consider Dr. Rosen's expert Declaration presented by the Crutchfields. The failure to consider the Declaration also raises due process issues, *i.e.*, whether Class Members actually had an opportunity to be heard when the district court declined to consider the evidence they presented regarding the Settlement's lack of value.

B. The District Court Erred As A Matter Of Law When It Failed To Apply CAFA To The Settlement.

Under the Settlement, Class Members can get no benefit unless they opt to purchase additional services from Defendant.[4] A cursory review of Congressional intent with regard to CAFA shows Congress wanted CAFA to apply to settlements

[4] One small group, Class Members who canceled their service between June 29, 2009 and July 5, 2011 may sign up for a free month with a waived activation fee.

wherein class members do not receive money damages while at the same time class counsel receive large attorneys' fees paid in real money. Committee Report, 109th Congress (2005-2006), Senate Report 109-014. Although CAFA never defines a coupon, "coupon" in the Congressional sense meant any device a defendant would rather use in place of the payment of money damages. This Settlement has the exact same effect as a coupon. According to the parties, the benefit to Class Members is this: if they choose to purchase satellite radio services from Sirius XM, they will pay less for those services than they would without the Settlement. It is immaterial whether that savings is accomplished by class members redeeming a discount coupon or class members benefitting from an agreement by Defendant not to raise prices. The effect and the problems of utilization and value are identical. The benefits provided under the Settlement are, for legal purposes, coupons, or are so similar to coupons, that the CAFA coupon provisions should apply. *See Synfuel Techs., Inc. v. DHL Express*, 463 F. 3d 646, 654 (7th Cir. 2006); *True v. American Honda Motor Co.*, 749 F.Supp.2d 1052, 1069 (C.D. Cal. 2010).

Coupon settlements are also problematic not only because they often fail to provide meaningful compensation, but because more importantly they fail to force defendants to disgorge ill-gotten gains, and they often require class members to continue to do business with the defendant. *See Figueroa v. Sharper Image Corp.*,

517 F.Supp.2d 1292, 1231 (S.D. Fla. 2007). This Settlement contains all of the problems created by coupon settlements. *See In re HP Inkjet Printer Litigation*, 2011 WL 1158635 (N.D. Cal. March 29, 2011) (The HP court considered valid the objectors' concerns that the same problems that plagued coupons were also present in that settlement's in-kind benefits, *i.e.*, that the credits did not provide meaningful compensation because they are "non-transferrable and cannot be used with other discounts or coupons" and they fail to "requir[e] HP to disgorge ill-gotten gains," acting rather as a marketing tool. *Id.* at *6.) The benefits in the Sirius Settlement are not transferrable, and allow Defendant to retain or sign up additional subscribers instead of forcing Defendant to disgorge its gains from its alleged improper conduct. A-232-33. Although CAFA does not include the definition of a coupon, courts have found a variety of non-cash benefits to be coupons even a non-cash benefit that allows a consumer to obtain a product from the defendant, without spending any money, is still considered to be a coupon. *Fleury v. Richemont North America, Inc.*, 2008 WL 3287154, *2 (N.D.Cal. 2008), *citing* 109 S. Rpt. 14 (2005) (suggesting that settlements where class members received free products were coupon settlements). The *Fleury* court stated:

> The legislative history, however, suggests that even such a noncash benefit could be a coupon. *See* 109 S. Rpt. 14 (2005) (suggesting that the following were coupon settlements: (1) "a recent class action where consumers alleged that a company was selling cribs that were

> unsafe for use by infants, [and] the class members received *either* a crib repair kit or a coupon for $55 which could be used toward the future purchase of a Dorel Juvenile Group Product"); (2) "[a]nother recent suit involv[ing] allegations that Poland Spring water does not really come from a spring deep in the woods of Maine," and the class members received "discounts *or* free water ... over five years and contributions of $2.75 million to charities"; and (3) a class action where "[a] manufacturer offered consumers who bought a dozen Pinnacle golf balls free golf gloves" but failed to do so, and the class members received three free golf balls) (emphasis added).

Fleury, 2008 WL 3287154 at *2. In *Fleury*, the court declined to use the percentage method to award attorneys' fees, and instead applied a lodestar analysis, when it did not have information regarding the rate of redemption of consumer credits. *Fleury*, 2008 WL 3287154 at *3.

