RECORD NOS.

11-3696 (L)

11-3965

11-3729; 113834; 11-3883; 11-3908; 11-3910; 11-3916; 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, Curtiss 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

vs.

Sirius XM Radio, Inc.

Defendant-Appellee,

John Ireland,

Objector-Appellant

(Caption Continued Inside Cover)

Brief of Appellant John Ireland with Appendix for Appeal 11-3965

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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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I. JURISDICTIONAL STATEMENT

The District Court had diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), because the case is a class action filed under Fed. R. Civ. Proc. 23 and at least one member of the proposed class is a citizen of a state different from one defendant, the number of members of all proposed plaintiff classes in the aggregate is at least 100, the aggregate amount in controversy exceeds $5 million, exclusive of costs and interests, and no statutory exception applied to 28 U.S.C. § 1332(d)(2)(A).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered its order approving the national class action settlement on August 24, 2011. (Doc. 160, APP. at __)(Hereinafter "Doc." shall refer to "docket entry" and "App." shall refer to Appellant Ireland's "Appendix" containing citations to the record.) Appellant Ireland timely filed the instant appeal on September 22, 2011. (Doc. 177, APP. __.) This Objector has standing to appeal this final approval of a class action settlement. *Devlin v. Scardeletti,* 536 U.S. 1 (2002).

II. STATEMENT OF ISSUES

Appellant presents the following issues for this Court's review:

1) Whether the settlement's failure to provide monetary review qualifies this settlement as a coupon settlement and, if so, whether the District

Court abused its discretion in failing to scrutinize the settlement terms in accordance with CAFA;

2) Whether the District Court's reliance upon Plaintiff's expert in its determination of the value of the settlement and the reasonableness of the attorneys' fee request supplanted Its analysis with a biased opinion, causing reversible error; AND

3) Whether the attorneys' fees are unreasonably high and unsupported by the record.

III. STANDARDS OF REVIEW

Issue One

"We review approval of class action settlements for abuse of discretion. The district court's factual conclusions related to a settlement agreement are reviewed for clear error; its legal conclusions we examine de novo." *Mba v. World Airways, Inc.*, 369 Fed. Appx. 194, 196 (2d Cir. 2010)(citing *Central States Southeast & Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care*, 504 F.3d 229, 246-47 (2d Cir. 2007).

"What constitutes a reasonable fee is properly committed to the sound discretion of the district court [citation], and will not be overturned absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding." *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2000).

IV. STATEMENT OF THE CASE

In the interests of judicial expediency and to avoid repeating any statements common to all Appellants in this matter, this Appellant adopts by reference the Statements of Facts contained in the briefs submitted by all counsel for co-appellants pursuant to F.R.A.P. 28(i). However, in addition to the statements of the case written by his fellow appellants, Appellant Ireland states the following:

Appellant Ireland and eighty-five other class members filed objections to the proposed settlement. (APP. 50.) Appellant filed his objection on July 19, 2011. (Appellant's objection is not found on Pacer but was timely submitted in accordance with the Notice and is attached hereto in hisa, at pages 40-48.) The trial court overruled all these objections and approved the motion for settlement as submitted. (APP 49-64.)(E.R. 160, 162, 163.) Appellant timely filed his notice of appeal on September 23, 2011. (APP 65-72.)(E.R. 177.)

V. STATEMENT OF FACTS

In the interests of judicial expediency and to avoid repeating any statements common to all Appellants in this matter, Ireland adopts by reference the Statements of Facts contained in the briefs submitted by all counsel for co-appellants pursuant to F.R.A.P. 28(i).

/ / /

VI. ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY APPROVING THE SETTLEMENT AS FAIR AND REASONABLE

1. The Coupon-like Nature of this Settlement Required Heightened Scrutiny under the Provisions of CAFA, 28 U.S.C. § 1712

Coupons come in many forms. Many of the objections filed below sought to inform the Court that this was just such a settlement. (APP. 51, However, despite this clear warning and the underlying facts, the District Court failed to scrutinize the settlement to the level required by the Class Action Fairness Act, 28 U.S.C. § 1712 et seq. ("CAFA"). The Court did not follow the prescribed guidelines outlined in CAFA despite this settlement's obvious coupon qualities. For this reason the District Court committed an abuse of discretion.

CAFA was specifically legislated to prevent, among other things, the abusive practices associated with coupon settlements. CAFA's subsection (a) requires the portion of the attorneys' fee award that is based upon a coupon settlement to be withheld pending disbursement of the relief. Subsection (e) states that the district court must subject any coupon settlement to increased scrutiny, particularly with respect to the attorneys' fees obtained to ensure that the award is fair, reasonable and adequate.

Webster's dictionary defines a coupon as: "A form surrendered in order to obtain an article, service, or accommodation: as either A) one of a series of attached tickets or certificates often to be detached and presented as needed; B) a ticket or form authorizing purchases of rationed commodities; C) a certificate or similar evidence of a purchase redeemable in premiums; or D) a part of a printed advertisement to be cut off to use as an order blank or inquiry form or to obtain a discount on merchandise or services." (emphasis added.)

Many Courts utilize the provisions of CAFA when dealing with a settlement even remotely similar to that of a coupon. In fact, because the statute does not specifically define "coupon," many Courts utilize its provisions for all manner of in-kind relief. *See Yeagley v. Wells Fargo & Co.*, 2008 U.S. Dist. LEXIS 5040, at *24 (N.D. Cal. Jan. 18, 2008) (reasoning that even if a credit report did not qualify as "coupon," CAFA was nevertheless instructive); *See generally Synfuel Techs., Inc. v. DHL Express*, 463 F. 3d 646 (7th Cir. 2006) (prepaid shipping envelopes similar to coupons); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007). (credit reports compared to coupons); *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007) (gift cards); *In re Microsoft I-V*, 135 Cal. App. 4th 706 (2006) (vouchers); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 46 *(2008)* (DVD subscription).

Despite the settling parties' and the District Court's refusal to deem this a

coupon settlement, the relief is, actually, a coupon settlement. In this case, the relief is not called a "coupon" but the effect is the same, regardless of clever nomenclature. The relief provides reduced rates on a Sirius XM subscription to all class members. (APP. 8-11, 34-5.) In order to obtain these benefits, each class member is required to either maintain his Sirius XM subscription, or renew his subscription. (APP. 8-11.) In sum, absent doing business or continuing to do business with Defendants, all other class members receive nothing. (APP. 40-49.) The relief is merely a thinly disguised marketing scheme, which provides the windfall of buying eternal peace for Defendants even while stimulating sales and promoting brand loyalty at minimal cost to Defendants and maximum fees for Class Counsel. This, by definition, is a coupon and subject to heightened scrutiny by the Courts in assessing fairness under the purview of CAFA.

Numerous courts have opined regarding the inherent dangers present in a coupon settlement. See *Reibstein v. Rite Aid*, 2011 WL 192512 (E.D. Pa. January 18, 2011 "[T]he funds at issue are to be extended to the class in the form of 'gift cards.'" The Rite Aid court was careful to state that, "[a]s a non-monetary award, this fund 'deserve[s] careful scrutiny to ensure ... [it] ha[s] actual value to the class.' Fed. R. Civ. P. 23, Advisory Committee Note." See e.g., *Synfuel Techs., Inc. v. DHL Express (USA), Inc*., 463 F.3d 646, 653-55 (7th Cir. 2006); see also, *Gen. Motors Corp*., 55 F.3d at 806-07. ("Most obviously, such settlements result in

"the increased possibility that the benefits afforded to class members will never be realized, since class members are provided with a future discount on a product or service with which they were previously dissatisfied.") *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 55 (D.D.C. 2010). *See, e.g., Sobel v. The Hertz Corp.*, 06-00545 (D.Nev.)(offering credit toward future car rental, settlement rejected by court); *In re HP Inkjet Printer Litig.*, 05-3580 (N.D.Cal.)(offering e-credits toward future printer purchases, settlement upheld). Where the district court's application of the law to the facts was illogical, implausible, or without support in inferences that may be drawn from the record, the Court of Appeals reviews for abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir.2009).

Despite the obvious fact that the District Court was faced with a coupon settlement, it stated the following in its final order, "Many objectors argued that their award is similar to a disfavored "coupon" settlement. Unlike coupon settlements, however, it does not require class members to purchase something they might not otherwise purchase to enjoy its benefits; rather, the vast majority of class members will benefit in the course of their normal subscription payments, and former subscribers may benefit from a month of free radio or internet service." (APP. 51.) (Doc. 160.)

This clear effort by the District Court to distinguish a coupon settlement from the relief provided in this settlement ignores the common denominator in all

coupon settlements, regardless of the name assigned to it: Namely, every coupon settlement offers discounts for the same type of service already used or purchased by the class member and the class member can only obtain this relief by continuing to do business with the defendant. The Court below failed to account for the situation where the class member has already suffered the injury and, despite the discounted service provided by Defendants as a result of this settlement, the class member decides not to renew his subscription. In that instance, the class member receives nothing and the relief derived from this settlement is absolutely valueless to him.

The district court's decision must be supported by sufficient findings to be afforded the traditional deference afforded by the abuse of discretion standard. *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003). In this case, the Court's treatment of the coupon issue is absolutely implausible and constitutes an abuse of discretion.

2. Faced with 85 Objections, the District Court Erred in Concluding That the Class Favored Approval.

The District Court buttressed its conclusion that the settlement is fair and reasonable by incorporating a fallacy into its order: that the class favors approval because only "0.0005% of the class objected." Final Order at 2 n.2 (APP. 50, at fn.

2.)(Doc. 160.). However, the District Court's attempt to downplay the significance of 85 objectors is inapposite and not supported by facts or legal principles.

The fact that there were "only" 85 objections does not mean that the remainder of the class has approved. No evidence was submitted below, to or by, the District Court that anyone (except for perhaps the named representatives) liked this settlement. The only class members that have expressed an opinion are those that have opted out (at least 1,093 as of the time of class counsel's motion for final approval, at appendix 14) or objected and they obviously believe this settlement is unacceptable. The millions of other class members have simply done nothing which is hardly the ringing endorsement which is claimed by the Court below. The relatively "small" number of objectors fails to support the Trial Court's approval of this settlement because, frankly, the quality of an argument does not become a better or worse argument because of the number of people that raise it. A meritorious argument is not less so because only one person makes it; nor is the opposite true.

In conjunction with the foregoing statements, this Appellant also joins in Appellant Martin's argument on this subject matter pursuant to Fed .R. App. Proc. 28(i), and states that the District Court's reliance on the numbers of objections and opt-outs as indicative of class-wide approval is an abuse of discretion.

3. It Was Error to Deem a Settlement Fair Where the Terms Flatly Exclude Two Subsets of Class Members From Recouping Any Relief.

The relief provided in this settlement provides discounts on future services from the Defendant. (APP. 7-11.) This means that two groups of class members were excluded from obtaining any settlement relief – those individuals that have paid in advance for a lifetime subscription, and those consumers who do not wish to sign up for Defendant's service again. (Hereinafter, "excluded class members"). These two groups gain absolutely nothing in exchange for a very valuable release of any claims they may have against Defendant. This is a violation of their due process rights and calls into question the adequacy of these class members' representatives under Fed. R. Civ. Proc. 23.

In assessing the adequacy and fairness of class settlements, the district courts are "expected to give careful scrutiny to the[ir] terms . . . in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). FRCP 23(a) permits certification of a class only if "the representative parties will fairly and adequately protect the interests of the class." FRCP 23(a)(4). This requirement consists of two inquiries: "(1) that the proposed representative Plaintiffs do not have conflicts of interest with the proposed class, and (2) that Plaintiffs are represented by qualified and competent counsel." *Dukes v. Walmart*, 603 F3d 571,

614 (9th Cir. 2010), citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 at 1020 (9th Cir. 1998) and *Molski v Gleich*, 318 F3d 937, 955 (9th Cir 2003).

In determining whether a class settlement falls within the reasonable range of approval, the trial court's task is to balance the amount offered in settlement against "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing." *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.* ["GMC Pick-Up"], 55 F.3d 768, 806 (3d Cir. 1995); see also *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). This inquiry requires the trial court to "'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement [was] in the best interest'" of the class. *GMC Pick Up*, 55 F.3d at 805 (quoting 2 Newberg & Conte § 11.41, at 11-88 to 11-89).

The calculation required by the District Court need not even be conducted. There can be no valuation done as to the relief recouped by the excluded class members because their relief equals $0.00. Although these excluded class members are situated no different from a claims or factual perspective, their representatives forsook their claims for the sake of an overall settlement. This Appellant wonders why such a result could occur, given the lack of differentiation between the members of this class. The only conclusion that may be reached is that

the settlement fails with respect to the excluded class members. Both the named representatives and class counsel failed in their advocacy of these class members' interests. However, despite this shortcoming in the settlement terms, the Trial Court made no findings regarding this shortfall, nor could it have resolved this discrepancy in treatment if it had tried. (See APP. 50-52, no discussion regarding this issue is found.)(E.R. 160.)

The District Court therefore committed reversible error on two counts – One, that it approved a class action settlement that discriminated arbitrarily against certain class members and therefore was neither fair nor reasonable, and two, where a court fails to provide a reasoned response to an objection on the record, the court commits abuse of discretion. *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832, 836 (9th Cir. 1976).

B. THE DISTRICT COURT ERRED IN ITS VALUATION OF THE SETTLEMENT BY RELYING UPON A BIASED EXPERT OPINION

Appellant objected to the Trial Court's reliance upon Class Counsel's paid expert regarding the value of the settlement. (APP. 42-45.) This valuation is vitally important to the Court's consideration whether the settlement is fair to the class as a whole, and whether the attorneys' fee request bears a reasonable relation to the value of the settlement to the class. In this case, only class counsel offered

an evaluation of the value of the settlement, which was not challenged by any other parties nor supported by any other evidence. (APP.33-39.)

Appellant's objections below were, summarily as follows:

- Mr. Langenfeld extrapolated Defendant's future subscription rates. Appellant contended that these future rates were unreliable as it assumed data which does not exist.
- Mr. Langenfeld's population rate involved just one year of data, undermining the reliability of his predictions.
- The fact that Defendant may "lose" $56 million in fees does not accrue to the benefit of the class, only to the detriment to Defendant. Including this figure, then, in the overall value of the settlement to the class is plain error, and grossly distorts the value and fairness of the settlement as a whole. (APP. 42-44.)

Appellant stands upon the foregoing objections to the use of Mr. Langenfield's biased declarations. It was an abuse of discretion for the Trial Court to abdicate its own fiduciary responsibility of assessing the fairness of the settlement in favor of Plaintiff's (paid) expert's opinion, which was unchallenged by the Court and supported with unreliable statistics.

