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FILED VIA ECFS

June 2, 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 *SECOND AMENDED COMPLAINT BASED UPON SELF-DEALING AND BREACH OF FIDUCIARY DUTY* for your review and attention.

As you know and as the Commissioner is aware, I previously attempted to intervene in the original complaint. The original complaint has been amended and was filed last week. This complaint now makes the case only an individual action as opposed to a class action suit. Plaintiff's counsel will be filing a dismissal of this individual action with prejudice this week.

Respectfully,

Michael Hartleib

Encl.

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

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GREG BROCKWELL, and TERRY	Plaintiffs,	: Index No. 600819/07
JOHNSON,		:
	vs.	: SECOND AMENDED COMPLAINT BASED
		: UPON SELF-DEALING AND BREACH OF
		: FIDUCIARY DUTY
SIRIUS SATELLITE RADIO, INC., JOSEPH		:
P. CLAYTON, MEL KARMAZIN, LEON D.		:
BLACK, JAMES F. MOONEY, MICHAEL J.		:
MCGUINNESS, WARREN N. LIEBERFARB,		:
JAMES P. HOLDEN and LAWRENCE F.		:
GILBERTI,		:
	Defendants.	:
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		x

Plaintiffs Greg Brockwell ("Brockwell") and Terry Johnson ("Johnson") (collectively "Plaintiffs"), by their attorneys, submit this Second Amended Complaint Based upon Self-Dealing and Breach of Fiduciary Duty (the "Complaint") against the defendants named herein.

SUMMARY OF THE ACTION

1. On February 19, 2007, Sirius Satellite Radio, Inc. ("Sirius" or the "Company"), a Delaware corporation, announced it had entered into an Agreement and Plan of Merger with XM Satellite Radio Holdings Inc. ("XM") (the "Merger Agreement"). The Merger Agreement contemplates the combination of two separate public companies in an all-stock merger with an aggregate value of approximately \$13 billion. Plaintiffs allege that the defendants breached their fiduciary duties, made insufficient disclosures and engaged in self-dealing in connection with the proposed so-called "merger of equals" between Sirius and XM (the "Merger"). This action seeks equitable relief only. Because Sirius shareholders voted to approve the Merger on November 13, 2007, immediate action is required to enjoin the consummation of this Merger.
2. Instead of pursuing the Merger in good faith, each of the defendants violated applicable law by directly breaching and/or aiding the other defendants' breaches of their fiduciary duties of loyalty, candor, due care, independence, good faith and fair dealing.
3. A review of the Form S-4/A Proxy Statement filed by Sirius and XM with the Securities and Exchange Commission ("SEC") on or about October 3, 2007 ("Proxy") demonstrates

that Plaintiffs were not equipped with enough information to cast an informed vote. First, the Proxy is silent as to whether defendant Mel Karmazin ("Karmazin") obtained the necessary pre-approval of Sirius' Board of Directors ("Board") prior to approaching XM's top management to discuss a possible business combination. Karmazin, Sirius' Chief Executive Officer ("CEO"), was egregious in his breaches of fiduciary duties if he was not acting with the Board's approval. It seemingly appears without further disclosures, on information and belief, Karmazin was acting solely to protect his own interests in preserving his reputation and standing in the entertainment community and in guarding his personal wealth. Further, on information and belief, in his haste to enter into negotiations, Karmazin effectively foreclosed the Board from fulfilling their fiduciary duties to consider strategic alternatives to the Merger.

4. It was not until months after Karmazin first initiated negotiations with XM that the Proxy affirmatively discloses the Board's actual knowledge of the possible business combination with XM. Moreover, the Proxy demonstrates that after the Board was informed of Karmazin's discussions, it failed to act in the best interests of Plaintiffs, as public shareholders of Sirius. Importantly, the Board did not properly inquire into any other strategic alternatives. Without consideration of strategic alternatives, Plaintiffs did not retain the material facts necessary to cast an informed vote. Specifically, it has not been disclosed whether the Board considered what it would cost Sirius to obtain subscribers from alternative sources, rather than by merging with XM. Nor is it disclosed to Plaintiffs whether the Board considered any alternative to maintaining and increasing subscribers and whether marginal costs and profits were higher or lower. In fact, the Proxy fails to disclose whether the Board considered the alternative of keeping Sirius as a stand-alone company in considering marginal costs and benefits regarding existing and future subscribers. Instead, the Board blindly followed Karmazin's lead and entered into the Merger Agreement between Sirius and XM.