Settlement benefits providing for one month of free cable service were "almost certainly coupons under CAFA," even where class members could opt for a $5 cash benefit instead. *Parker*, 631 F.Supp.2d at 267. Where a settlement offered in-kind relief of two months of a free membership, the settlement shared many characteristics with an "infamous 'coupon' settlement." *Wilson,* 2011 WL 2050537 at *6. Where class members had the choice to either continue with a plan of service, or cancel the plan and receive a credit, the settlement was like "settlements providing class members with coupons or certificates, where the true value of the award was less than its face value." *Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 852 (5th Cir. 1998).

Even if settlement relief is not "identical to a coupon," it should be treated like a coupon when it is "in-kind compensation" that "shares characteristics" with coupons. *Synfuel,* 463 F. 3d at 654. Courts that have not explicitly held that a specific type of in-kind relief was a "coupon" have considered CAFA's provisions regarding coupon settlements to be "instructive" where settlement benefits were "coupon-like." *Fleury*, 2008 WL 3287154 at *2, *citing Yeagley v. Wells Fargo & Co.*, 2008 WL 171083, *9 (N.D. Cal. Jan. 18, 2008), *reversed on other grounds*, 365 F.Appx. 886 (9th Cir. 2010) (reasoning that even if credit report did not qualify as "coupon," CAFA was nevertheless instructive); *see also, In re HP Inkjet Printer Litigation*, 2011 WL 1158635 at *6. Thus, where, as here, the benefit to the class is non-monetary, it is a coupon, and the heightened scrutiny required by CAFA should apply.

The nature of this Settlement required the district court to apply the CAFA provisions limiting contingent fee awards in coupon settlements. See A-1357-59. The district court erroneously found that the Settlement did not qualify as a coupon settlement because the Settlement did not "require class members to purchase something they might not otherwise purchase." A-1346. The district court should have been thinking in terms of sophisticated litigators getting around the CAFA coupon settlement restrictions. The case law and legislative intent discussed above

shows that CAFA should apply even when sophisticated litigators arrange things so that class members do not have to purchase anything. The district court should have seen that CAFA applies even when "class members do not have to purchase anything" and the class members receive a totally free product. CAFA provides that, in the context of a contingent fee award,

> [i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

28 U.S.C. § 1712(a). Further,

> [i]f a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

28 U.S.C. § 1712(b)(1). The district court awarded Class Counsel $13 million in fees without any consideration of the rate at which Class Members would partake of the Settlement "benefits." A-1357-59. Furthermore, CAFA requires that the measure of the Settlement benefit be the "value to class members." 28 U.S.C. § 1712(a). Appellants have shown through the declaration of Dr. Rosen that the $180 million figure put forth by the parties and accepted by the district court as the Settlement value is grossly inflated, and that the Settlement essentially has no monetary value.

The fact that, as noted by Dr. Rosen, there is no way of knowing whether an attempted price increase by Defendant would have survived the market, and that there is nothing in the Settlement prohibiting Defendant from raising its prices much higher after December 31, 2011 to make up for the Settlement's six-month price cap, make valuing the Settlement impossible. *See* SPA-5-6. This indeterminacy made approval of the Settlement improper. *See Sobel v. Hertz Corp.*, 2011 WL 2559565, *13 (D. Nev. June 27, 2011) (rejecting settlement and motion for fees where "[a]s in *True*, 749 F.Supp.2d at 1078, of all the components of the settlement, the only components with any determinate – or on this record determinable – value are the attorneys' fees, incentive payments, and to some extent the costs of notice and administration."). Even if the Court considers the Settlement as providing injunctive relief, rather than a coupon, CAFA requires attorneys fees to be awarded by the lodestar method where the class receives injunctive relief the valuation of which is impractical, if not impossible. *In re AOL Time Warner Shareholder Derivative Litigation*, 2010 WL 363113, *6 (S.D.N.Y. Feb. 1, 2010). Here, the Crutchfields and Appellant Martin have amply demonstrated the multifarious difficulties that render impractical the valuation of the Settlement. See discussion, infra; see also Martin Opening Brief.

Thus, the district court was required to award attorneys' fees according to either the value to the Class Members of the Settlement "benefits" actually used (the

determination of which presents intractable problems of determining whether the Settlement was useful to the Class), or the lodestar method. The failure to do so was reversible error, and the award of attorneys' fees should be reversed and remanded with instructions to apply CAFA.

