MICHAEL HARTLEIB
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FILED VIA ECFS

May 13, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation; Consolidated Application for Authority to Transfer Control of XM Radio Inc. and Sirius Satellite Radio Inc.
MB Docket No. 07-57

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, and the Commission's Public Notice dated March 29, 2007 (DA 07-1435), and as per my letter and filing of May 12, 2008, I respectfully submit the attached *Memorandum in Opposition to the Proposed Settlement.*

Respectfully,

Michael Hartleib

Encl. Memorandum

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GREG BROCKWELL, Individually and On Behalf of All Other Similarly Situated,	:	Case No.:600819/07
Plaintiff,	:	
vs.	:	
SIRIUS SATELLITE RADIO, INC., JOSEPH P. CLAYTON, MEL KARMAZIN, LEON D. BLACK, JAMES R. MOONEY, MICHAEL J. MCGUINESS, WARREN N. LIEBERFARB, JAMES P. HOLDEN and LAWRENCE F. GILBERTI,	:	
Defendants	:	

SHAREHOLDER MICHAEL HARTLEIB'S MOTION AND MEMORANDUM OF LAW IN OPPOSITION TO THE COURT GRANTING PRELIMINARY APPROVAL OF THE SETTLEMENT

G. Richard Malgran, Esquire on behalf of shareholder and class member, Michael Hartleib, respectfully submits this Motion and Memorandum of Law in Opposition to this Court's Preliminary Approval of the Settlement.

Michael Hartleib is a member of the class in that he has been a shareholder of Sirius since October of 2003. Mr. Hartleib currently owns 151,000 shares of Sirius Satellite Radio, Inc. (See Copy of Mr. Hartleib's Ameritrade Account Statement attached herein as Exhibit "A").

INTRODUCTION

On February 19, 2007, Sirius Satellite Radio, Inc. ("Sirius") and XM Satellite Radio, Inc. ("XM") jointly announced that Sirius had agreed to merge with XM. The merger was supposed to be a $13 billion merger of equals. As a result of the merger, Greg Brockwell, commenced a class action lawsuit against Sirius and the individual defendants herein on or about March 13, 2007.

The basis of the lawsuit was that the defendants breached their fiduciary duties to the company and that the defendants failed to disclose material information regarding the merger. As a result of the lack of adequate disclosures the shareholders did not possess material information critically needed to vote for the merger or reject it. The attorneys for the plaintiff and putative class made some really strong allegations against the defendants pertaining to the merger agreement. More specifically, the plaintiff alleged that defendants purposefully withheld crucial information. (See Amended Complaint on page 11). The proxy had numerous material deficiencies; the most glaring one was the Board's failure to inquire about any other strategic alternatives to the merger. (See Amended Complaint at ¶44 on page 11). Plaintiff in the action claims that the shareholders cannot adequately vote on the deal until the company discloses the revenue and cost per subscriber. (See Amended Complaint at ¶50 on page 13).

The complaint alleges that Sirius must pay a termination fee in the amount of $175 million for cause if the deal is not consummated and the merger agreement contains a clause which precludes solicitation. Plaintiff alleges that these factors seriously restrict the actions of Sirius. As a result of the alleged breaches of fiduciary duties, the plaintiff maintains that the Court must enjoin the merger or the alleged breaches by the defendants will continue. (See Amended Complaint at ¶83 on page 19).

The prayer for relief requested by the plaintiffs is that the court enjoin the merger agreement because the defendants breached their fiduciary duties to the company.

BACKGROUND OF THE SETTLEMENT

After continued litigation, the parties entered into a Settlement Agreement in which Sirius and the defendants would cause the company to disseminate additional information or further disclosures regarding the merger. The defendants are also responsible to pay attorneys’ fees and reimbursement of costs. The parties claim that the settlement was a result of protracted and intensive arms-length negotiations between the parties and that it constitutes an excellent resolution of a case of substantial complexity. Moreover, plaintiff claims that the settlement is eminently fair, adequate, reasonable and in the best interest of Sirius shareholders.(See

Plaintiffs Motion to Preliminarily Approve the Settlement on page 1).

Michael Hartleib maintains that this proposed settlement is not in the best interest of the Sirius shareholders. The parties agreed to settle the case by agreeing to circulate additional information that defendants admit is meaningless. Accordingly, the settlement should not be preliminarily approved.

ARGUMENT

I. THIS HONORABLE COURT SHOULD NOT PRELIMINARILY APPROVE THE SETTLEMENT BECAUSE IT IS NOT IN THE BEST INTEREST OF THE SHAREHOLDERS

Michael Hartleib does agree with the law cited in Plaintiff's Motion for Preliminary Approval of the Settlement herein. However, the following factors of the Settlement make the settlement, as a whole, one which this Court should not approve: the release is too broad; the Notice is inadequate; class counsel has extensive problems; plaintiff, Greg Brockwell has not proved he has standing; the exact amount of attorneys' fees and reimbursement of expenses must be disclosed; and the class will receive no consideration as part of this settlement.