5. Moreover, the defendants have effectively prevented the Company from even considering any future alternatives through a "no solicitation" clause in the Merger Agreement. This clause bars soliciting transactions or giving suitors inside information. There is also a termination fee clause which requires Sirius to pay XM \$175 million in the event Sirius determines the Merger is not in the best interest of the Company or materially breaches its obligations under the Merger

Agreement. The no-solicitation clause coupled with the termination fee in the Merger Agreement ensures that an accurate market check of the consideration to be paid in the Merger Agreement cannot occur. All of these provisions prevent a true market valuation of Sirius and the Merger. Plaintiffs were asked to vote on the Merger Agreement without knowing what alternative value they could have obtained in its stead.

6. The Merger also is acting as a weight on Sirius prospects, due to antitrust problems. The Merger is facing strict regulatory scrutiny. Governmental agencies must agree to the Merger before it can be consummated, and the United States Congress has expressed interest in the matter. In an attempt to pass these hurdles, defendant Karmazin has already pledged to cap subscription prices as well as other concessions in an attempt to pass regulatory muster. Thus, the profits of the combined company will undoubtedly be dampened, thereby affecting shareholder value. Again, defendants forced Plaintiffs to vote their Sirius shares without disclosing the details concerning alternatives that could have avoided these weighty concessions.

7. Defendants also failed to weigh the vast liability that XM currently faces. This liability stems not only from a pending securities class action but also from a breach of contract action brought by a technological partner. Advanced Global Technologies, LLC ("AGT"), is suing XM in the Southern District of New York for failure to properly market and share technology ("AGT Action"). The AGT Action alleges XM contractually promised to market AGT's consumer satellite radio products to XM's customers and share technology with AGT to properly develop those products. AGT, however, alleges that XM has breached this contract, forcing AGT from the satellite radio business. AGT is suing for its alleged guaranteed profit margin under the contract. Despite the defendants silence as to the details of this liability and its impact, these liabilities will pass to the combined company and will result in a loss of shareholder value for Sirius' shareholders.

8. Further, certain former and current XM directors and officers are currently under investigation by the SEC for illegally backdating XM options. Backdating involves the cherry-picking of stock-option grant dates—with the benefit of hindsight—to take advantage of lower exercise prices than the price on the actual grant date. The price of XM shares on the reported option-grant date, therefore, was lower than the share price on the actual day options were issued.

XM directors and officers, who have credibility issues, now stand to become officers and directors of the combined company. Again, Sirius shareholders must be told about the details concerning the misconduct of these directors.

JURISDICTION AND VENUE

9. This Court has jurisdiction over each defendant named herein because each defendant is either a corporation that conducts business in and maintains operations in this County, or is an individual who has sufficient minimum contacts with New York so as to render the exercise of jurisdiction by the New York courts permissible under traditional notions of fair play and substantial justice.

10. Venue is proper in this Court because one or more of the defendants either resides in or maintains executive offices in this County, a substantial portion of the transactions and wrongs complained of herein, including the defendants' primary participation in the wrongful acts detailed herein and aiding and abetting and conspiracy in violation of fiduciary duties owed to Sirius occurred in this County, and defendants have received substantial compensation in this County by doing business here and engaging in numerous activities that had an effect in this County.

PARTIES

11. Plaintiff Greg Brockwell is, and at times relevant hereto was, a shareholder of Sirius.

12. Plaintiff Terry Johnson is, and at times relevant hereto was, a shareholder of Sirius.

13. Defendant Sirius offers satellite radio services. The Company is headquartered in New York, New York and incorporated in Delaware.