C. The District Court Erred As A Matter Of Law When It Found The Settlement Required Less Scrutiny When It Required Heightened Scrutiny.

In discussing the attorneys' fees award, the district court noted that the fee award is "a separate obligation that will not come out of the Settlement amount. . .," and suggested that thus its "'fiduciary role in overseeing the award is greatly reduced. . .'" A-1348, *citing McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006).[5] The district court's abdication of its fiduciary role and application of reduced scrutiny was an abuse of discretion.

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[5]It should be noted that the case cited by the district court was in the context of the class receiving actual monetary damages, not, as here, non-monetary relief, and the *McBean* court also noted that "[o]ne could imagine a situation where exorbitant attorney's 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 interests, because it was in the *attorneys'* interests that the settlement, and therefore the fee award, be approved." *McBean*, 233 F.R.D. at 392 n. 9 (emphasis in original). The very case cited by the district court in support of its reduced scrutiny contemplated that in a situation like the instant case, such a reduction would be inappropriate.

In making that determination, the district court lost sight of the reality that from the defendant's point of view the class benefit and the attorneys' fees are not separate and distinct because defendants look at settlements as a package, with both relief for the Class and attorneys' fees together defining the extent of their liability. *Parker,* 631 F.Supp.2d at 264 ("'The defendants in class actions are interested in minimizing the sum of the damages they pay the class and the fees they pay the class counsel, and so they are willing to trade small damages for high attorneys' fees. . . The result of these incentives is to forge a community of interest between class counsel. . . and the defendants,'" *quoting Thorogood*, 547 F.3d at 744-45); *Johnston v. Comercia Mortg. Corp.*, 83 F.3d 241, 245-46 (8th Cir. 1996) ("The award to the class and the agreement on attorney fees represents a package deal."). Even when fees are paid directly from the defendant to class counsel, those fees "are still best viewed as an aspect of the class' recovery." *Johnston*, 83 F.3d at 245-46.

To discharge its responsibility to the Class, the Court must discern the value of the Settlement to ensure that the award of attorneys' fees is commensurate with the benefit to the Class. *Parker*, 631 F.Supp.2d at 264. "In many instances, the court may need to proceed with care in assessing the value conferred on class members. . . In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. **Settlements involving nonmonetary**

provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class." Rule 23(h), Fed. R. Civ. P., Adv. Comm. Notes (2003) (emphasis added). This Settlement clearly provides nonmonetary relief to Class Members, while reserving the entirety of the monetary relief Defendant has agreed to part with for the attorneys. The Settlement provides $13 million is fees for Class Counsel, while the only benefits Class Members receive are Defendant's agreement to not raise prices before December 31, 2011, and, for former subscribers, waiver of the activation fee and one free month of service if they choose to sign up again. A-232-33, A-235. Thus, the settlement and class counsel's attorneys fees deserved careful scrutiny that the district court failed to provide when it adopted its reduced fiduciary role.

Additionally, the Settlement requires even *more* scrutiny because it contains provisions that indicate "that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 947 (9th Cir. 2011). Those indicators are:

> (1) "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded," *Hanlon [v. Chrysler Corp.]*, 150 F.3d [1011, 1021] at 1021 [(9th Cir. 2000)]; *see Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006); *Crawford v. Equifax Payment Servs., Inc.*, 201 F.3d 877, 882 (7th Cir. 2000);

> (2) when the parties negotiate a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, which carries "the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class," *Lobatz [v. U.S. West Cellular of Calif., Inc.]*, 222 F.3d [1142, 1148] at 1148 [9th Cir. 2000]; *see Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991) ("[L]awyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees."); and
>
> (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund, *see Mirfashi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (Posner, J.).

654 F.3d at 947. The Settlelment contains all three of these indications that Class Counsel, while not necessarily engaging in overt collusion, has subordinated the interests of the Class Members to their own interests. *See* A-232-33, A-235.