A. The Release Is Too Broad

This Court must not approve the Stipulation of Settlement because the Release is overly broad. Section 1.15 of the Stipulation of Settlement defines the released claims. The "Released Claims" means any statutory or common law claims, rights, demands, suits, matters, or causes of action under federal, state, local, foreign law, or any other law, rule or regulation that were, could have been or might have been asserted against Defendants and their Related Persons by Plaintiffs or any other Class member in any court of competent jurisdiction or other adjudicatory tribunal, in connection with, arising out of, related to, based upon, in whole or in part, directly or indirectly, in any way, the Merger, the Merger Agreement, Defendants' public filings and statements relating to the Merger and Merger Agreement, the Individual Defendants' fiduciary and disclosure obligations relating to the merger and the Merger Agreement, and any other facts, transactions, events, occurrences, acts, disclosures, oral or written statements, representations, filings, publications, disseminations, press releases, presentations, accounting practices or procedures, omissions or failures to act which were or which could have been alleged in this Action. The "Released Claims" include but are not limited to, any and all claims for damages, penalties, disgorgement, restitution, interest, attorneys' fees, expert or consulting fees, and any and all other costs, expenses or liability whatsoever, whether based on federal, state, local, foreign, statutory, common law or any other law, rule or regulation, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, including both known claims and unknown claims that were, could have been, or might have been alleged in the Action.

Many courts have not approved class action settlements where it was determined that the language in the Release is too broad. See *UniSuper Ltd. V. News Corporation*, 2006 WL 1550809 (Del. Ch. May 31, 2006). In *UniSuper Ltd*, the Chancery Court required the plaintiffs to modify a release that was too broad in connection with the settlement of a class action. The Chancery Court held the following: that the release extended to claims not part of the operative core facts; the release purported to extend to future claims; the plaintiffs should be judicially estopped from asserting that the operative facts of the case include the merits of the decision to extend the poison pill because the plaintiffs have expressly stated otherwise; the release bound non-voting shareholders forcing them to give up claims in return for benefits they do not share. The Court reasoned that the Release was overly broad and ran aground of the standard set forth by the Delaware Supreme Court.

Here, plaintiff alleged in his complaint extremely specific counts for breaches of fiduciary duties on the part of the defendants. The proposed release grants the defendants too much relief in relation to the allegations of the Complaint. If the Court approves this Release as defined in Section 1.15 of the Stipulation of Settlement, the shareholders will forever release the defendants for any potential claim, in particular, those claims that fall outside the scope of plaintiffs' complaints. Accordingly, this Honorable Court cannot approve the released claims as currently set forth in the Stipulation of Settlement.

B. The Notice Is Inadequate

The parties agreed to have the Notice published only one (1) day in the *Wall Street Journal*. Michael Hartleib maintains that publishing the Notice of the Settlement for one day in the *Wall Street Journal* is inadequate notice. Many shareholders of Sirius are most likely not subscribers and/or readers of the *Wall Street Journal*. Sirius has the names and addresses of all of its shareholders. The company recently sent out proxy statements for the vote. Accordingly, the best practicable notice procedure would be for the company to send the Notice directly to its shareholders. In the Electronic Data Systems derivative lawsuit in which Robbins, Umeda & Fink was one of the co-lead counsel, the Notice of Settlement was mailed to all of the shareholders. *Moore v. Brown, et al.*, USDC EDTX C.A. 6:04-CV-77. (See "Exhibit B" which is a true and correct copy of the Notice in Electronic Data Systems). Moreover, another case which involved similar issues in which Robbins, Umeda & Fink was lead counsel was In re: Sirna Therapeutics, Inc. In that case the Notice was mailed to shareholders as well. (See "Exhibit C" which is a true and correct copy of the Notice in Sirna Therapeutics, Inc.).

The proposed Notice does not include any information as to how much the attorneys will be receiving in fees and reimbursement of expenses. The class is entitled to know this information. Michael Hartleib maintains that the Notice must be amended to include this information. Robbins, Umeda & Fink have filed similar cases in In re: Direct General Derivative Litigation and Cardinal Health, Inc. Derivative Litigation. In the Notice of the Settlement, the amount of the Attorneys' Fees and Reimbursement of Expenses is included in the Notice. (See the Direct General Derivative Litigation and Cardinal Health, Inc. Derivative Litigation Notices attached hereto as "Exhibit D" and "Exhibit E").

Moreover, Robbins, Umeda & Fink had petitioned the Court to issue a Protective Order in an effort to hide important factors of the settlement such as attorney's fees and the number of shareholders who voted in favor of the deal.

The Notice should also include a provision in the Stipulation of Settlement in which the defendants state that the Supplemental Disclosures that are the basis of the settlement are not material or otherwise required by law.

C. Class Counsel Is Not Adequate

Robbins, Umeda & Fink has had extensive problems in litigating similar type cases throughout the country.