14. Defendant Joseph P. Clayton ("Clayton") is Chairman of Sirius.

15. Defendant Karmazin is CEO and a director of Sirius.

16. Defendant Leon D. Black ("Black") is a Sirius director.

17. Defendant James F. Mooney ("Mooney") is a Sirius director.

18. Defendant Michael J. McGuiness ("McGuiness") is a Sirius director.

19. Defendant Warren N. Lieberfarb ("Lieberfarb") is a Sirius director.

20. Defendant James P. Holden ("Holden") is a Sirius director.

21. Defendant Lawrence F. Gilberti ("Gilberti") is a Sirius director.

22. The defendants named above in ¶¶14-21 are sometimes collectively referred to herein as the "Individual Defendants."

DEFENDANTS' FIDUCIARY DUTIES

23. In accordance with their duties of loyalty, candor, care and good faith, the Individual Defendants, as directors and/or officers of Sirius, are obligated to:

(a) disclose all information that Plaintiffs as reasonable shareholders would consider important in deciding how to cast their vote and whether to pursue appraisal rights or similar remedies in Court;

(b) ensure that Sirius is properly valued before consummation of the Merger;

(c) ensure that XM is properly valued before consummation of the Merger;

(d) participate in no transaction where the directors or officers' loyalties are divided;

(e) participate in no transaction where the directors or officers receive or are entitled to receive a personal financial benefit not equally shared by Plaintiffs as public shareholders of Sirius; and

(f) form a committee of truly independent and disinterested directors to evaluate strategic alternatives.

24. Plaintiffs allege herein that the Individual Defendants, separately and together, in connection with the Merger, violated the fiduciary duties owed to Plaintiffs, including their duties of loyalty, candor, good faith and independence, insofar as they failed to disclose key information to ensure that Plaintiffs were able to cast an informed vote. The Individual Defendants violated their duties owed to Plaintiffs by, among other things: (i) failing to provide adequate disclosure of important information that Plaintiffs as reasonable shareholders would need in order to fully understand their rights and remedies in connection with the Merger; (ii) failing to properly consider any strategic alternatives to the Merger; (iii) refusing to conduct an independent evaluation of the transaction to ensure the proper regard for the interests of Plaintiffs; and (iv) contractually prohibiting themselves from fulfilling the fiduciary duties owed to Plaintiffs.

25. Because the Individual Defendants have breached their duties of loyalty, candor, good faith and independence in connection with the sale of Sirius, the burden of proving the inherent or entire fairness of the Merger, including all aspects of its negotiation and structure, is placed upon the Individual Defendants as a matter of law.

DEFENDANTS' FLAWED NEGOTIATION PROCESS WITH XM

26. In the Proxy, the companies detailed the negotiations leading to the execution of the Merger Agreement. These negotiations were dominated and directed by CEO Karmazin. But the Proxy is silent as to what, if any, authorization was granted by the Board to Karmazin to enter into discussions with XM or why that authority was given in the first place. As such, on information and belief, Karmazin may have only been looking out for his own personal interests, not the interests of Plaintiffs as Sirius shareholders.

27. Negotiations for a possible transaction between Sirius and XM were first started in late 2002 and early 2003. Both companies at the time were experiencing financial uncertainties. Unable to reach a mutual understanding on how to proceed with negotiations, discussions were called off.

28. In February 2006, defendant and Sirius CEO Karmazin, with no indication of Board approval, contacted XM's Chairman, Gary M. Parsons ("Parsons"), to propose a meeting. On March 6, 2006, a meeting was held just between Karmazin, Parsons, and XM's CEO, Hugh Panero ("Panero"). Among the topics discussed was the possibility of a merger between the two companies. Further, Karmazin made no attempt to notify the Board of this meeting.

29. On September 21, 2006, a further meeting between the above-mentioned players, along with Sirius CFO David Frear ("Frear") was held. Karmazin reiterated Sirius' interest in a business merger with XM. At this time, the Board was still unaware of Karmazin's negotiations with XM.