/ / /

C. THE ATTORNEYS' FEES ARE GROSSLY DISPROPORTIONATE TO THE RELIEF PROVIDED TO THE CLASS.

Appellant argued before the Court below and again here, that this settlement is tantamount to a coupon settlement and thus, subject to the terms of CAFA. (APP. 41-2.) As described below, the District Court failed to conform with the requirements of CAFA and thus, committed an abuse of discretion because it made an error as a matter of law.

Subsection (e) of CAFA mandates the district court review all coupon settlements with heightened scrutiny, particularly with respect to the attorneys' fees obtained. Subsection (c) states in cases in which the settlement is part coupon and part equitable relief, such as it is here, the district court must calculate the portion of the fees attributable to work on the coupon portion of the settlement on the actual value redeemed by the class, 28 U.S.C. § 1712(c)(1), whereas fees incurred in pursuit of the injunctive relief must be calculated based on counsel's hours reasonably incurred, 28 U.S.C. § 1712(c)(2). The former methodology was not utilized here because the District Court determined this was not a coupon settlement. Instead, it awarded fees based upon counsel's purported lodestar. The District Court applied the incorrect legal rule in this instance and, therefore, committed an abuse of discretion. *Fox v. Vice* 131 S.Ct. 2205, 2216 (2011.)

As recommended by Appellant in his objection, the portion of the fees attributable to the coupon portion of the settlement should be awarded according to the relief actually obtained by the class. (APP.46-48.) The point of staging or deferring fee awards in coupon settlements is an effort to stem abusive practices by class attorneys that have historically recouped millions while class members received nearly worthless relief in the form of a coupon. Thus, basing the attorneys' fee award upon the actual value of the benefit to the class comports with the requirements of CAFA.[1]

i. Legal Analysis of the District Court's Decision.

The requirements of CAFA mandate the District Court to make the usual Rule 23 findings that the settlement is fair, reasonable and adequate. However, CAFA added a further requirement that the District Court's findings be written. 28 U.S.C. § 1712(e). Although the District Court did make written findings regarding the fairness and reasonableness of the settlement, these findings were summary in nature and in many cases incorrect. (APP.53.) (Doc. 160.) Chiefly, the District Court's conclusion that the request for attorney's fees in the amount of

[1] In *Richard Duhaime v. John Hancock Mutual Life Insurance Company, et al.,* 177 F.R.D. 54 (D.Mass 1997), the federal court withheld 40% of the contemplated fee for a year so the court could review the quality of representation provided by Lead Counsel and the results achieved for the class. Also, in *Ace Seat Cover Co., Inc., et al. v. The Pacific Life Insurance Company*, Case No. 97-CI-00648 (Kenton Cir. Ct. Ky., Nov. 19, 1998), the court ordered 20% of the fees withheld until completion of the settlement agreement. In *In re: Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450 (D.N.J. 1997), aff'd re class certification and settlement but vacated and remanded re attorneys' fees, 148 F.3d 283 (3d Cir. 1998), the court ultimately ordered that 50% of the attorney's fees be withheld. Likewise, as recently as April 12, 2007, in *In Re: PNC Financial Services Group, Inc. Securities Litigation*, Case No. 2:02-cv-00271-DSC (U.S.D.C. W.D. Pa. filed April 17, 2007), Judge Cercone ordered part of the class counsel's fee withheld pending entry of an order of distribution.

$13,00,000.00 was reasonable under both the lodestar and percentage of the fund method is unsupported and incorrect. (APP. 53.) (Doc. 160.)

In its final Order, the District Court stated its approval of class counsel's request for $13 million in fees while stating, "[t]he requested $13 million award understandably raised concerns, especially when compared to the very modest award provided to each class member. However, upon closer inspection, the award when compared to the Settlement as a whole is not unfair… The award, as noted above, may well signal a defect in the system, but if so the Congress has to fix it." (App. 53.)(Doc. 160.) However, the Court committed an egregious error by stating that Congress should fix the problem that was squarely under the District Court's control. Congress already gave this Court a solution – to follow the stringent requirements outlined in CAFA. The District Court simply elected not to utilize these provisions, and so committed reversible error.

The attorneys' fee award is excessive, particularly given the *de minimis* relief provided to the Class. At a bare minimum, the relief actually provided to the class should have first been ascertained prior to awarding these fees to class counsel. Based on the foregoing, the District Court committed a clear (and admitted – see App. 53) abuse of discretion.

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/ / /

VII. CONCLUSION

For the foregoing reasons, this Honorable Court should reject the Settlement approved below and remand to the district court for further consideration of the issues above. Appellant also requests such other relief, as the Court deems appropriate.

Dated: January 25, 2011

Law Offices of Darrell Palmer

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer
Attorney for Appellant JOHN IRELAND

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)

Certificate of Compliance with Typeface Requirements
and Type Style Requirements

This opening brief complies with the type-volume limitation of Fed.R.App. P. 32(a)(7)(B) excluding the parts of the opening 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. R. App. P. 32(a)(6) because this opening brief has been prepared in a 14-point, proportionally spaced typeface using Times New Roman in Word format. The word count in the brief is 3,763.

Dated: January 25, 2012

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 25, 2012.

I certify that all active participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. All non-registered participants will be served via U.S. Mail.

/s/ Joseph Darrell Palmer_____
Joseph Darrell Palmer

RECORD NOS.

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Appendix of Appellant John Ireland for Appeal 11-3965

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Plaintiffs,

-against-

SIRIUS XM RADIO INC.,

Defendant

No. 09-CV-10035 (HB)

JURY TRIAL DEMANDED

SECOND CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Plaintiffs Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, Brian Balaguera, Scott Byrd, Glenn Demott, Andrew Dremak, Melissa Fast, James Hewitt, Todd Hill, Curtis Jones, Ronald William Kader, Edward Leyba, Greg Lucas, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Janel and Kevin Stanfield, Paul Stasiukevicius, Todd Stave, and Paola Tomassini, individually and on behalf of all others similarly situated, upon personal knowledge as to their own acts and status, and upon information and belief as to all other matters, make the following allegations against Defendant Sirius XM Radio Inc. ("Sirius XM" or the "Company"), individually, and as the successor-in-interest to Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Holdings Inc. ("XM"):

I. NATURE OF ACTION

1. This is an action to unwind the anticompetitive merger between Sirius and XM and to compensate the victims of the anticompetitive acts that the merged entity, Sirius XM, has committed. The action is brought pursuant to federal antitrust laws, state consumer protection statutes, and state common law.

2. Prior to the merger, Sirius and XM were the only competitors in the market to sell satellite digital audio radio service ("SDARS") in the Unites States. Vigorous competition between Sirius and XM kept SDARS prices stable. In over six years of operation prior to the merger, Sirius never raised its monthly charge, and XM raised its monthly charge only once.

3. On July 28, 2008, XM and Sirius – the only two providers of SDARS in the United States – merged to form Sirius XM. The merger of Sirius and XM has substantially lessened competition in the SDARS market in the United States, and in fact, has resulted in the creation of a monopoly. Since the merger, Sirius XM has abused its monopoly power by raising prices and sustaining such price increases, reducing the quantity and quality of programming,

breaching subscriber contracts, and making false and misleading statements to subscribers and the public.

4. In connection with their applications for regulatory approval of their merger, Sirius and XM predicted that the synergies achieved by the merger would bring cost savings resulting in lower prices to their subscribers and more programming choices. Now, 18 months after the merger took effect, it is clear that the impact on consumers has not been as predicted – and promised – by Sirius and XM. While the Company may have benefitted from the merger, subscribers have only been harmed.

5. In the worst climate for consumer spending since the Great Depression, Sirius XM has substantially increased prices and revenue. During an analyst conference call discussing the Company's positive results for the second quarter of 2009, Sirius XM's CEO Mel Karmazin bragged about the how the Company was flourishing in the absence of competition:

> Last week marked the one-year anniversary of the merger of Sirius and XM. What the company has accomplished in the last 12 months is extraordinary. . . [and] was all accomplished during the most difficult business environment in recent history. . . . Sirius XM is truly a cash flow growth story. . . . [A] great story it is. As you saw in our press release this morning, we increased for the third time since our merger our guidance for 2009 . . . . We anticipate over $400 million this year, compared with a loss of $136 million in 2008, which is a swing of over $536 million in one year. I believe you will all agree that will be [an] astonishing performance.

A report issued late in 2009 by Bank of America/Merrill Lynch was "exceptionally bullish" on Sirius XM and predicts a positive EBITDA exceeding $1 billion per year by 2013. *See* http://seekingalpha.com/article/180735-bank-of-america-issues-exceptionally-bullish-outlook-on-sirius-xm. This performance was made possible by the elimination of any economically meaningful competition to Sirius XM in the SDARS market.

6. Since gaining the enhanced market power conferred by the merger, ***Sirius XM has profitably sustained multiple price increases, during a severe recession.*** These price increases include:

a. Within just six months of the merger, the combined Company announced an increase in monthly charge per additional radio for multi-radio subscribers by nearly 30% (from $6.99 per month for each additional radio to $8.99 per additional radio). This 30% price increase became effective on March 11, 2009, less than eight months after the merger.

b. Before the merger, both Sirius and XM subscribers received internet access to programming as part of their standard subscription price. On March 11, 2009, the Company required all subscribers seeking internet access to pay a monthly charge of $2.99.

c. Effective July 29, 2009 – one year after the merger was finalized – Sirius XM again increased prices by charging a "U.S. Music Royalty Fee" (the "Royalty Fee") of 10% to 28%, which it deceptively represented to customers as a direct pass-through of only *increases* in the royalties that it has paid to the music industry, *i.e.*, musicians, record companies, and music publishers, since March 20, 2007.

d. Also since the merger, Sirius XM has added or increased various administrative fees. The Company increased the activation fee for subscribers who sign up online by 50% – from $9.99 to $14.99 for XM subscribers and from $10.00 to $15.00 for Sirius subscribers. Additionally, Sirius XM added new fees for XM subscribers, who now are

charged $75.00 for subscription cancellations and $15.00 to transfer their accounts from one radio to another. Before the merger, XM did not charge its subscribers for these account changes.

7. In sum, between the new fees and rate increases, a subscriber with one additional radio who had previously accessed the internet service for free was paying $19.94 per month and is now paying $27.88 – a 40% increase in total.

8. At the February 25, 2010, fourth quarter earnings call, Sirius XM CFO David Frear made clear that the price increases imposed since the merger have allowed Sirius XM to increase profitability, despite the challenging economic climate:

> Through the worst economic environment in a generation our results are phenomenal.
>
> Self-pay churn was under 2% for the second consecutive quarter despite the introduction of the U.S. music recovery fee in August.
>
> Revenues for the quarter were $684 million, ***up 6%*** as subscription and other revenues increased with higher ARPU [average revenue per user] and the implementation of the music recovery fee. ARPU improved $0.27 or 2.5% to $10.92 driven by higher sales of best sub packages ***and the rate increases on multi-radio subscriptions and internet streaming.***

Sirius XM Radio Q4 2009 Earnings Call Transcript, available at http://seekingalpha.com/article/190683-sirius-xm-radio-q4-2009-earnings-call-transcript (emphasis added).

9. Additionally, the price increases had very little impact on subscriber deactivations, known as "churn." At the fourth quarter 2009 earnings call, Karmazin stated that there was a "lack of discernable impact on churn of the company's passing through the music royalty fee." *Id.* Thus, Sirius XM was able to raise prices an average of 15% and experienced no discernable impact on subscriber deactivations. It is clear, therefore, that Sirius XM has been

able to impose and profitably sustain a significant non-transitory price increase on SDARS consumers.

10. Since the merger, Sirius XM subscribers have seen that the Company's commitment to offering competitive prices and improved programming was illusory. Worse, subscribers have experienced the fallout of the cost-cutting measures. In an attempt to consolidate supposedly overlapping programming between the two networks, Sirius XM eliminated many subscribers' favorite channels, including eclectic channels that attracted these listeners to satellite radio in the first place.

11. On the technical side, Sirius XM subscribers have not benefitted from synergies created by the merger, if any. There are still two separate radio networks, so subscribers still have to choose between Sirius or XM and, with rare exceptions, cannot switch between the two without either buying new equipment or paying a transfer fee. Thus, for many subscribers, the merger has had no benefit.

12. The Company's illegal and deceptive conduct has harmed competition and injured consumers in the SDARS market in the United States. Thus, Plaintiffs bring claims for violation of the federal antitrust laws and state consumer protection statutes, as well as a state law claim for breach of contract.

II. JURISDICTION AND VENUE

13. This is a class action involving more than 100 class members, a member of the Plaintiffs' Class is a citizen of a state different from Defendant, and the amount in controversy, in the aggregate, exceeds the sum of $5,000,000, exclusive of interest and costs.

14. This Complaint is filed, and these proceedings are instituted, under common law, consumer protection statutes, the Clayton Act, 15 U.S.C. § 12, *et seq.*, and the Sherman Act, 15 U.S.C. § 1, *et seq.* to recover threefold damages and the costs of suit and reasonable attorneys'

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- SIRIUS XM RADIO INC., Defendant.	No. 09-cv-10035 (HB)(RLE)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION (1) FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT, (2) FOR APPROVAL OF THE FORM AND MANNER OF NOTICE TO THE CLASS, AND (3) TO SCHEDULE A HEARING ON FINAL APPROVAL OF THE SETTLEMENT AND ON CLASS COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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November 17, 2010 Opinion and Order had based dismissal of that claim. The next day, December 21, 2010, the Court denied leave to amend.

Plaintiffs moved to bifurcate the antitrust claims and the consumer protection claims. The Court's November 17, 2010 Opinion and Order denied that motion.

On July 30, 2010, Plaintiffs moved for class certification. By Opinion and Order dated March 29, 2011, the Court granted class certification as to the federal antitrust claims and denied class certification as to the state law consumer protection claims and the claim for injunctive relief.

At the conclusion of discovery, Defendant moved for summary judgment dismissing all claims. By Opinion and Order dated March 29, 2011, the Court denied summary judgment as to the federal antitrust claims and granted summary judgment as to the remaining state law consumer protection claims.

A May 2, 2011 trial date was set by the Court. The trial was thereafter postponed to permit Rule 23 notice of the certification of the antitrust class, as well as an opportunity to request exclusion, to be provided to Class Members.

After intensive and protracted settlement discussions, the Settlement Agreement was entered into on May 12, 2011.