Clearly the Class has received "no monetary distribution but class counsel are amply rewarded." *Bluetooth*, 654 F.3d at 947. Class Counsel get $13 million. A-1357-59. Class Members get the right to a discount on satellite radio services and/or the right to reactivate their service. A-232-33. The right to reactivate is not a "'value' that falls within the range of reasonable settlements." *See Wilson*, 2011 WL 2050537 at *14 (rejecting a settlement that provided two free months of membership to a discount buying club). The grossly inflated figure of $180 million the district court accepted as the value of the Settlement (*see* A-1357-59) is excessive and unreasonable. "'[C]ompensation in-kind is worth less than cash of the same nominal

value,' since, as is typical with coupons, some percentage [of the in-kind compensation] [ ] will never be used. . ." *Synfuel*, 463 F.3d at 654, *citing In re Mexico Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 321-22 (N.D. Ga. 1993) (disagreeing with testimony from credible experts that value of coupons for travel was the same as the face value and finding that "the true value of the certificates to the class depends on when the certificates will be used, how they will be used, and who will be using them."); *see also Wilson*, 2011 WL 2050537, *6 (finding that as with most in-kind benefits, the dollar amount ascribed to the benefit did not represent its actual cost to defendant). The Rosen Declaration supports the conclusion that the value of the Settlement is much, much, less than its nominal value of $180 million. *See generally*, SPA-3-11.

The Settlement value is also inflated because it less costly to Defendant than the parties suggest. *See Wilson*, 2011 WL 2050537 at *6; *see also Clement v. Am. Honda Finance Corp.*, 176 F.R.D. 15, 26-27 (D. Conn. 1997) (disapproving settlement and noting that coupons acted as sophisticated marketing scheme for defendant). The calculation of the Settlement benefit omitted any consideration of the benefit provided to Defendant when Class Members take advantage of the in-kind relief by remaining subscribers, or by signing up again. *See generally*, A-359-61. As

in *Figueora v. Sharper Image Corp*., 517 F.Supp.2d 1290 (S.D.Fla. 2007), "[r]ather than resulting in [the] Defendant[s] disgorging any wrongfully obtained gains, the result will likely be increased [business]. . ." *Id*. at 1327. As in *Sobel*, the benefits of the Settlement are "non-transferrable, non-sellable, and may only be redeemed with the issuing defendant." *Sobel*, 2011 WL 2559565 at *12. Class Members are forced to continue or reinitiate business with Defendant in order to obtain any benefit under the Settlement. The logic from *Sobel* applies forcefully here: "For each class member who [continues to do business with the defendant who would not have done so absent the non-monetary relief], that Defendant 'will experience a net benefit.'" *Id.*, citing *True*, 749 F.Supp.2d at 1075. This Settlement does not provide substantial value to the Class and is, at best, no more than a promotion. *See id.*, citing *In re GMC*, 55 F.3d at 768. Any Class Members who take advantage of the Settlement "benefits" will likely provide a net benefit to Sirius, in that they increase Sirius's market share and may continue the service after the Settlement period is over. In the absence of probative evidence regarding the value of the coupons, the Defendant's unwillingness to agree to any cash settlement and willingness to issue coupons suggested "perhaps the actual value of the coupons is nothing at all." *Sobel*, 2011 WL 2559565 at *12. The court in *In re Compact Disc Minimum Advertised Price Antitrust Litig*., 216 F.R.D. 197 (D.Maine 2003) rejected a class action settlement where the only benefit

to class members was a 50% discount scheme on compact discs. The court stated: "for all I know this will be just another contribution to their marketing program that will result in more profitable sales than previously, and cost them nothing as a settlement." *In re Compact Disc*, 216 F.R.D. at 220-21. Without evidence that the 50% discounts would provide additional significant value, the court could not quantify the value of the settlement either as a benefit to the class or a detriment to the defendant. *Id.* at 220. The *In re Compact Disc* court held that "a settlement is not fair where all the cash goes to expenses and lawyers, and the members receive only discounts of dubious value."[6] [7] *Id.* at 221. This described the Sirius Settlement exactly.

Even before the application of CAFA's coupon settlement provisions, courts have adjusted the value of "common fund" settlements that provided non-monetary relief to reflect redemption rates. *See Strong*, 137 F.3d at 852; *see, e.g.*, *In re*

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[6] The *In re Compact Disc* court, after considering approving the settlement but denying fees, rejected the entire settlement because it contained a reversion clause that would send unawarded fees back to the defendant. *Id.* This Settlement should have received similar treatment – instead of just awarding the entirety of the requested attorneys' fees because any unawarded amount would have reverted, the district court, in light of the reversion and the disparity between the nonmonetary relief to the Class and the very monetary attorneys' fees, should have rejected the entire Settlement.