30. On October 17, 2006, Karmazin, Frear, Parsons and Panero held another meeting, at which the participants agreed that their respective companies would proceed with a merger if there was a reasonable probability that regulatory approvals could be obtained. Afterwards, legal counsel to both companies gave initial assessments on the possibility of obtaining the approvals. Even

though those metrics weighed heavily for defendants, Plaintiffs *have not* been supplied with information needed to assess the prospects for gaining regulatory approval. That is, the Proxy does not disclose these initial assessments. And despite all of these proactive discussions with XM and legal counsel related to a merger with XM, there is still no indication Karmazin notified the Board.

31. In December 2006, once he had a limited option to propose to the Board, Karmazin finally briefed the Board of Sirius on his interactions with XM and his desire to engage an investment banking firm for the proposed merger with XM. This was the first notification the Board received of Karmazin's activities related to the Merger, according to the Proxy. There is no indication that Karmazin discussed any other strategic alternatives or that the Board considered any other alternatives. The Sirius Board only then authorized Karmazin to engage an investment banker for a possible merger with XM.

32. On December 8, 2006, members of Sirius' Board and management met with Morgan Stanley to discuss an engagement over the proposed merger with XM. On December 19, 2006, Karmazin and Frear met with Morgan Stanley representatives and XM and first proposed a "merger of equals."

33. On January 29, 2007, Karmazin met with Parsons and representatives of their companies' respective investment bankers to discuss the merger of Sirius and XM.

34. On February 8, 2007, Karmazin and Parsons, with other members of XM's Board, discussed the proposed merger, wherein all XM shareholders would receive 4.6 shares of Sirius common stock for every XM share. At this meeting, financial models were reviewed, but there is no indication that any strategic alternatives to the Merger were considered or even discussed.

35. Over the next ten days, legal counsel to Sirius and XM drafted and reviewed the Merger Agreement between Sirius and XM.

36. On February 19, 2007, the Merger Agreement between Sirius and XM was executed. In entering the Merger Agreement, the Individual Defendants have caused themselves and Sirius to violate the fiduciary duties owed to Plaintiffs as public shareholders of Sirius.

THE PROPOSED MERGER

37. On February 19, 2007, Sirius and XM jointly announced that Sirius had agreed to merge with XM. On that date, Sirius and XM jointly issued a press release titled "Sirius and XM to Combine in \$13 Billion Merger of Equals." The press release provided in relevant part:

XM Satellite Radio and SIRIUS Satellite Radio today announced that they have entered into a definitive agreement, under which the companies will be combined in a tax-free, all-stock merger of equals with a combined enterprise value of approximately \$13 billion, which includes net debt of approximately \$1.6 billion.

Under the terms of the agreement, XM shareholders will receive a fixed exchange ratio of 4.6 shares of SIRIUS common stock for each share of XM they own. XM and SIRIUS shareholders will each own approximately 50 percent of the combined company.

Mel Karmazin, currently Chief Executive Officer of SIRIUS, will become Chief Executive Officer of the combined company and Gary Parsons, currently Chairman of XM, will become Chairman of the combined company. The new company's board of directors will consist of 12 directors, including Messrs. Karmazin and Parsons, four independent members designated by each company, as well as one representative from each of General Motors and American Honda. Hugh Panero, the Chief Executive Officer of XM, will continue in his current role until the anticipated close of the merger.

The combined company will benefit from a highly experienced management team from both companies with extensive industry knowledge in radio, media, consumer electronics, OEM engineering and technology. Further management appointments will be announced prior to closing. The companies will continue to operate independently until the transaction is completed and will work together to determine the combined company's corporate name and headquarters location prior to closing.

The combination creates a nationwide audio entertainment provider with combined 2006 revenues of approximately \$1.5 billion based on analysts' consensus estimates. Today the companies have approximately 14 million combined subscribers. Together, SIRIUS and XM will create a stronger platform for future innovation within the audio entertainment industry and will provide significant benefits to all constituencies, including:

- **Greater Programming and Content Choices** — The combined company is committed to consumer choice, including offering consumers the ability to pick and choose the channels and content they want on a more a la carte basis. The combined company will also provide consumers with a broader selection of content, including a wide range of commercial-free music channels, exclusive and non-exclusive sports coverage, news, talk, and entertainment programming. Together, XM and SIRIUS will be able to improve on products such as real-time traffic and rear-seat video and introduce new ones such as advanced data services including enhanced traffic, weather and infotainment offerings.
- **Accelerated Technological Innovation** — The merger will enable the combined company to develop and introduce a wider range of lower cost, easy-to-use, and multi-functional devices through efficiencies in

chip set and radio design and procurement. Such innovation is essential to remaining competitive in the consumer electronics-driven world of audio entertainment.