ARGUMENT

I. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

The settlement of complex class action litigation is favored by public policy and strongly encouraged by the courts. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("We are mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy.") (internal quotation marks and citation omitted); *In re Prudential Sec.*

Inc. Ltd. P'ships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

When reviewing a proposed settlement in the context of preliminary approval, courts make a preliminary determination regarding the fairness, reasonableness, and adequacy of settlement terms prior to allowing notice to be sent to the potential class. In making this preliminary determination, "[w]here the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted." *In re Initial Pub. Offering Sec. Litig.*, 243 F.R.D. 79, 87 (S.D.N.Y. 2007) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)); *see also Cohen v. J.P. Morgan Chase & Co.*, 262 F.R.D. 153, 157 (E.D.N.Y. 2009). The Court should "review the negotiating process that produced the [proposed] settlement to ensure: (1) that the settlement was the product of arm's-length negotiations; and (2) that class counsel "'possessed the experience and ability, and . . . engaged in the discovery, necessary to effective[ly] represent[] . . . . the class's interests.'" *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 368-69 (S.D.N.Y. 2005) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)).

The terms of the proposed Settlement are plainly "within the range of possible approval." *Initial Pub. Offering*, 243 F.R.D. at 87. Defendant had contemplated and made plans for raising the base subscription price by $2 upon expiration, on July 28, 2011, of the three-year cap on any increases to Sirius XM's base subscription rates that was imposed on Sirius XM by the FCC Order allowing the license transfers needed for completion of the merger that formed Sirius XM.

Defendant estimates that the value to the Class of not implementing this rate increases between the period of August 1, 2011 through December 31, 2011 is at least $180 million.

In addition, the settlement allows former subscribers who are in the class to reconnect their radios and to obtain one free month of basic service. Inasmuch as the reconnection fee is normally $15 and a month of service would cost $12.95, the value of this benefit is over $27 per former subscriber who takes advantage of it. While it is not known (or knowable) how many will take advantage of this offer, there are approximately 4 million former subscribers in the Class. If only 25% of them were to take advantage of this aspect of the settlement, the additional value would be over $25 million.

Although Plaintiffs and Class Counsel believe that the claims asserted in the Action are meritorious and that the Class would ultimately prevail at trial, continued litigation posed significant risks, including (i) the risk that Sirius XM would prevail at trial or on appeal, and (ii) risks related to establishing and calculating the amount of damages suffered by the Class. The substantial benefits of the Settlement to the Class, when viewed in the context of these risks and the uncertainties involved with any litigation, make the Settlement extremely beneficial to the Class.

The Settlement was negotiated at arm's-length, by counsel who are experienced in complex antitrust litigation and who were acting in an informed manner. The Action was actively prosecuted against Sirius XM for over 18 months and settled on the verge of trial. Class Counsel conducted substantial discovery during this time – including inspection of millions of pages of documents, fact depositions, exchange of expert reports, and expert depositions – and also exchanged motions in limine. Accordingly, Class Counsel are well-informed as to the operative facts and potential risks of the Action. Under these circumstances, a presumption of

fairness attaches to the proposed settlement. *See Wal-Mart*, 396 F.3d at 116 (A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.42 (1995)); *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-cv-8144 (CM), 2009 WL 5178546, at *4 (S.D.N.Y. Dec. 23, 2009) (same).

For all of these reasons, the Court should preliminarily approve the Settlement.

II. THE NOTICES AND THE NOTICE PLAN SHOULD BE APPROVED

A. THE RELEVANT LEGAL STANDARD REGARDING NOTICE

Plaintiffs have fashioned the Proposed Notice Plan to provide notice of the pendency of this action in a manner consistent with constitutional due process and the requirements of Fed. R. Civ. P. 23(c). Rule 23(c)(2)(B) states that "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *See Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). "[D]ue process does not require actual notice, but rather a good faith effort to provide actual notice." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997) (citing *In re Cherry's Petition to Intervene*, 164 F.R.D. 630, 636 (E.D. Mich. 1996)). *See also In re Sony SXRD Rear Projection Television Class Action Litig.*, No. 06-cv-5173(RPP), 2008 WL 1956267, at *4 (S.D.N.Y. May 1, 2008) (ordering notice by e-mail where available, by direct mail where e-mails bounced back, by newspaper publication, and also on a settlement website).

B. THE METHODS OF NOTIFYING THE CLASS

As explained in the accompanying Declaration of Shannon Wheatman, the Proposed Notice Plan consists of multiple components: (1) an e-mail notice to be e-mailed to all Class Members with e-mail addresses;(2) summary notice to be sent via postcard to those Class

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- SIRIUS XM RADIO INC., Defendant.	No. 09-cv-10035 (HB)(RLE)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT

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Class Counsel

settlement is the product of "arm's length negotiations conducted by experienced counsel after adequate discovery," the settlement enjoys a strong presumption of fairness.[8] The settlement of disputed claims, particularly in complex class actions, is favored by public policy and strongly encouraged by the courts in this Circuit.[9]

A. APPLICATION OF THE *GRINNELL* FACTORS SUPPORTS APPROVAL OF THE SETTLEMENT

The standards governing approval of class action settlements in this Circuit are set forth in *City of Detroit v. Grinnell Corp.*:

> (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted), *abrogated on other grounds, Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also Wal-Mart*, 396 F.3d at 117; *Marsh & McLennan*, 2009 WL 5178546, at *4. "In finding that a settlement is fair, not every factor must weigh in favor of settlement, rather the court should consider the totality of these factors in light of the particular circumstances."[10] In deciding whether to approve a settlement, a court "should not attempt to approximate a litigated determination of the merits of the case lest the process of

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[8] *Marsh & McLennan*, 2009 WL 5178546, at *8; *see also In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 0165 (CM), 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007).

[9] *See Wal-Mart,* 396 F.3d at 116 ("We are mindful of the 'strong judicial policy in favor of settlements, particularly in the class action context.'") (citation omitted); *In re WorldCom, Inc. Sec. Litig.,* 388 F. Supp. 2d 319, 337 (S.D.N.Y. 2005) ("public policy favors settlement, especially in the case of class actions"); *In re Prudential Sec. Inc. Ltd. P'ships Litig.,* 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

[10] *Marsh & McLennan*, 2009 WL 5178546, at *4 (internal quotations and citation omitted); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (same).

substantial delays in recovery for the class. In contrast, the Settlement avoids the costs and uncertainty of continued litigation and provides immediate and significant benefit with an estimated value of at least $180 million for the Class.

2. The Class's Reaction To The Settlement

The reaction of the class to a proposed settlement is a factor in considering its adequacy.[14]

As discussed in Point II below, the Notice Administrator provided notice to the Class as directed by the Court's Preliminary Approval Order. Out of a class of approximately 15.7 million current and former Sirius XM subscribers, to date Class Counsel have received only 49 objections to the Settlement. The objectors represent less than 0.001% of the Class. There have also been 1,093 requests for exclusion, which amounts to only 0.007% of the Class. Thus, the overwhelming majority of the Class have neither objected nor opted out, which weighs in favor of approval. *See Thompson v. Metropolitan Life Ins. Co*., 216 F.R.D. 55, 62 (S.D.N.Y. 2003) (Baer, J.), where this Court stressed that the fact that objections were filed by under .05% of all class members supported approval of the settlement. *See also Dewey v. Volkswagen of Am*., 728 F. Supp. 2d 546, 563, 574 (D.N.J. 2010) (characterizing 203 objections (and 1,119 opt outs) in a class of 5 million as a "small number of objections … [that] may be indicative of endorsement"); *In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prods. Liab. Litig.*, No. 09-MD-2102, 2010 WL 3422722, at *6 (S.D.N.Y. Aug. 24, 2010) (83 opt-outs and 20 objections in class over 350,000 found to "constitute a miniscule percentage," weighing in favor of approval); *In re Western Union Money Transfer Litig.*, No. 01-cv-0335, 2004 WL 3709932, at *7 (E.D.N.Y Nov. 28, 2005) (small number of objectors favors approval, with 38 objections out

[14] *See ML Tyco*, 249 F.R.D. at 134; *Strougo ex rel. Brazilian Equity Fund v. Bassini,* 258 F. Supp. 2d 254, 258 (S.D.N.Y. 2003); *Maley v. Del Global Techs. Corp*., 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

was obtained before Class Counsel signed the Settlement Agreement. "Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05-cv-10240, 2007 WL 2230177, at *4 (S.D.N.Y. July 24, 2007).

Moreover, Class Counsel, who have extensive experience prosecuting complex class actions (including antitrust class actions) and were thoroughly informed about the strengths and weaknesses of the Class's claims when the agreement to settle was reached, believe that the Settlement is fair, reasonable and adequate, and in the best interests of the Class. Sabella Decl. ¶ 2. Experienced and informed counsel's endorsement of a proposed settlement is entitled to "great weight." *PaineWebber*, 171 F.R.D. at 125; *see also Veeco,* 2007 WL 4115809, at *12; *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d at 418, 430 (S.D.N.Y. 2001).

In sum, an analysis of all the factors to be considered under *Grinnell* demonstrates that the Settlement is fair, reasonable and adequate and warrants approval by the Court.

C. THE OBJECTIONS TO THE SETTLEMENT SUBMITTED BY CLASS MEMBERS SHOULD BE OVERRULED[26]

The objectors to the settlement fall into four general categories: (1) those objecting because they view the relief as being too little; (2) those objecting because they view the lawsuit as without merit and therefore view the relief as too much; (3) those complaining about business practices of Sirius XM that were not at issue in the case; and (4) those objecting to Plaintiffs' counsel's request for an award of attorneys' fees and expenses of up to $13 million. None of these objections provides a basis to reject the Settlement.[27]

[26] For the Court's convenience, a chart listing each objection received through July 14, 2011 is attached hereto as Exhibit A. Copies of the objections are attached to the Declaration of Shelly Friedland.

[27] The deadline for objections has not yet passed. After the deadline, Plaintiffs will file additional papers responding to additional objections, if any, that are received.

1. Objectors Asserting That The Relief Is Inadequate

The Class members who object because they view the relief as inadequate raise a variety of complaints with the terms of the Settlement. Some object because they believe they should receive a refund or cash payment. Others suggest that the Court impose different or additional terms. Still others suggest that Plaintiffs should have proceeded to trial.

Objectors who argue that Plaintiffs should have continued to litigate and taken the case to trial fail to appreciate the considerable risks and uncertainties that existed in this case, detailed above, which made it far from certain that any recovery, let alone the substantial Settlement, would be achieved. These "objectors wrongly assume [Sirius XM's] guilt would be proven at trial. Such assumption cannot stand as a proper basis to evaluate the proposed settlement's fairness." *Thompson*, 216 F.R.D. at 66.[28] Considering the challenges Plaintiffs would have faced at trial, and the fact that the Settlement does provide concrete value of at least $180 million, it is fair, reasonable, and adequate. *See Excess Value*, 2004 WL 1724980, at *13 (although value of vouchers offered in settlement was uncertain, court did find that settlement provided value to class and was therefore fair, reasonable and adequate, in light of plaintiffs' difficult odds of winning).

Many of the objectors who contend the relief is inadequate focus on the Royalty Fee, as that is the item that impacts the most people. Such objections overlook that all of the consumer protection and breach of contract claims, which Class Counsel believed were the strongest claims with respect to the Royalty Fee, were dismissed on the pretrial motions. The only claim left – the antitrust claim – was much weaker with respect to the Royalty Fee, both because of the above-discussed difficulties of prevailing on the merits and also because issues such as whether

[28] *See also Lloyd's*, 2002 WL 31663577, at *19 (objections based on "the hope that recovery . . . would recoup all the market losses . . . improperly assume that Plaintiffs' alleged losses and damages have already been proven").

the Royalty Fee was deceptive or whether it was calculated as represented were less relevant with respect to the antitrust claim. *See* pp.9-10 *supra*.

Objectors who argue that the Court should impose different settlement terms that would – in their view – fully redress the alleged harms fail to recognize that the Court's role is to approve (or reject) the Settlement negotiated by the parties consistent with the standards of Rule 23, not to impose different terms. As this Court stated in *Thompson*, 216 F.R.D. at 65:

> Contrary to the objectors' expectations, the settlement "is not a wish-list of class members that the Defendant[] must fulfill." *Bowling v. Pfizer, Inc*., 143 F.R.D. 141, 169 (S.D. Ohio 1992). These and other objectors fail to understand that the form and amounts of benefit provided were arrived at as a result of hard-fought negotiations between experienced class action attorneys.

For example, some objectors say they would have preferred cash to the price freeze. "[T]he fact that some objectors would have preferred cash cannot be determinative of the issue whether the settlement before the court is reasonable." *In re Cuisinart Food Processor Antitrust Litig.,* M.D.L. 447, 1983 WL 153, at *7 (D. Conn. Oct. 24, 1983) (Cabranes, D.J.).[29] Class Counsel tried to obtain a settlement that would have provided refunds or credits to Class members, but Defendant was unwilling to consider any settlement that would have required an outlay of cash to Class members. *See* Sabella Decl. ¶ 51. Had Class Counsel insisted on a cash recovery for all Class members, no settlement at all would have been possible. *See Myers v. Medquist, Inc.*, No. 05-cv-4608, 2009 WL 900787, at *12 (D.N.J. Mar. 31, 2009) ("[T]he Court notes that . . . Plaintiffs were unable to prevail upon [the defendant] to consent to a settlement that provided for direct payments to class members, and that no settlement could have been

[29] *See also Chakejian v. Equifax Info. Servs., LLC*, No. 07-cv-2211, 2011 WL 2411109, at *11 (E.D. Pa. June 15, 2011) (approving settlement providing free credit monitoring service for several months, where services valued at over 30% of maximum possible recovery); *Sony Corp. SXRD Rear Projection*, 2010 WL 3422722, at *7 (approving settlement comprised of warranty extensions, product replacements, and refunds); *Lloyd's*, 2002 WL 31663577, at *16 (collecting cases where courts have approved settlements with non-cash consideration).

reached if Plaintiffs insisted upon such terms."); *Schneider v. Citibank Mortgage, Inc.*, 324 F. Supp. 2d 372, 377-78 (E.D.N.Y. 2004) (approving voucher settlement where defendants rejected demand for cash settlement and alternative was likely no relief at all). Recognizing the risks of proceeding to trial, Class Counsel viewed the Settlement that was achievable as preferable to running the risk of zero recovery. Additionally, they believed that even if Sirius XM had agreed to some cash settlement, any such settlement would have been far less valuable than the agreed-upon price freeze for the present subscribers, valued at approximately $180 million (as well as the additional value to the former subscribers). *See In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1018-19 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001) ("a well-designed coupon settlement can provide class members with more value than a cash settlement because the defendant is likely to be much more generous in its coupon offer.").