[7] In later proceedings upon a revised settlement agreement that was approved, the district court postponed the award of attorneys' fees until the rate of participation in the settlement was known. *Id.* at 189-90.

Domestic Air Transp. Antitrust Litig., 148 F.R.D. at 348-52 (adjusting value of settlement for the likelihood that coupons for travel would be used by class members in determining attorneys' fees); *Duhamie v. John Hancock Mut. Life Ins. Co.*, 989 F.Supp. 375, 379 (D.Mass. 1997) (approving the fee request provisionally and permitting immediate partial payment, but reserving the balance for adjustment in light of the actual experience under the settlement, where settlement value was unknown because class could opt to receive either relief against insurance policy or through ADR process); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F.Supp.2d 184, 189-90 (D. Maine 2003) (postponing awarding attorneys' fees until the rate of redemption of vouchers was known). The same issues plague this Settlement. There is no way of knowing how many Class Members who are current Sirius XM subscribers will drop the service, many perhaps in response to the flagrantly unfair Settlement that gives Class Counsel $13 million in cash and Class Members the "right" to purchase additional services from Defendant for a few months without a price increase. The determination of the value of a settlement must take into account consumer response. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 322.

The approval or disapproval of the Settlement also deserves a higher scrutiny in that it includes a clear-sailing provision by which the Defendant agreed not to

contest any request for attorneys' fees that did not exceed $13 million. Settlement, p. 9. "[T]he very existence of a clear sailing provision increases the likelihood that class counsel will have bargained away something of value to the class." *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991). Such provisions "by [their] nature deprive[ ] the court of the advantages of the adversary process." *Id.* This lack of participation by an adversarial defendant "makes heightened judicial oversight. . . highly desirable." *Id.*; *see also Bluetooth*, 654 F.3d at 947.

Assuming arguendo that the district court did not award $13 million in attoneys' fees this court should note that any unawarded portion of the $13 million in attorneys' fees agreed to under this Settlement would have reverted back to Defendant; not the class. *See generally*, A-228-80 (no reference to what happens to any unawarded portion of the agreed-upon $13 million to be paid by Defendant). This provision, especially in conjunction with the clear-sailing provision, indicates unfairness in that it works to insulate the agreed-upon fee of $13 million from scrutiny or reduction. Class Members have no incentive to challenge, nor does the district court have any incentive to reduce, the award since no additional value would flow to the Class. The district court failed to provide the heightened scrutiny required by the presence of disproportionate attorneys' fees, the clear sailing agreement, and the reversion of unawarded fees. *See Bluetooth*, 654 F.3d at 947.

CONCLUSION

Appellants have shown that the district court abused its discretion when it declined to consider the declaration of the Crutchfield's expert on the issue of the settlement lack of value, Harvey Rosen; that the district court committed error as a matter of law when it found that this coupon settlement was not governed by the CAFA; and, the district court also erred as a matter of law when it failed to apply heightened scrutiny to this coupon settlement despite the fact that the settlement provides no monetary distribution to the class members, contains a clear sailing provision regarding class counsel $13 million attorneys fee, and fails to provide for payment to the class of any monies from the $13 million not awarded by the district court is attorneys' fees. Any one of these legal errors would require this Court to remand the matter to the district court with directions to apply the correct law. It is respectfully submitted, this Court should remand with directions to the district court to consider the Declaration of Harvey Rosen and then set forth in detail the court's analysis of the conflict between the experts regarding the issue of value; to declare this is a coupon settlement controlled by the Class Action Fairness Act, and then

apply the heightened scrutiny required by the act to both the fairness adequacy and reasonableness of the settlement and the requested $13 million in attorneys' fees.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original INITIAL BRIEF OF THE CRUTCHFIELD APPELLANTS and six paper copies of this brief were sent via Federal Express Overnight Delivery to the Clerk of the Court on January 25, 2012 and that an Adobe Acrobat PDF file electronic version of the INITIAL BRIEF OF THE CRUTCHFIELD APPELLANTS was uploaded to the Court's website on January 25, 2012 and that all record counsel will be served by the courts CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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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 January 25, 2012.

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N. Albert Bacharach, Jr.