In the Red Hat Derivative Lawsuit, Robbins, Umeda & Fink, particularly Jeffrey P. Fink, had a significant problem before the Honorable Ben F. Tennille in *Andrew Egelhof v. Szulik*, State of North Carolina, Superior Court Division, County of Wake File No. 04 CVS 11746. (See Order of the Honorable Ben F. Tennille attached hereto as "Exhibit F"). Judge Tennille prohibited Jeffrey Fink and Robbins, Umeda & Fink from practicing law in the state of North Carolina for a period of five (5) years. Judge Tennille banned Jeff Fink and his firm from practicing because they never communicated with the firm's client in the case. If they had done so, they would have learned that the client had sold the shares of the Red Hat stock. The firm never informed the Court that they could not get in contact with their client. Moreover, Mr. Fink and his partner, Mr. Robbins, failed to be properly admitted to the Court.

Mr. Fink and one of the associates at Robbins, Umeda & Fink had a significant problem before the Honorable Robert B. Kugler in the Commerce Derivative Lawsuit captioned *Pearl E. Lucas, et al. v. Vernon W. Hill, et al.*, USDC New Jersey C.A. No. 07-349. The lawyers from Robbins, Umeda & Fink intervened in the action and claimed that the lawyers in the case engaged in collusion. Judge Kugler asked the attorney at Robbins, Umeda & Fink the names of individuals who participated in the secret agreement to deprive. Judge Kugler admonished the lawyers at Robbins, Umeda & Fink stating that they were making terrible allegations against the lawyers, alleging that they are involved in a willful fraud.

Judge Kugler stated that the Robbins, Umeda & Fink firm seems to enjoy the scorched earth type of litigation. As a result of the firm's action, Jeffery Fink was denied admission pro hac vice to the Court. He concluded that the Robbins, Umeda & Fink firm do not have a good grasp on securities law. Judge Kugler further declared that he was surprised that the lawyers at Robbins, Umeda & Fink had not found a cure for cancer among all of the other great things they had done. (See Transcript of *Lucas et al. v. Hill et al.,* before Judge Kugler attached hereto as "Exhibit G").

These examples demonstrate the antics of the lawyers at Robbins, Umeda & Fink which should give this Court some concern regarding this Settlement.

D. Plaintiff Must Demonstrate He Is a Shareholder

Greg Brockwell is the plaintiff in this matter. In order to be a plaintiff, Mr. Brockwell has to demonstrate that he is a current shareholder of Sirius. Due to past instances in which Robbins, Umeda & Fink had a client who was not a shareholder, Michael Hartleib demands that Greg Brockwell prove that he is a current shareholder of Sirius. Moreover, he should disclose the amount of shares he is holding. In the past, Robbins, Umeda & Fink has failed to disclose that its client was not a current shareholder. (See Egelhof attached hereto as "Exhibit F").

Michael Hartleib is ready, willing to serve as plaintiff in this matter. Robbins, Umeda & Fink has not demonstrated that Greg Brockwell had any involvement in the settlement negotiations.

E. The Settlement Provides No Consideration

As part of the Settlement, defendants agreed to make supplemental disclosures. The Stipulation of Settlement, Section 2.1 deal with the supplemental disclosures. The Section states the following:

Plaintiffs' Counsel and Defendants' Counsel conferred on disclosures supplemental to those contained in the Proxy Statement and Defendants agree to make certain supplemental disclosures relating to the Merger and the Merger Agreement. Following negotiations with Plaintiffs' Counsel, on November 5, 2007, Defendants caused Sirius to issue and publicly file with the U.S. Securities and Exchange Commission a Current Report on Form 8-K containing additional disclosures relating to the Merger and the Merger Agreement . . . Defendants make no admission that the Supplemental Public Disclosure is material or otherwise required by law. (See Stipulation of Settlement Paragraph 2.1).

As part of the Stipulation of Settlement, the defendants made no admission that the Supplemental disclosures are material. In other words, the defendants believe that the supplemental disclosures which is the basis of the settlement added nothing of value to the initially disclosed information by the company.

If you look closely at the information included in the supplemental disclosure, no real information is revealed. (See “Exhibit H” attached hereto which is a true and correct copy of the Supplemental Disclosure). Accordingly, the plaintiff has resolved this litigation for no real consideration.

II. THE ATTORNEYS REQUEST FOR REIMBURSEMENT OF EXPENSES SHOULD BE ACTIVELY SCRUTINIZED BY THIS COURT

It has long been customary in class actions for the courts to reimburse the attorneys for the costs incurred in prosecuting the litigation. Here, the attorneys have not revealed their cost, but they will do so in the future. Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation of those clients. *Miltalnd Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993).

The photocopying cost should be limited to $0.10 per copy and not $0.25 because it could not cost $0.25 to make a copy.

This Honorable Court should scrutinize the submission of counsel with regard to the costs in this matter.

Further, this Court should actively scrutinize the costs submitted by the firms to ensure that paralegal services are not being billed as costs in this matter. Often in these type of matters firms will include time of non-attorneys in the costs of the case.

CONCLUSION

For all of the reasons set forth herein and in the testimony to be submitted at the Preliminary Approval hearing, Michael Hartleib respectfully submits that the Settlement Agreement should not be Approved by this Honorable Court and if the Court does Preliminarily Approve the Settlement, the Notice must be amended.

Respectfully submitted,

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Attorney for Michael Hartleib

Dated: March 14, 2008