Moreover, on a per subscriber basis, any cash recovery would have been minimal for most subscribers. With over 15 million Class members, a $180 million cash settlement would have meant that, on average, each Class member would have received $12, and many would have received far less if they were not subscribers for the entire Class period – amounts that would have scarcely been worth the administrative cost of issuing checks or processing credit-card refunds (and which many Class members likely would not have even sought to claim). *See New York v. Nintendo of Am. Inc.*, 775 F. Supp. 676, 681 (S.D.N.Y. 1991) (in assessing adequacy of settlement comprised primarily of $5.00 coupons, court noted that "[t]he coupons, while not an ideal form of compensation, are adequate. . . . [T]he cost of a check reimbursement scheme would approach $5.00 per check"). Class Counsel therefore determined that the structure of this Settlement was more likely to provide substantial value to the Class. For example, Class members who pay on a monthly or quarterly basis will automatically benefit

from the Settlement. As Plaintiffs' expert has estimated, the value to these Class members alone is approximately $162 million. *See* Langenfeld Decl. ¶ 5; *Excess Value*, 2004 WL 1724980, at *14 (noting that vouchers would be automatically provided to the vast majority of class members with accounts with defendant UPS, 2.3 million of 2.6 million class members).

Additionally, as indicated in the accompanying Declaration of Catherine Brooker, submitted by Sirius XM, the cost of the price concessions for SXM is not merely theoretical. The Settlement will cost Sirius XM approximately $180 million in foregone income. *See Cuisinart Food Processor Antitrust Litig.,* 1983 WL 153, at *7 (noting that defense counsel confirmed that coupons provided pursuant to settlement "would result in an actual loss") (internal quotation omitted).

Ultimately, after extensive negotiations, Class Counsel concluded that it was not possible to negotiate better settlement terms, and that the alternative to the proposed Settlement was no settlement at all. In the judgment of Class Counsel, for the reasons set forth herein, the proposed Settlement was the preferable choice. Nothing said in any of the objections should persuade the Court otherwise.

2. Objectors Asserting That The Relief Is Excessive Because The Lawsuit Is Without Merit

Objections that the lawsuit lacks merit and that the Settlement should therefore be rejected because it harms Sirius XM are irrelevant to the Court's consideration of the Settlement. "[T]he court's role under Rule 23 is not to protect defendant's shareholders or its future customers; defendants' interests are protected by its counsel. Rather, the court's role is to ensure that absent class members are treated fairly." *Schneider*, 324 F. Supp. 2d at 372.[30] Sirius XM

[30] *See also Dewey*, 728 F. Supp. 2d at 576 ("The Court's obligation when evaluating a class settlement is not to protect the defendants … who are in a position to protect their own interests during negotiations"); *Dupler v. Costco* *(Cont'd)*

was represented in the settlement negotiations by experienced in-house and outside counsel. The concern expressed by these objectors is more properly addressed to Sirius XM, and not to the Court reviewing whether the Settlement is fair to the Class. In any event, the fact that the antitrust claim survived summary judgment and was certified for class action treatment is sufficient to show that these objections lack merit.

3. Objections Based On Conduct By Sirius XM That Was Not At Issue In This Case

Several objections relate to alleged improper business practices by Sirius XM that were not at issue in this case. For example, some objectors complain that Sirius XM's customer service makes it very difficult to cancel one's subscription. The fact that the Settlement does not provide relief for practices not at issue in the case is no basis for rejecting the Settlement.

The objection by Joel Broida complains that he is the plaintiff in a case against Sirius XM in the federal court in California, styled *Broida v. Sirius XM Radio, Inc*., No. 11-cv-1219 LAB RBB (S.D. Cal.), which alleges that Sirius XM has engaged in false advertising by offering subscribers to its Family Friendly plan five free months and then not providing those free months. The complaint further alleges that Sirius XM has charged taxes on internet access in violation of the Internet Tax Fairness Act. Mr. Broida's objection to the Settlement at bar is that he asserts that the release in this case would extinguish the claims he is asserting in his case. The release in the Settlement Agreement is supported by Second Circuit authority, however. *See Wal-Mart Stores, Inc.*, 396 F.3d at 107-08 (and cases cited therein). And here, consistent with that authority, the release only bars all claims "arising out of, based on or relating to the merger

Wholesale Corp., 705 F. Supp. 2d 231, 248 (E.D.N.Y. 2010) (dismissing as irrelevant objections to class action settlements in general and to the litigation itself).

that formed Sirius XM Radio Inc." Settlement Agreement ¶ 8(a).[31] In any event, although it is for a future court to decide in the context of a specific claim and defense to it presented to that court, the claims in Mr. Broida's California case would not appear to be ones "arising out of, based on or relating to the merger" and hence they would not appear to be released.

4. Objections To The Attorneys' Fee/Expense Award

With respect to the objections to the requested award of fees and expenses, Plaintiffs refer the Court to Class Counsel's memorandum of law in support of their motion for an award of attorneys' fees, for a detailed discussion of the justification of the fee requested.

II. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Settlement Class satisfied the requirements of Rule 23(c)(2)(B), which requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice also satisfied Rule 23(e)(1), which requires that notice "fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart*, 396 F.3d at 114 (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

Both the substance of the Notice and the method of its dissemination to Class Members satisfied these standards. The Notice, which the Court approved in its Preliminary Approval Order, included all the information required by Federal Rule of Civil Procedure 23(c)(2)(B) including: (a) an explanation of the nature of the Action and the Class's claims; (b) a definition

[31] The named plaintiffs' release is broader, extending to "any claim arising out of, based on, or related to all conduct alleged or that could have been alleged in the" complaint. Settlement Agreement ¶ 8(a).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- SIRIUS XM RADIO INC., Defendant.	No. 09-cv-10035 (HB)(RLE)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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Class Counsel

- Extensive factual and legal research to enable the drafting of the original complaints, the First Amended Complaint and the Second Amended Complaint
- The review by Plaintiffs' counsel of 1.3 million documents produced by Sirius XM and non-parties
- 18 fact depositions
- 6 expert depositions
- Preparation of numerous submissions to Magistrate Judge Ellis concerning discovery disputes, and argument thereon before Judge Ellis
- Briefing of Defendant's motion to dismiss
- Briefing and oral argument of Plaintiffs' motion for class certification
- Briefing and oral argument of Defendant's motion for summary judgment
- Exchange of motions in limine
- Preparation of the exhibit list, witness list, deposition designations, proposed stipulations of fact and law, opening statement, and other trial documents

After intensive and protracted settlement discussions, the Settlement Agreement was entered into on May 12, 2011.

ARGUMENT

I. THE REQUEST FOR ATTORNEYS' FEES SHOULD BE APPROVED

The undersigned submit that an award of $13 million for attorneys' fees and expenses, to be paid directly by Sirius XM and not out of money that would otherwise go to the Class, is fair and reasonable in this action.

While this case does not involve a common fund created for the benefit of the Class, the standards used in common fund cases to determine whether attorneys' fees are reasonable are nonetheless instructive. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 243-45 (E.D.N.Y. 2010). In common fund cases, courts traditionally have used two methods to evaluate the reasonableness of fee requests: (1) the percentage method, which awards attorneys' fees as a percentage of the benefit created for the class; and (2) the lodestar approach, which involves multiplying the number of hours expended by counsel by the hourly rate normally charged for

similar work by attorneys of comparable skill and experience and then enhancing the resulting lodestar figure by an appropriate multiplier to reflect litigation risk, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors. *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999). The Second Circuit has held that district courts may use either the percentage method or the lodestar method, although the trend is toward the percentage method. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see also In re Bisys Sec. Litig.*, No. 04-cv-3840, 2007 WL 2049726, at *2 (S.D.N.Y. July 16, 2007).[1] Even when not used as the primary means to determine an appropriate fee, "[t]he lodestar method remains highly useful … as a 'cross-check' to further ensure reasonableness." *Bisys*, 2007 WL 2049726, at *2; *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000).[2]

Regardless of whether a court applies the percentage method or the lodestar method, its ultimate task is to ensure that the fees awarded are "reasonable" under the circumstances. *Goldberger*, 209 F.3d at 47. The determination of "reasonableness" is within the Court's discretion. *Goldberger*, 209 F.3d at 47; *WorldCom*, 388 F. Supp. 2d at 355. The Second Circuit has instructed that, in the exercise of such discretion:

> [D]istrict courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ... ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations."

Goldberger, 209 F.3d at 50 (citation omitted).

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[1] Additionally , "the percentage approach most closely approximates the manner in which private litigants compensate their attorneys in the marketplace contingency fee model." *In re Lloyd's Am. Trust Fund Litig.*, No. 96-cv-1262, 2002 WL 31663577, at *26 (S.D.N.Y. Nov. 26, 2002).

[2] "Where the lodestar fee is used as 'a mere cross-check' to the percentage method of determining reasonable attorneys' fees, 'the hours documented by counsel need not be exhaustively scrutinized by the district court.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005) (quoting *Goldberger*, 209 F.3d at 50).

Moreover, the Second Circuit has recognized that "market rates, where available, are the ideal proxy for [class counsel's] compensation." *Id.* at 52. Thus, the court should "approximate the reasonable fee that a competitive market would bear." *Johnson v. City of New York*, No. 08-cv-3673, 2010 WL 5818290, at *4 (E.D.N.Y. Dec. 13, 2010) (citing *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010); *see also McDaniel,* 595 F.3d at 422 (district court's focus should be "on mimicking a market"); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825, 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (court's "primary goal when awarding fees is to approximate the prevailing market rate for counsel's services").

Further, where, as here, Defendant is paying the attorneys' fees directly, "'money paid to the attorneys is entirely independent of money awarded to the class, [and] the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members.'" *Dupler*, 705 F. Supp. 2d at 243 (quoting *McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006)). Indeed, if the Court were to deny the requested award for fees and expenses, in whole or in part, none of the $13 million that SXM has agreed to pay Plaintiffs' counsel would be paid to the Class. The money would just revert to Sirius XM. Thus, barring Plaintiffs' counsel from receiving the requested attorneys' fees would simply benefit Sirius XM, without any offsetting gain to the Class. Here as in *Schneider v. Citicorp Mortgage, Inc.*, 324 F. Supp. 2d 372, 379 (E.D.N.Y. 2004), "denial of fees earned by plaintiffs' counsel . . . would accrue only to the benefit of defendants."

Additionally, Plaintiffs' counsel's fee was agreed to only after the parties agreed upon the terms of the Settlement, further minimizing the risk of a conflict between the interests of the attorneys and those of the Class. Sabella Decl. ¶ 55. *See Dupler*, 705 F. Supp. 2d at 243; *Schneider*, 324 F. Supp. 2d at 378 (noting with approval that attorneys' fee and expense amount

were separately negotiated and funded from settlement); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 71 (S.D.N.Y. 2003) (Baer, J.) (fact that fees were negotiated separately from settlement weighed in favor of approval).[3]

For the reasons set forth below, Plaintiffs' counsel submit that the requested award of fees and expenses is reasonable under both the percentage and lodestar methods, and when viewed in light of the *Goldberger* factors.

A. THE REQUEST IS REASONABLE UNDER THE PERCENTAGE METHOD

The requested fees and expenses of $13 million amount to approximately 7% of the approximately $180 million value of the price freeze that is part of the Settlement here.[4] This relatively small percentage supports approval.

Instructive is *Dupler v. Costco Wholesale Corp.*, a recent case where the settlement also did not involve payment of money to the class. There, the plaintiffs challenged the membership renewal practices of Costco, which operates retail warehouse stores where only members can shop. The plaintiffs alleged that Costo's practice of backdating members' renewals, which effectively shortened the term of the renewed membership, violated the terms of the customer agreements, was a deceptive trade practice in violation of New York General Business Law § 349, and resulted in Costo's unjust enrichment. *Dupler*, 705 F. Supp. 2d at 235. Under the terms of the settlement, class members would receive additional months of Costco membership at no charge. This settlement did not provide class members with monetary relief but did provide economic value, estimated at approximately $38.8 million. *Id.* at 241. The attorneys

[3] *See also In re Tyson Foods Inc.*, No. 08-cv-1982, 2010 WL 1924012, at *4 (D. Md. May 11, 2010) (same)

[4] The $180 million estimated value does not include a component for former subscribers who will take advantage of the offer of a free month's service. There are approximately 6 million former subscribers in the Class. If only 10% of them were to take advantage of this aspect of the settlement, the additional value would be over $16 million. *See* Langenfeld Decl. ¶ 7.

requested a fee award of $5,380,000, which was to be paid directly by the defendant. The court then evaluated whether the requested fee was appropriate as a percentage of the value of the settlement, *i.e.*, whether the $5,380,000 as a percentage of the settlement worth $38.8 million represented a reasonable fee. The court concluded that a fee that was equivalent to at most 14% of the "direct economic benefit to the class," was comparable to fees awarded as a percentage of a common fund. The fact that it would have been reasonable in a common fund case provided strong support for the conclusion that it was reasonable where the defendant was paying the attorneys directly. *Id.* at 243-44.

Numerous other cases that also did not involve the payment of money to the class support the reasonableness of the fee request here. *See, e.g., In re Sony Corp. SXRD Rear Projection Television Mktg., Sales Practices & Prods. Liab. Litig.*, No. 09-md-2102, 2010 WL 3422722, at *8-9 (S.D.N.Y. Aug. 24, 2010) (where settlement was combination of warranty extensions, product replacements, and refunds, and defendant valued settlement at $7 million, court approved fee equivalent to 8.8% of total value); *McBean*, 233 F.R.D. at 393 (where plaintiffs were prisoners suing regarding strip search policy, each class members would receive fixed dollar amount and attorneys were paid separately, not from common fund, and fees at approximately 18% of total payout to the class were deemed reasonable); *Thompson*, 216 F.R.D. at 71 (where plaintiffs received cash or life insurance benefit, depending on policy purchased, and no common fund was created, court determined that fee equivalent to 15.6% of total estimated value of settlement was reasonable).

Further, in December 2010 Sirius XM reduced the Royalty Fee from $1.98 to $1.40, which Plaintiffs' expert estimates has reduced what subscribers had to pay in this period by approximately $56 million. *See* Langenfeld Decl. ¶ 8. Sirius XM documents created before the

litigation show that the Company planned to reduce the Royalty Fee in or about ***August 2011***. *See* Sabella Decl. ¶ 79. Then, in October 2010, in the midst of a Rule 30(b)(6) deposition addressing the topic, Sirius XM disclosed that it would reduce the Royalty Fee in ***December 2010***. *Id*. Plaintiffs believe that the Court can take this reduction into account in evaluating the fee request.[5] It should be noted, however, that Sirius XM contends that its decision to reduce the Royalty Fee in December 2010 was not influenced in any way by the litigation and does not provide a net benefit to subscribers.

Even without the $56 million factored into the value provided to the Class, Plaintiffs' counsel's request of an award of less than 10% would be well within the range of fees deemed reasonable by courts in this Circuit in common fund cases. *See*, *e.g.*, *Lloyd's Am. Trust Fund*, 2002 WL 31663577, at *26 (awarding fee equivalent to 28% of settlement value and collecting common fund cases with awards of 1/3 or 33%); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, No. 98-cv-4318 (HB), 2001 WL 709262, at *6 (S.D.N.Y. June 22, 2001) (reducing fee from requested 30% to 15% and collecting common fund cases with fees ranging from 4% to 30%). Adding in the $56 million attributable to the reduction in the Royalty Fee, bringing the total value to $236 million, the requested fee would be only 5.5% of the value of the Settlement.[6]

B. THE REQUEST IS REASONABLE UNDER THE LODESTAR METHOD

Application of the lodestar method confirms the reasonableness of Plaintiffs' counsel's request. The lodestar, or the presumptively reasonable fee, is comprised of the number of hours devoted by counsel multiplied by the normal, non-contingent hourly billing rate of counsel.

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

[6] The foregoing does not even take into account the value of the free service former subscribers will obtain.

Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany, 522 F.3d 182, 190 (2d Cir. 2008); *see also In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 985 F. Supp. 410, 414 (S.D.N.Y. 1997). Courts then adjust that lodestar figure (typically by applying a multiplier) to reflect such factors as the risk and contingent nature of the litigation, the results obtained, and the quality of the attorneys' work. *See*, *e.g.*, *Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167-69 (3d Cir. 1973).

Plaintiffs' counsel collectively expended more than 37,000 hours of professional time on the prosecution of this litigation (excluding time spent on the instant fee and expense application) on a fully contingent fee basis. *See* Sabella Decl. ¶ 80.[7] Plaintiffs' counsel's total lodestar, derived by multiplying these hours by each firm's current hourly rates[8] for its attorneys, paralegals, and other professional staff, amounts to $17,476,859.50. *See* Sabella Decl. ¶ 80. Deducting from the requested $13,000,000 the $3,231,244.24 in out-of-pocket expenses that Plaintiffs' counsel has incurred leaves a fee award of $9,768,755.76, which amounts to only 56% of the lodestar. Given that courts frequently award fees equal to a *multiple* of class counsel's lodestar in complex class actions,[9] a fee representing such a large *discount* to counsel's lodestar

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[7] The calculation of the lodestar excludes time spent by Plaintiffs' counsel in preparing a response to Sirius XM's motion to dismiss the First Amended Complaint. When the Court granted Plaintiffs leave to file their Second Amended Complaint, which mooted that motion to dismiss, the Court stated, with respect to Plaintiffs' brief in opposition to that motion to dismiss: "I will not read this unnecessary expensive piece of scholarship and hopefully you won't bill for it." Plaintiffs' counsel has heeded that instruction and excluded all time spent on that brief.

[8] The Supreme Court and Second Circuit have both approved the use of current rates, rather than historic rates, in *the* lodestar calculation. *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *Gierlinger v. Gleason*, 160 F.3d 858, 882 (2d Cir. 1998); *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir. 1998). Using current rates helps "compensate for the delay in receiving compensation, inflationary losses, and the loss of interest." *In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 724 F. Supp. 160, 163 (S.D.N.Y. 1989) (citation omitted).

[9] *See*, *e.g.*, *Wal-Mart Stores*, 396 F.3d at 123 (multiplier of 3.5 times lodestar of $62,940,045.84 held reasonable); *Bisys*, 2007 WL 2049726, at *3 ("The reasonableness of the 30% [fee] is also confirmed by the resultant lodestar multiplier of 2.99 …. Such a multiplier falls well within the parameters set in this district and elsewhere.") (citations omitted); *Comverse Tech.*, 2010 WL 2653354, at *5 (awarding 2.78 times lodestar, noting that "[w]here … counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar"); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03-md-1529, 2006 WL 3378705, at **2-3 (S.D.N.Y. Nov. 16, 2009), *aff'd*, 272 Fed. Appx. 9 (2d Cir. 2008) (multiplier of 2.89 times lodestar of $33,686,468); *(Cont'd)*

is clearly reasonable. *See, e.g., In re Marsh ERISA Litig.*, 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (fact that counsel sought only 87.6% of their lodestar "strongly suggests that the requested fee is reasonable"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400, 2010 WL 4537550, at *26 (S.D.N.Y. Nov. 8, 2010) (fact that requested fee was less than lodestar was indication of reasonableness); *Sony*, 2010 WL 3422722, at *9 (same); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04-cv-8144, 2009 WL 5178546, at *20 (S.D.N.Y. Dec. 23, 2009) (approving fees where "not only are Lead Counsel not receiving a premium on their lodestar, their fee request amounts to a deep discount from their lodestar"); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 515 (S.D.N.Y. 2009) (there is "no real danger of overcompensation" where fractional multiplier is sought).[10]

Lest there be any question about the reasonableness of the hourly rates used in calculating Plaintiffs' counsel's lodestar, pursuant to the "forum rule" reasonable hourly rates are those normally charged for similar work by attorneys of comparable skill and experience in the district where the court sits. *Simmons v. N.Y. City Transit Auth.*, 575 F.3d 170, 175-76 (2d Cir. 2009); *Arbor Hill*, 522 F.3d at 190-91; *Olsen v. County of Nassau*, No. 05-cv-3623, 2010 WL 376642, at *3 (E.D.N.Y. Jan. 26, 2010). Plaintiffs' counsel's hourly rates range from $250 to $795 for attorneys. *See* Sabella Decl. ¶ 80. These rates are in line with those charged by firms practicing

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WorldCom, 388 F. Supp. 2d at 354 (awarding multiplier of 4 times lodestar of $83,183,238.70); *In re Remeron Direct Purchaser Antitrust Litig.*, No. 03-cv-0085, 2005 WL 3008808, at *17 (D.N.J. Nov. 9, 2005) (collecting cases, noting that multiplier of 1.8 is on the "low end of the spectrum"); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (awarding multiplier of 3.97 times lodestar of $36,191,751, noting that multipliers between 3 and 4.5 are common).

[10] *See also In re Insurance Brokerage Antitrust Litig.*, 579 F.3d 241, 284-85 (3d Cir. 2009) (lodestar cross-check confirmed reasonableness of fee request, where requested fee was "only a fraction of the work that they billed"); *Louisiana Mun. Police Employees Ret. Sys. v. Sealed Air Corp.*, No. 03-cv-4372, 2009 WL 4730185, at *9 (D.N.J. Dec. 4, 2009) (lodestar cross-check supported reasonableness of fee when lodestar "multiplier" was less than one); *In re Portal Software, Inc. Sec. Litig.*, No. 03-cv-5138, 2007 WL 4171201, at *16 (N.D. Cal. Nov. 26, 2007) (noting that "multipliers are frequently greater than one and often on the order of two to four," and finding that a "negative" multiplier of 0.83 "suggests that the percentage-based amount is reasonable and fair").

in New York City on both sides of the caption in complex class actions, and with the hourly rates that have been applied under the lodestar method in other recent cases. *See, e.g.*, *National Law Journal* samplings of law firm billing rates in 2008, 2009 and 2010 (listing a number of law firms in New York City and other major metropolitan areas with billing rates comparable to Plaintiffs' counsel's), Sabella Decl. ¶ 81;[11] *Castagna v. Madison Square Garden*, No. 09-cv-10211, 2011 WL 2208614, at *10 (S.D.N.Y. June 7, 2011) (fees were reasonable under a lodestar analysis where the hourly rates ranged from $250 to $600); *Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd.*, No. 10-cv-1853, 2011 WL 1002439, at *6 (S.D.N.Y. Mar. 16, 2011) (finding hourly rates reasonable and approving award where hourly rates were: $761 for senior partner; $616 for partner; $392 for an associate; and $312 for an associate awaiting admission); *Chin v. RCN Corp.*, No. 08-cv-7349, 2010 WL 3958794, at *5-6 (S.D.N.Y. Sept. 8, 2010) (approving a "blended" hourly rate of approximately $605); *Comverse Tech.*, 2010 WL 2653354, at *4 (hourly rates from $125 to $880 were "not extraordinary for top New York law firms"); *Marsh ERISA Litig.*, 265 F.R.D. at 146 (court was "satisfied that the lodestar [was] reasonable" where the rates ranged from $125 for administrative personnel to $775 for senior lawyers); *Telik,* 576 F. Supp. 2d at 589-90 (noting that hourly rates of $700-$750 for partners and $300-$550 for associates were consistent with the rates charged by the defense bar for similar work, and that comparable rates have been found reasonable by other courts for class action work); *In re Gilat Satellite Networks, Ltd.*, No. 02-cv-1510, 2007 WL 2743675, at *17 (E.D.N.Y. Sept. 18, 2007)

[11] Among the responding New York law firms that are not involved in this litigation are Chadbourne & Parke, with partner rates of $390-$995 and associate rates of $110-$625; Curtis, Mallet-Prevost, Colt & Mosle, with partner rates of $675-$785 and associate rates of $290-$575; Greenberg Traurig, with partner rates of $355-$875 and associate rates of $200-$610; Kelley Drye & Warren, with partner rates of $465-$900 and associate rates of $275-$565; Nixon Peabody, with partner rates of $375-$905 and associate rates of $195-$580; and Schulte Roth & Zabel, with partner rates of $735-$895 and associate rates of $275-$690. As one court has noted, "[p]erhaps the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in . . . class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008).

(attorney rates from $325 to $725 were "not out of line with the rates of major law firms engaged in this type of litigation"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02-md-1484, 2007 WL 313474, at *22 (S.D.N.Y. Feb. 1, 2007) (hourly rates of $650-$850 for partners and $515 for senior associate were "not inordinate for top-caliber New York law firms"); *In re Stock Exchanges Options Trading Antitrust Litig.*, No. 09-cv-962, 2006 WL 3498590 at *10 (S.D.N.Y. Dec. 4, 2006) (finding that rates ranging from $100 to $675 were reasonable).

C. THE REQUEST IS REASONABLE UNDER THE *GOLDBERGER* CRITERIA

As noted above, the Second Circuit has stated that whether the Court uses the percentage method or the lodestar approach, it should continue to consider the following traditional criteria: (1) the time and labor expended by counsel; (2) the risks of the litigation; (3) the magnitude and complexity of the litigation; (4) the requested fee in relation to the settlement; (5) the quality of representation; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50. "In applying these criteria, a Court essentially makes … a qualitative assessment of a fair legal fee under all the circumstances of the case." *Marsh & McLennan*, 2009 WL 5178546, at *15 (citation and internal quotation omitted). An analysis of these factors further demonstrates that Plaintiffs' counsel's fee request is reasonable.

1. The Time And Labor Expended By Counsel

The many hours expended by Plaintiffs' counsel, which resulted in the highly favorable Settlement, are plainly reasonable in view of the work performed in this complex antitrust action. It is generally not possible to segregate time spent only in connection with the antitrust claims against Defendant from time spent on the breach of contract claims that were dismissed or the consumer fraud claims for which summary judgment was granted in Defendant's favor, since so much time – such as time spent reviewing documents and taking depositions – related to all then-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- SIRIUS XM RADIO INC., Defendant.	No. 09-cv-10035 (HB)(RLE)

DECLARATION OF JAMES LANGENFELD IN SUPPORT OF (1) PLAINTIFFS'MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENT AND (2) CLASS COUNSEL'S APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

I, James Langenfeld, declare:

1. I am a Managing Director at Navigant Economics, an economic consulting firm specializing in applied microeconomics, antitrust, intellectual property, labor, and financial analysis. I am also an Adjunct Professor at Loyola University Chicago School of Law. I have been retained as an expert to Class Counsel in this matter and previously submitted reports on class certification and damages in this matter.[1]

2. I have been asked by Counsel for the Class to estimate the benefit to subscribers from the proposed Blessing v. Sirius XM Settlement agreement (the "settlement").[2] In particular, I have been asked to estimate subscriber savings related to Sirius XM's agreement to keep the prices of its subscription plans on both primary radios and multiple radios at or below current price levels through December 31, 2011.

3. It is my understanding that Sirius XM contemplated and made plans to increase its prices on its subscription plans (including both primary radios and multiple radios) by $2 per month once the price restriction imposed by the Federal Communications Commission ("FCC") expires on July 28, 2011. Thus, I estimate subscriber savings from the settlement for the period August 1, 2011 through December 31, 2011 based on the assumption that Sirius XM would have increased its prices by $2 on these subscription plans at the beginning of August "but for" for the proposed settlement agreement. This increase would have affected subscribers who had a scheduled renewal during this period, or who choose to renew early to take advantage of the lower subscription rate during this period. In addition, the music royalty fees (MRFs) are

[1] See Expert Report of Dr. James Langenfeld, July 30, 2010, Supplemental Expert Report of Dr. James Langenfeld, October 29, 2010, Damages Report of Dr. James Langenfeld, December 3, 2010, and Expert Rebuttal Report of Dr. James Langenfeld, January 4, 2011.
[2] Settlement Agreement in Carl Blessing v. Sirius XM Radio Inc., May 13, 2011.

assessed as a percentage of revenue, so the savings to consumers include the lower MRFs in addition to the $2 lower subscription rate.

4. In addition, I have been asked by Counsel for the Class to estimate the subscriber savings from the reduction in the Sirius XM music royalty fee ("MRF") from $1.98 per month to $1.40 per month beginning December 6, 2010 on primary radios, based on the assumption that the Blessing v. Sirius XM litigation led Sirius XM to reduce its MRF earlier than otherwise planned. This analysis is included in the Appendix to the Declaration and Exhibits 6 (a) – 6 (i).

5. As shown in Exhibit 1 to this report, subscriber savings for the settlement agreement are at least $200 million. This estimate takes into consideration five areas of subscriber savings:

- **primary radio subscribers** who save $132 million on their **scheduled renewals**
- **primary radio subscribers** who save $15 million by **renewing early**
- **multiple radio subscribers** who save $30 million on their **scheduled renewals**
- **multiple radio subscribers** who save $3 million by **renewing early**
- **primary and multiple radio subscribers** who save $20 million in **reduced MRF payments**.

6. This $200 million in estimated savings is conservative, because it does not include savings from other parts of the settlement agreement such as: (1) Sirius XM agreeing to not increase internet streaming fees, and (2) Sirius XM agreeing to provide one month of free service and not to charge reactivation fees to former Sirius XM subscribers who reactivate their service and had previously terminated their services between July 29, 2009 and the deadline for requesting exclusion from the Class.

7. In the case of Sirius XM providing one month of free service and no reactivation charge, I estimate that about 6 million self-pay Sirius XM subscribers paid an MRF

and terminated their service between July 29, 2009 and July 31, 2011. Given that each of these subscribers would save as much as $27.95 if they choose to reactive their service under the terms of the settlement agreement (the $15 waived activation fee and the free month of service at $12.95), the savings from the settlement agreement to these returning subscribers could be substantial. For example, assuming that 10% of these former subscribers decide to reactivate their service (i.e., 600,000 subscribers), then these subscribers would save $16.8 million (600,000 X $27.95) under the settlement agreement compared with if they had paid the activation fee and not received the free month of service.

8. I estimate subscriber savings from the settlement agreement using the following methodology:

- **First**, I estimate the number of self-pay Sirius XM subscribers (primary and multiple radio) by payment plan type (e.g., monthly, quarterly, annually, etc.) "but for" the settlement agreement for the period August 1, 2011 through December 31, 2011. I start with the number of self-pay subscribers as of April 30, 2011, and then project forward based on historical subscriber growth rates.[3]
- **Second**, I estimate the number of renewal payments that are likely to be made per self-pay subscriber between August 1, 2011 through December 31, 2011 for each payment plan type. The number of scheduled renewal payments per self-pay subscriber are estimated based on subscribers' scheduled renewal dates. For self-pay subscribers not up for renewal during the last 5 months of 2011, I estimate the number of renewal payments

[3] The number of self-pay subscribers "but for" the settlement agreement is estimated based on subscriber growth rates from April 30, 2010 to April 30, 2011. I use the estimated growth rate during this period to project the number of self-pay subscribers likely to exist as of July 30, 2011. I then assume that the growth rate of subscribers during August 1, 2011 through December 31, 2011 is 0%. For primary radio subscribers, this assumption is based on the notion that subscriber growth rates are likely to decline somewhat compared with historical trends due to the assumed $2 increase in Sirius XM subscription prices as of August 1, 2011 "but for" the settlement agreement. The assumption of 0% growth is consistent with an increase in the Sirius XM self-pay monthly churn rate from 2% to 2.6%. In my opinion, there would likely have been at least some growth in primary radio subscribers in the last five months of 2011 even if there was a $2 increase in the prices of subscription plans. From this perspective, my assumption of 0% subscriber growth leads to a relatively conservative estimate of primary subscriber savings from the settlement agreement. For secondary radio subscribers, the 0% growth rate assumption is consistent with the 0% subscriber growth between April 30, 2010 and April 30, 2011.

by conservatively assuming that 10 percent of self-pay subscribers that are not up for renewal choose to renew early and lock in current subscription prices.

- **Third**, for each plan type, I multiply estimated renewal payments per self-pay subscriber times the estimated number of self-pay subscribers for August 1, 2011 through December 31, 2011. This gives me an estimate of total scheduled renewal payments for each plan type.
- **Fourth**, I estimate the expected savings for each renewal that is likely to occur during August 1, 2011 through December 31, 2011. For example, monthly Sirius XM subscribers are expected to save $2 on each renewal payment. Other subscribers save in a similar fashion, although I adjust longer term plans where subscribers receive a certain number of free months. For example, an annual renewing subscriber pays for a year of service but receives one month free – thus the savings for such annual subscriber who renews during the last five months of 2011 are $22 ($2 X 11 months).
- **Fifth**, for each plan type, I multiply the expected savings for each renewal payment times the total number of expected renewal payments. This generates a savings estimate for each plan type for the period. I then sum together the savings level for each plan type in order to estimate total savings for the period August 1, 2011 through December 31, 2011.
- **Sixth**, I separately estimate savings due to reduced MRFs based on the current MRF rate of 10.8% (e.g., $1.40/$12.95 = 10.8%). I estimated the reduced MRFs by applying the 10.8% to the total estimated subscriber savings from the lower subscription fees.

9. I break out my savings estimates into the five categories described above. Exhibit 2 shows estimated subscriber savings for primary radio subscribers who are up for a scheduled renewal during the last five months of 2011. Estimated savings for this group of subscribers is $132 million for the period August 1, 2011 through December 31, 2011.

10. Exhibit 3 shows estimated subscriber savings for long-term primary radio subscribers who are not up for a scheduled renewal during the last five months of 2011 but who choose to renew early in order to lock in current prices. I conservatively assume that 10 percent of long-term self-pay subscribers who are not up for renewal choose to renew early. Estimated

subscriber savings for the primary radio subscribers who choose to renew early is $15 million for the period August 1, 2011 through December 31, 2011.

11. Exhibit 4 shows estimated subscriber savings for multiple radio subscribers who are up for a scheduled renewal for their secondary radios during the last five months of 2011. Estimated savings for this group of subscribers is $30 million for the period August 1, 2011 through December 31, 2011.

12. Exhibit 5 shows estimated subscriber savings for long-term multiple radio subscribers whose secondary radios are not up for a scheduled renewal during the last five months of 2011 but who choose to renew early in order to lock in current prices. Again, I conservatively assume that 10 percent of these long-term self-pay subscribers who are not up for renewal choose to renew early. Estimated subscriber savings for the multiple radio subscribers who choose to renew their multiple radios early is $3 million for the period August 1, 2011 through December 31, 2011.

13. The note to Exhibit 1 further explains my calculation of the lower MRF payments due to the absence of the $2 subscription price increases, which amounts to approximately $19.5 million.

14. Overall estimated savings from the settlement agreement for all self-pay subscribers is $200 million for the period August 1, 2011 through December 31, 2011. This $200 million estimate of savings is conservative in that it only includes savings related to not increasing primary and multiple radio subscription prices, and does not include other sources of subscriber savings from the settlement such as freezing the rates of internet streaming fees and not charging reactivation fees and giving one month of free service to certain former subscribers who decide to reactivate their service.

James Langenfeld, Ph.D.

July 15, 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- SIRIUS XM RADIO INC.,	:	No. 09-CV-10035 (HB)(RLE)

OBJECTION OF UNNAMED CLASS MEMBER JOHN IRELAND TO CLASS ACTION SETTLEMENT, SETTLEMENT AGREEMENT, AND ATTORNEY FEES AND NOTICE OF INTENT TO APEAR AT FAIRNESS HEARING

Class Member JOHN IRELAND (hereinafter, "Objector"), objects to the proposed class action settlement and Motion for Fees in *Blessing v. Sirius XM Radio, Inc.*, case number 09-cv-10035 HB, and gives notice of his intent to appear at the Final Fairness Hearing at 10:00 a.m. on August 8, 2011, in Courtroom 23B at the United States Courthouse for the Southern District of New York, 500 Pearl Street, New York, New York 10007-1312.

PROOF OF MEMBERSHIP IN THE CLASS

I was a subscriber to Sirius XM radio between July 29, 2008 and July 5, 2011. For privacy purposes, my address and telephone number will not be listed here. Upon request, I will submit my personal information to the Court and Counsel.

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denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975), quoted in City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1099 (2d Cir.1977) ("Grinnell II").

The instant settlement cannot be approved without this Court's detailed review of the terms to determine whether it satisfies Rule 23(e). From a review of the documents filed in this case, it is not clear that either this settlement or the requested fee amount are fair, reasonable, or adequate.

B. <u>The Settlement Must Be Fair, Reasonable and Adequate</u>

a. This Settlement is a Coupon settlement and the Relief is Nebulous.

The Class Action Fairness Act ("CAFA") denotes specific requirements with respect to approval of coupon settlements. The statute requires that before a district court may approve a "coupon settlement," it must "determine whether, and mak[e] a written finding that, the settlement is fair, reasonable, and adequate for class members." 28 U.S.C. § 1712(e). Although the "fair, reasonable, and adequate" language used in section 1712(e) is identical to the language relating to settlement approval contained in Rule 23(e)(2), several courts have read § 1712(e) as imposing a heightened level of scrutiny in reviewing such settlements. See, e.g., *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); Pub.L. 109–2 § 2(a)(3)(A) 119 Stat . 4 (February 18, 2005.); *Silberblatt v. Morgan Stanley*, 524 F.Supp.2d 425, 432 (S.D.N.Y., 2007.) (Stating, although "an item of non-monetary consideration may not fall within the statute's use of the term "coupon" does not make it any less worthy of close judicial scrutiny.")

Courts have primarily articulated three concerns with "coupon settlements": "they often do not provide meaningful compensation to class members; they often fail to

disgorge ill-gotten gains from the defendant; and they often require class members to do future business with the defendant in order to receive compensation." *Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1302 (S.D. Fla. 2007.), citing Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 GEO. J. LEGAL ETHICS 1395, 1396-97 (2005)). This settlement suffers from all three of these issues.

First, this Class Action settlement provides no monetary relief to Class Members. Class Members do not receive a compensatory check for Defendant's alleged antitrust transgressions. They only receive "discounts" from Defendant, which come only with continued patronage to Defendant's satellite radio services. **Second**, although this Objector cannot hope to opine on the guilt or innocence of Defendant with respect to the claims against him, this settlement will certainly not disgorge any profits from Defendant, ill-gotten or otherwise. Contrarily, Defendant stands to gain business from this Settlement while releasing potentially valuable claims that Plaintiffs may have against it regarding its 2008 merger. **Third**, the relief available to Class Members is only retrievable with renewed or continued subscriptions to Sirius XM radio.

This is, de facto, a coupon settlement and requires heightened scrutiny by this Court regarding its fairness and the fairness of the fees requested in conjunction with it.

b. The Court must rely on credible evidence to support its findings, not on the opinion of Plaintiff's self-serving expert report.

Nothing can sway the District Court's independent analysis as the fiduciary of the class in its fairness determination of the settlement and fee request. *Maywalt v. Parker & Parsley Petroleum Co.* 67 F.3d 1072 (2nd Cir 1995), citing *Walsh v. Great Atlantic & Pacific Tea Co.,* 726 F.2d 956, 964 (3d Cir. 1983). Although expert reports, like the one

at issue here, can often be helpful to the Court in understanding complicated issues, the expert is compensated by Plaintiffs' and, as such, will naturally provide an analysis certain to be favorable to Lead Counsels' Motion. There is no other expert opinion available here as there would be in a trial to dissect Plaintiff's expert report and opine on its validity. There is no defense expert to provide a different perspective, different variables, or different calculations. As such, the District Court's duty to carefully inspect the settlement terms is all the more heightened in light of this self-serving and biased expert declaration.

The expert opinions of James Langenfield in support of the value and overall reasonableness of the settlement and fee request must be disregarded or, in the alternative, he should be produced at the final approval hearing for examination by the court, parties, and objectors.

i. *The Estimated Future Settlement Value by James Langenfield is Speculative and, in Any Case, Subject to Analysis by the Court, an Opposing Expert and Class Members at the Fairness Hearing.*

Mr. Langenfield's Expert Report purports to analyze the total future value of the reward to which the Class will be entitled. According to his report, the value to the Class of these discounts, which only last through December 31, 2011, is more than $180 Million. Lead Counsels' fee request is based on this hypothetical number. Thus, this Objector reviewed the calculation conducted by Mr. Langenfield and disagrees that the result is certain or even remotely accurate.

Although an exhaustive review of this report will not be detailed here, some of the following peculiarities are worth noting. For example, in order to ascertain the future value of the relief, Mr. Langenfield made some far-reaching assumptions regarding future

subscription rates. (Declaration James Langenfield, "Dec. Langenfield", ¶ 5.) It simply cannot be known how many current customers will continue their service in the future and/or renew their service early in order to take advantage of the Settlement. With respect to renewal rates, Mr. Langenfield made creative postulations regarding the historical growth rate of subscribers in order to predict future patterns of customer behavior. However, he only utilizes data from the previous year, April 2010 through April 2011. (Dec. Langenfield Exhibit 2.) Mr. Langenfield does not make clear how a one-year period is indicative of a pattern among millions of customers; he simply states that it is so. The expert report also makes sweeping estimates, not based on any pattern of activity among Sirius XM's customer base, such as assuming that 10% of customers that were not slated for renewal between August 1, 2011 and December 21, 2011 will renew early. (Dec. Langenfield, Exhibit 3, fn.1.)

Furthermore, although Mr. Langenfield does not include this number in the "aggregate value" of the settlement, he does attribute Defendant's reduction in fees from $1.98 to $1.40 on December 6, 2010 to this litigation; valued at $56 Million. (See Dec. Langenfield, Appendix.) This is improper, and cannot be attributed to Class Counsel's efforts. This was not a part of the Settlement negotiated by the parties. As such it should not be considered in the Court's analysis.

Lead Counsels' attempt to rely on this analysis of the future value of the relief is nebulous at best. Certainly, Lead Counsels' confidence in the value of $180 Million dollars seems misplaced and requires detailed scrutiny by the Court and probably an additional expert. This "relief" is all that the Class will receive in exchange for a release of all Claims arising out the merger of Sirius and XM Radio in 2008. Class Counsel hope

to be paid $14 Million for this "relief." Certainly, this estimate requires more scrutiny than that performed by an employee of Class Counsel.

c. The Settlement Abandons Two Subsets of Deserving Class Members and Presents Questions of Collusion between Class and Defense Counsel.

This Settlement leaves out two groups of Class Members from any relief whatsoever – lifetime subscribers and former Sirius XM subscribers that choose not to sign up for a new subscription. These class members should be just as eligible as other Class Members since they were equally subject to Defendant's presumed unlawful practices and therefore suffered the same amount in damages. It is unclear the reasons for which they were not included but it raises the specter of collusion for the reasons explained below.

Plaintiffs' Second Amended Complaint states that Defendant's anticompetitive behavior resulted in higher rates for all of their customers. (Docket 46.) These allegations were made on behalf of all users of Defendant's services. It can only be assumed from the structure of the Settlement that Defendant refused to offer relief to those Class Members that would not re-commit to using their Satellite radio. In other words, it seems Defendant would not offer actual relief to those individuals from whom they did not stand to gain anything. While it is true those continuing and renewing users of Sirius XM will see a small reduction in their monthly subscription costs for a time, Defendant receives a windfall. This discount has the potential to woo back countless former subscribers and may entice current subscribers to remain customers. It is only those Class Members from whom Defendant will receive nothing monetarily that are left out of the Settlement.

Heightened scrutiny by the Court is necessary when even the slightest potential for collusion between Defendants and Plaintiffs is raised. "In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately." *Maywalt v. Parker & Parsley Petroleum Co.* 67 F.3d at 1078, citing *Walsh* 726 F.2d at 964. The Court should strictly scrutinize the relief that is granted, and withheld, from Class Members as not all equally deserving Class Members were treated equally.

C. <u>The Attorneys' Fee Request Must Be Fair, Reasonable, and Adequate.</u>

a. The Requested Fee is Excessive Given the Uncertain Value of the Settlement.

Although Class Counsel state that their Lodestar far exceeds their requested fee, this, alone, is not proof that their request is reasonable. There is a host of problems with Class Counsel's requested relief. Their fee application is unjustified, unsupported, and excessive given the results in this case. This is apparent upon utilizing the factors espoused within the Second Circuit for analysis of fee awards.

This Circuit utilizes a six-point assessment to determine an appropriate fee in common fund cases: (1) the time and labor expended by counsel; (2) the magnitude and complexity of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger v. Integrated Resources, Inc.* 209 F.3d 43, 50 (2d. Cir. 2000), (Citing *City of Detroit v. Grinnell Corporation* (Grinnell I), 495 F.2d 448, 469 (2d Cir.1974), and *Grinnell II*, 560 F.2d 1093 (2nd Cir.1977). Overlaying the facts of this case with the

foregoing *Goldberger* analysis, the requested amount does not appear to be fair or reasonable.

First, although the time and labor expended by Counsel appears to be significant, at 37,000 hours, there is no proof that this number of hours justifies the result. Spending this many attorney hours on a two-year case appears dramatic and, further, is unsubstantiated. Counsel has submitted no proof that these hours were reasonable or justified, instead only providing an unhelpful one-page summary listing the 37,000 hours spent. (See. Exhibits to James Sabella Declaration, Ex. 18.)

Second, the magnitude and the complexity of the litigation were only made so by Class Counsel's attempt to combine 50 state consumer law allegations with antitrust violations. The complexity of the case was really quite average; the allegations quite simple. However, through dalliance, it appears, this case nearly went to trial when it should have and could have settled long ago.

Third, the risks of the litigation also appear insignificant. Plaintiffs sued the only two providers of satellite radio services for antitrust and anticompetitive behavior upon their merger. The term "shooting fish in a barrel" never rang truer. Thus, the risk appears average, in comparison with other complex actions.

Fourth, the quality of the representation is in question given the overall settlement, involving only prospective relief, and their failure to provide any respite for lifetime subscribers and former subscribers that choose not to renew their satellite radio service.

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Fifth, and most importantly, the relief to the Class is unclear and, thus, an evaluation of the fee in relation to the settlement cannot be made. Class Counsel's statement that this fee request constitutes 7 percent of the "common fund" created for the Class means nothing. It cannot be known what the percentage of the "fund" is, in fact. Importantly, Class Counsel has failed to provide relief for those individuals from whom Defendants will gain no new patronage. In sum, Class Counsel has reached a result that is both unclear and leaves certain Class Members with no relief, while waiving all future claims against Defendant (unless they opt out.) Their fee request has no rational relationship to the settlement and thus should be significantly reduced or, at the very least, postponed until the actual value of relief to the Class Members can be accounted for and realized.

III. JOINDER IN OTHER OBJECTIONS

This Objector adopts and joins in all other well taken - bona fide objections filed by other Class Members in this case, and incorporates them by reference as if they appeared in full herein.

IV. CONCLUSION

For the foregoing reasons and all such others that are raised at oral argument, I respectfully submit the foregoing objections to the Court and requests the following relief:

A. Upon proper hearing, sustain these Objections;

B. Upon proper hearing, enter such Orders as are necessary and just to adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and unreasonableness of the proposed settlement; AND

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING ET AL.,	:	
	:	
Plaintiffs,	:	
	:	**09 CV 10035 (HB)**
- against -	:	
	:	**OPINION &**
SIRIUS XM RADIO INC.,	:	**ORDER**
	:	
Defendant.	:	

Hon. Harold Baer, Jr., District Judge:

At the eve of trial, the parties in this class action antitrust litigation executed a settlement agreement dated May 12, 2011 (the "Settlement" or "Settlement Agreement"). Class counsel now moves for final approval of the Settlement Agreement and for an award of attorneys fees and costs. I held a final approval hearing on August 8, 2011 at which class counsel, Defendant's counsel, and numerous class members presented their views. I have considered their oral and written submissions and for the reasons described below the motions are GRANTED.

I. The legal standard

Class action settlements are subject to court approval. Fed. R. Civ. P. 23(e). Approval hinges on whether the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044. A court must consider both the substantive and procedural aspects of the settlement, *i.e.* "the settlement's terms and the negotiating process leading to settlement." *Id.* The analysis is framed by the "strong judicial policy in favor of settlements, particularly in the class action context." *Id.*

II. A presumption of fairness is appropriate

The Settlement merits a presumption of fairness where it was the culmination of a complicated litigation over the course of several years between "experienced, capable counsel after meaningful discovery." *Id.* As noted in a previous opinion, class counsel has experience in class action antitrust litigation, and undeniably "engaged in the discovery necessary [for] effective representation of the class's interests." *McReynolds v. Richards-Cantave*, 588 F3d 790, 804 (2d Cir. 2009) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). The discovery process involved the exchange of literally millions of documents, several instances of court intervention to resolve adversarial differences, numerous third-party subpoenas, depositions of 17 fact witnesses and 6 expert witnesses, and interrogatories. Sabella Decl. ¶ 22-31. The parties first began settlement

discussions in November 2010, but were unable to reach an accord. Sabella Decl. ¶ 50. They then, in concert with the pretrial schedule, went on to brief a number of substantive motions, and on the eve of trial, after substantial efforts towards trial preparation, finally settled. The Settlement is entitled to a presumption of fairness.

III. The Settlement's terms favor approval

I have reviewed the Settlement's substantive terms and conclude that they demonstrate sufficient fairness, adequacy, and reasonableness. While each of the "*Grinnell*" factors considered by the Circuit as the path to fairness supports this conclusion,[1] I address only those factors that relate to the main objections raised in opposition to final approval.[2] I also note that all class members had the opportunity to opt out of the settlement.

The risk of establishing liability was significant

One might conclude that class counsel did well to reach a settlement at all in view of the questionable liability in this case. More than one government agency assessed the merger and concluded that it did not have unlawful anti-competitive effects. The Department of Justice Antitrust Division closed its investigation by saying that "[a]fter a careful and thorough review of the proposed transaction, the Division concludes that the evidence does not demonstrate that the proposed merger of XM and Sirius is likely to substantially lessen competition, and that the transaction therefore is not likely to harm consumers." Sabella Decl. Ex. 9. The Federal Communications Commission (FCC) approved the merger – albeit with limited precautions such as the 3-year price cap. On July 27, 2011, however, the FCC concluded that it was *not* necessary to extend the price cap, in part because numerous competitive alternatives have arisen since 2008 which allayed any antitrust concerns that had previously justified the price-cap. *See* Sabella Reply Decl. Ex. 1. While these findings are not dispositive, Plaintiffs' case would have at least in part required convincing a jury that two federal agencies were wrong. Even had I concluded that the agencies' opinions were inadmissible, Defendant would doubtless have proffered the same underlying admissible evidence that led the agencies to conclude that there was no antitrust violation, or put another way, the merger did not lessen

[1] These include "(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation." *Authors Guild v. Google, Inc.*, 770 F.Supp.2d 666, 674, (S.D.N.Y. 2011) (Chin, J.) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974)).

[2] The Court counted a total of 85 objectors (not all of whom properly submitted objections), which comprises less than 0.0005% of the class, a fact that favors approval. *See Banyai*, 2007 WL 927583, at *9 ("[A] small number of objections received when compared to the number of notices sent weighs in favor of approval.") (citing *D'Amato*, 236 F.3d at 86-7).

competition. Perhaps more important is whether the settlement was a fair one or whether it serves in large measure to do little for the class and a lot for counsel.

The award is reasonable and not illusory

Most of the objectors complain that the Settlement provides no meaningful relief. This assumes that they suffered a meaningful injury. "Such assumption cannot stand as a proper basis to evaluate the proposed settlement's fairness." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 66 (S.D.N.Y. 2003) (citing *Grinnell*, 495 F.2d at 458–59). As discussed above, it is far from certain that Plaintiffs would have prevailed on the merits. Even had they succeeded, there was a real risk that damages, split between over 15 million class members, would be so little that many members may not even have bothered to cash their checks.[3]

Many objectors argued that their award is similar to a disfavored "coupon" settlement. Unlike coupon settlements, however, it does not require class members to purchase something they might not otherwise purchase to enjoy its benefits; rather, the vast majority of class members will benefit in the course of their normal subscription payments, and former subscribers may benefit from a month of free radio or internet service. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 237 (E.D.N.Y. 2010) (approving settlement that awarded additional months on existing Costco memberships or temporary membership for those whose Costco membership had expired).

Some object that the award is illusory because Sirius XM would not have raised prices even without the Settlement. This theory fails because the evidence demonstrates that Sirius XM had every intention of raising prices beginning in August of this year, and had the go-ahead from the FCC to do so. In fact, the Settlement Agreement requires Sirius XM to forego some $180 million in fees. *See* Langenfeld Decl.; Brooker Decl. Speculation to the contrary is not grounds to reject the Settlement. The declarations and other material submitted to this Court strongly suggest that the $180 million calculation is not illusory, and represents, at a conservative estimate, 40% of the Plaintiffs' estimated best possible recovery – a result that is fair and reasonable in the antitrust context.[4] *See, e.g., In re Warfarin Sodium Anitrust Litig.*, 391 F.3d 561, 538 (3d Cir. 2004) (upholding approval of settlement equal to 33% of estimated damages).

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[3] *See* Sabella Decl. ¶¶ 71-72; Potter Decl. ¶3-7. Plaintiffs calculate that, if they could have convinced Defendant to provide a $180 million cash settlement (the rough equivalent of the Settlement value), the average class member would have received $12, depending on their subscription plans. *See* Docket Entry 116 at 20. Of course, this is not the most a verdict could have awarded.

[4] In antitrust cases, although plaintiffs would be entitled to treble damages, courts assess the value of the settlement as it compares to single, not treble, damages. *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800 (LMM), 2009 WL 4403185, at *5 n.3 (S.D.N.Y. Dec. 1, 2009) (citing *Grinnell*, 495 F.2d at 459).

Other objectors raised concerns about the adequacy of the award as compared to the requested $13 million in attorneys fees and costs. There appeared some suspicion that, once class counsel was assured that it would recover fees and costs, they lost their incentive to pursue the class claims. This theory overlooks the fact that our legal system relies upon attorneys to uphold their ethical obligations to do everything reasonable in support of their clients' cause, regardless of their compensation scheme. Nothing in the record supports the proposition that Class Counsel fell below that basic professional standard, nor that the attorneys relaxed their pursuit of class interests with the promise of payment. Indeed, the amount of attorneys fees was not negotiated and agreed upon until after the Settlement was finalized. Sabella Decl. ¶ 55. The Settlement here has been compared to a "shakedown" by more than one objector, and there appears some suspicion that class actions are mere vehicles for attorneys to seek large fee awards. However, nothing suggests that Class Counsel here went beyond what the law allows. Whatever abuse the objectors believe the class action scheme works or indeed has worked here, it is a legislative problem and not a ground which permits this Court to set aside the settlement.

The Settlement's release is not overbroad

The Settlement Agreement releases Defendant from all claims by class members "arising out of, based on or relating to the merger that formed Sirius XM." Docket Entry 96 ¶ 8(a). It includes claims that class members did not or could not know were available at the time of the Settlement Agreement – the type of claim that some state laws preserve unless expressly waived (*i.e.* it cannot be released through a "general" release). *See* Docket Entry 96 ¶ 8(b). The scope of the release is consistent with the parameters established in this Circuit. A class action settlement may release "claims not presented and even those which could not have been presented as long as the released conduct arises out of the identical factual predicate as the settled conduct." *Wal-Mart*, 396 F.3d at 106.[5] The released claims here are limited to those claims that arise out of the merger that formed Sirius XM – a common factual predicate that defines the scope of the release with acceptable breadth.

The objectors also argue that "released claims" is referred to as a defined term, but nowhere is it defined. It is true that there is no official definition, but it is clear from the text – and both Defendant and Class Counsel agree – that "released claims" refers to those claims described in paragraph 8(a). I would be remiss to assume that other courts are unable to understand what is clear from the text of the release. This technical drafting oversight threatens no real risk to future litigants, and is insufficient to hold up the approval process.

[5] Indeed, "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-Mart*, 396 F.3d at 106.

IV. The request for attorneys fees and costs is reasonable

The motion for attorneys fees and costs provoked numerous and impassioned objections. The requested $13 million award understandably raised concerns, especially when compared to the very modest award provided to each class member. However, upon closer inspection, the award when compared to the Settlement as a whole is not unfair. I have reviewed the attorney expense sheets as well as the attorney time-keeping records, and found nothing to suggest exorbitant rates nor double billing nor padding of any kind. The award, as noted above, may well signal a defect in the system, but if so the Congress has to fix it. Perhaps they should, but for now, under the law as I read it, the settlement is reasonable under both the lodestar and percentage method of calculation, and appropriate in view of the criteria established in *Goldberger v. Gleason*, 160 F.3d 858 (2d Cir. 1998). Again, the fee is a separate obligation that will not come out of the Settlement amount, and was negotiated after the terms of the Settlement had been agreed upon. *See McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006) (Lynch, J.) (where "money paid to the attorney is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members").

The Clerk of the Court is instructed to close this matter and remove it from my docket.

SO ORDERED

August 24, 2011
New York, New York

Hon. Harold Baer, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

SIRIUS XM RADIO INC.,

Defendant.

No. 09-cv-10035 (HB)(RLE)

FINAL ORDER AND JUDGMENT

WHEREAS, Plaintiffs Carl Blessing, Edward A. Scerbo, John Cronin, Brian Balaguera, Scott Byrd, Glenn Demott, James Hewitt, Todd Hill, Curtis Jones, Ronald William Kader, Edward Leyba, Greg Lucas, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Janel and Kevin Stanfield, Paul Stasiukevicius, and Paola Tomassini ("Plaintiffs"), on behalf of themselves and the Class defined below, have entered into a Settlement Agreement, dated May 12, 2011 (the "Agreement") with Defendant Sirius XM Radio Inc. ("Defendant") to settle this action (the "Action") on the terms and conditions set forth therein; and

WHEREAS, unless otherwise defined in this Judgment, the capitalized terms herein shall have the same meaning as they have in the Agreement; and

WHEREAS, by Order dated May 19, 2011 and amended by Order dated June 9, 2011 (together the "Preliminary Approval Order"), this Court (a) preliminarily approved the Settlement; (b) ordered that notice of the proposed Settlement be provided to Class Members; (c) provided Class Members with the opportunity either to exclude themselves from or to object

to the proposed Settlement; and (d) scheduled a hearing regarding final approval of the Settlement; and

WHEREAS, due and adequate notice has been given to the Class; and

WHEREAS, the Court conducted a hearing (the "Settlement Hearing") on August 8, 2011 to consider, among other things, (i) whether the terms and conditions of the Settlement are fair, reasonable and adequate and the Settlement should therefore be approved; and (ii) whether a judgment should be entered dismissing the Action with prejudice; and

WHEREAS, the Court having reviewed and considered the Agreement, all papers filed and proceedings held herein in connection with the Settlement, all oral and written comments received regarding the proposed Settlement, and the record in the Action, and good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. **Jurisdiction:** The Court has jurisdiction over the subject matter of the Action, and all matters relating to the Settlement, as well as personal jurisdiction over the Parties and each of the Class Members.

2. **Class:** As set forth in the Court's March 29, 2011 Opinion and Order, the Class is as follows:

> FEDERAL ANTITRUST DAMAGE CLASS. All persons or entities who reside in the United States and who contracted with Sirius Satellite Radio, Inc., XM Satellite Radio Holdings, Inc., Sirius XM Radio Inc., or their affiliated entities, for the provision of satellite digital radio services who during the relevant period of July 29, 2008 through July 14, 2011: (1) paid the U.S. Music Royalty Fee; (2) own and activated additional radios ("multi-radio subscribers") and paid the increased monthly charge of $8.99 per additional radio; or (3) did not pay to

access the content available on the 32 bkps or 64 bkps connections on the Internet but are now paying the Internet access monthly charge of $2.99;[1]

3. **Adequacy of Representation:** Named Plaintiffs and Class Counsel have fully and adequately represented the Class for purposes of entering into and implementing the Settlement and have satisfied the requirements of Federal Rules of Civil Procedure 23(a)(4) and 23(g).

4. **Notice:** The Court finds that the distribution of the Notice and the publication of the Publication Notice to the best of the Court's knowledge: (i) were implemented in accordance with the Preliminary Approval Order; (ii) constituted the best notice reasonably practicable under the circumstances; (iii) constituted notice that was reasonably calculated, under the circumstances, to apprise Class Members of the pendency of the Action, of the effect of the Settlement (including the releases provided for therein), of Class Counsel's motion for attorneys' fees and reimbursement of litigation expenses incurred in connection with the prosecution of the Action, of their right to object to the Settlement and/or Class Counsel's motion for attorneys' fees and reimbursement of litigation expenses, of their right to exclude themselves from the Class, and of their right to appear at the Settlement Hearing; (iv) constituted due, adequate, and sufficient notice to all Class members who could be identified with reasonable efforts; and (v) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, Rule 23.1 of the Local Civil Rules of the United States District Court for the Southern District of New York, and all other applicable law and rules.

[1] Excluded from the Class are: (1) all persons or entities that make a timely election to be excluded from the proposed Class; (2) Sirius XM and its legal representatives, officers, directors, assignees and successors; (3) governmental entities; and (4) the judges to whom this case is assigned and any immediate family members thereof.

5. **Final Settlement Approval:** Pursuant to, and in accordance with, Rule 23 of the Federal Rules of Civil Procedure, this Court hereby fully and finally approves the Settlement as set forth in the Agreement in all respects, and finds that the Settlement is, in all respects, fair, reasonable, and adequate.

6. **Dismissal:** The Action is hereby dismissed on the merits and with prejudice, as of the Effective Date, and the Clerk is instructed to remove the matter from the Court's docket. The Parties shall bear their own costs and expenses, except as otherwise expressly provided in the Agreement.

7. **Binding Effect:** The terms of the Agreement and of this Judgment shall be forever binding on Plaintiffs and all Class Members who have not excluded themselves, as well as all of their successors and assigns. The Parties are directed to implement, perform and consummate the Settlement in accordance with the terms and provisions contained in the Agreement.

8. **Releases:** The releases as set forth in the Agreement (the "Releases") are expressly incorporated herein in all respects. The Releases are effective as of the Effective Date. Accordingly, this Court orders that, as of the Effective Date:

(a) Upon the Settlement becoming final in accordance with Section 6 of the Agreement, Plaintiffs and any Class Members who have not timely excluded themselves from the Class Action (collectively, the "Releasing Parties"), whether or not they object to the Settlement, shall release and forever discharge Defendant, its past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, subsidiaries, partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns (collectively,

the "Released Parties") only from those claims, demands, actions, suits, causes of action, damages whenever incurred, liabilities of any nature whatsoever, whether class, individual or otherwise in nature, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, that any Releasing Party ever had, now has or hereafter can, shall or may have, arising out of, based on, or relating to the merger that formed Sirius XM Radio Inc., including, without limitation, claims which have been asserted or could have been asserted in this litigation which arise under, are based on, or relate to any federal or state antitrust, unfair competition, unfair practices, consumer protection, misrepresentation, or other law or regulation, or common law, including, without limitation, the Sherman Antitrust Act, 15 U.S.C § 1 et seq., and the Clayton Antitrust Act, 15 U.S.C. § 12 et seq. Plaintiffs, as defined in the first whereas clause on page 1 above, shall further release the Released Parties only from those claims arising out of, based on, or related to all conduct alleged or that could have been alleged in the Second Consolidated Amended Class Action Complaint filed in this action. Each Releasing Party hereby covenants and agrees that it shall not, hereafter, seek to establish liability against any of the Released Parties based, in whole or in part, upon any of the claims released herein.

(b) Upon the Settlement becoming final, all Class Members who have not timely excluded themselves from the Class Action shall be deemed to have waived any and all provisions, rights and benefits conferred by § 1542 of the California Civil Code, which reads:

> Section 1542. General Release; extent. A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor;

or by any law of any state or territory of the United States or any other principle of common law, which is similar, comparable, or equivalent to § 1542 of the California Civil Code. Each Class

member may hereafter discover facts other than or different from those which he, she, or it knows or believes to be true with respect to the claims which are the subject matter of this paragraph, but each Class member hereby expressly waives and fully, finally, and forever settles and releases, upon the Settlement becoming final, any known or unknown, suspected or unsuspected, contingent or non-contingent claim that would otherwise fall within the definition of Released Claims, whether or not concealed or hidden, without regard to the subsequent discovery or existence of such different or additional facts.

(c) Upon the Settlement becoming final, Defendant, on behalf of itself and its past, present or future officers, directors, insurers, general or limited partners, divisions, stockholders, agents, attorneys, employees, legal representatives, trustees, parents, associates, affiliates, subsidiaries, partners, heirs, executors, administrators, purchasers, predecessors, successors and assigns, acting in their capacity as such, shall release Plaintiffs and their past, present or future agents, attorneys, employees, legal representatives, trustees, parents, heirs, executors, administrators, predecessors, successors and assigns, from all claims, demands, actions, suits, causes of action, or liabilities of any nature whatsoever, in law or in equity, that Defendant ever had, now has, or hereafter can, shall or may have, to the extent arising out of or relating to the Action (the "Defendant's Released Claims").

(d) The intent of the foregoing is to bar all claims that are or could have been brought regarding the claims in the Action consistent with the broadest principles of res judicata.

9. **No Admissions:** This Judgment, the Agreement, any of their terms and provisions, any of the negotiations, proceedings or agreements connected therewith, any matters arising in connection with settlement negotiations, proceedings, or agreements, and/or any of the documents or statements referred to therein:

(a) shall not be admissible in any action or proceeding for any reason, other than in an action to enforce the terms of the Settlement or this Judgment, or to establish the preclusive effect of this Judgment and the releases contained herein and in the Agreement in any subsequent proceeding, or to rebut an allegation that there has been an admission of liability or an admission of the validity of any claim or defense on the part of any Party in any respect;

(b) shall not be described as, construed as, offered or received against Defendant as evidence of and/or deemed to be evidence of any presumption, concession, or admission by Defendant of: (i) the truth of any fact alleged by Plaintiffs; (ii) the validity of any claim that has been or could have been asserted in the Action or in any litigation or forum; (iii) the deficiency of any defense that has been or could have been asserted in the Action or in any litigation or forum; or (iv) the existence of personal or subject matter jurisdiction over, or concession thereto by, Defendant;

(c) shall not be described as, construed as, offered or received against Plaintiffs or any Class Members as evidence of any infirmity in the claims of said Plaintiffs and the Class;

(d) shall not be described as, construed as, offered or received against any of the Parties in any other civil, criminal or administrative action or proceeding, *provided*, however, that if it is necessary to refer to the Agreement or this Judgment to effectuate or enforce the provisions of the Agreement or this Judgment, it may be referred to in such proceedings; and

(e) shall not be described as or construed against Defendant, Plaintiffs, or any Class Members as an admission or concession that the consideration to be given hereunder represents the relief, if any, that could be or would have been awarded to said Plaintiffs or any Class Member after trial of this Action.

10. **Retention of Jurisdiction:** Without affecting the finality of this Judgment in any way, this Court retains continuing and exclusive jurisdiction over: (a) the Parties for purposes of the administration, interpretation, implementation and enforcement of the Settlement; (b) any motion for an award of attorneys' fees and/or expenses by Class Counsel in the Action; and (c) the Class Members for all matters relating to the Action.

11. **Attorneys' Fees and Expenses Not a Delay:** Any order entered regarding any motion for attorneys' fees and expenses filed by Class Counsel shall in no way affect or delay the finality of this Judgment and shall not affect or delay the Effective Date of the Settlement.

12. **Modification of Settlement Agreement:** Without further approval from the Court, Plaintiffs and Defendant are hereby authorized to agree to and adopt such amendments or modifications of the Agreement or any exhibits attached thereto to effectuate this Settlement that: (i) are not materially inconsistent with this Judgment; and (ii) do not materially limit the rights of Class Members in connection with the Settlement. Without further order of the Court, Plaintiffs and Defendant may agree to reasonable extensions of time to carry out any provisions of the Settlement.

13. **Termination:** If the Effective Date does not occur or the Agreement is terminated, then this Judgment (and any orders of the Court relating to the Settlement) shall be vacated, rendered null and void and be of no further force or effect, except as otherwise provided by the Agreement.

Dated: August 25, 11

SO ORDERED:

USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

SIRIUS XM RADIO INC.,

Defendant.

No. 09-cv-10035 (HB)(RLE)

ORDER AWARDING ATTORNEYS' FEES AND EXPENSES

This matter came on for hearing on August 8, 2011 (the "Settlement Hearing") on the motion of Class Counsel to determine, among other things, what amount, if any, to award Class Counsel in the above-captioned class action (the "Action") for attorneys' fees and reimbursement of expenses.

The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that notices of the Settlement Hearing substantially in the form approved by the Court were disseminated to all Settlement Class Members who could be identified with reasonable effort, except those persons or entities excluded from the definition of the Settlement Class, and that summary notices of the hearing substantially in the form approved by the Court were published pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Order Awarding Attorneys' Fees and Expenses incorporates by reference the definitions in the Settlement Agreement and all terms used herein shall, with respect to the Settlement Agreement, have the same meanings as set forth in the Settlement Agreement.

2. The Court has jurisdiction to enter this Order Awarding Attorneys' Fees and Expenses, and over the subject matter of the Action and all parties to the Action, including all Class Members.

3. Notice of Class Counsel's application for attorneys' fees and reimbursement of expenses was given to all Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the motion for attorneys' fees and expenses constituted due, adequate, and sufficient notice to all persons or entities entitled to receive notice of the motion and satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), and all other applicable law and rules.

4. Class Counsel are hereby awarded unopposed attorneys' fees and reimbursement of expenses in the total amount of $13,000,000.00, to be paid by Defendant Sirius XM Radio Inc., plus interest accrued at the rate of .050% from the date of entry of the Court's Preliminary Approval Order, which sum the Court finds to be fair and reasonable. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a manner which, in the opinion of Class Counsel, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution and settlement of the Action. Any disagreement with respect to the amount of fees awarded to any firm will be promptly presented to this Court, and resolved in an unappealable order by the Court.

5. In making this award of attorneys' fees and reimbursement of expenses, the Court has considered and found that:

a. Class Counsel has obtained a settlement that will provide Class Members with benefits estimated to be worth at least $180 million.

b. To the best of the Court's knowledge, a total of 9,162,286 E-Mail Notices and 6,078,359 Postcard Notices were sent to potential Class Members, using data provided by the Defendant, stating that Class Counsel would seek fees and expenses to be paid by Defendant in an amount up to $13 million.

c. Class Counsel have conducted the litigation and achieved the Settlements with skill, perseverance and diligent advocacy.

d. The Action involves complex factual and legal issues and was actively prosecuted to the eve of trial. In the absence of a settlement, it would involve further lengthy proceedings with uncertain resolution of the complex factual and legal issues.

e. Had Class Counsel not achieved the Settlement there would remain a significant risk that Plaintiffs and the Class may have recovered less or nothing from the Defendant; and

f. The amount of attorneys' fees awarded and expenses reimbursed are fair and reasonable and consistent with awards in similar cases.

Dated: August 25, 11

SO ORDERED:

HONORABLE HAROLD BAER, Jr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

09 Civ. 10035 (HB) (RLE)

- against -

SIRIUS XM RADIO INC.

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

NOTICE OF APPEAL IN A CIVIL CASE

Notice is hereby given that JOHN IRELAND (*party*)

hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment

Final Order and Judgment (Doc 162) and Order Awarding Attorneys' Fees and Expenses (Doc. 163)
(*describe the judgment*)

entered in this action on the 25th (*date*) day of August (*month*), 2011 (*year*).

Signature

603 N. Highway 101, Suite A
Address

Solana Beach, CA 92075
City, State & Zip Code

DATED: September 22, 2011

(858) 792 - 5600
Telephone Number

NOTE: To take an appeal, this form must be received by the *Pro Se* Office of the Southern District of New York within thirty (30) days of the date on which the judgment was entered, or sixty (60) days if the United States or an officer or agency of the United States is a party.

Rev. 05/2007