- **Benefits to OEM and Retail Partners** — The combined company will offer automakers and retailers the opportunity to provide a broader content offering to their customers. Consumer electronics retailers, including Best Buy, Circuit City, RadioShack, Wal-Mart and others, will benefit from enhanced product offerings that should allow satellite radio to compete more effectively.
- **Enhanced Financial Performance** — This transaction will enhance the long-term financial success of satellite radio by allowing the combined company to better manage its costs through sales and marketing and subscriber acquisition efficiencies, satellite fleet synergies, combined R&D and other benefits from economies of scale. Wall Street equity analysts have published estimates of the present value of cost synergies ranging from \$3 billion to \$7 billion.
- **More Competitive Audio Entertainment Provider** — The combination of an enhanced programming lineup with improved technology, distribution and financials will better position satellite radio to compete for consumers' attention and entertainment dollars against a host of products and services in the highly competitive and rapidly evolving audio entertainment marketplace. In addition to existing competition from free "over-the-air" AM and FM radio as well as iPods and mobile phone streaming, satellite radio will face new challenges from the rapid growth of HD Radio, Internet radio and next generation wireless technologies.

"We are excited for the many opportunities that an XM and SIRIUS combination will provide consumers," said Gary Parsons, Chairman of XM Satellite Radio and Hugh Panero, CEO of XM Satellite Radio, in a joint statement. "The combined company will be better positioned to compete effectively with the continually expanding array of entertainment alternatives that consumers have embraced since the Federal Communications Commission (FCC) first granted our satellite radio licenses a decade ago."

"This combination is the next logical step in the evolution of audio entertainment," said Mel Karmazin, CEO of SIRIUS Satellite Radio. "Together, our best-in-class management team and programming content will create unprecedented choice for consumers, while creating long-term value for shareholders of both companies. The combined company will be positioned to capitalize on SIRIUS and XM's complementary distribution and licensing agreements to enhance availability of satellite radios, offer expanded content to subscribers, drive increased advertising revenue and reduce expenses. Each of our companies has a strong commitment to providing listeners the broadest range of music, news, sports and entertainment and the best customer service possible. We look forward to sharing the benefits of the exciting new growth opportunities this combination will provide with all of our stakeholders."

The transaction is subject to approval by both companies' shareholders, the satisfaction of customary closing conditions and regulatory review and approvals, including antitrust agencies and the FCC. Pending regulatory approval, the companies expect the transaction to be completed by the end of 2007.

SIRIUS' financial advisor on the transaction is Morgan Stanley and Simpson Thacher & Bartlett LLP and Wiley Rein LLP are acting as legal counsel. XM's financial advisor on the transaction is J.P. Morgan Securities Inc. and Skadden Arps, Slate, Meagher & Flom LLP; Jones Day; and Latham & Watkins LLP are acting as legal counsel.

38. The Merger faces intense regulatory scrutiny because the Merger will result in one company holding both satellite radio licenses. Indeed, United States Congressman Edward J. Markey, Chairman of the U.S. House Telecommunications and Internet Subcommittee, has urged regulators to look carefully at the Merger. Markey stated that "[t]he companies need to demonstrate that consumers would clearly be better off with both more choices and *affordable prices*." Although the Merger has been approved by the Federal Communications Commission, it still must pass regulatory muster from the Department of Justice's Antitrust Division.

39. In an effort to meet this intense scrutiny, defendant Karmazin has already told lawmakers that he is willing to make concessions to gain regulatory approval, including price caps, as indicated in the Reuters February 28, 2007, article titled "Sirius CEO Says would Cap Prices to Seal XM Deal," which stated in relevant part:

The head of [Sirius] told lawmakers on Wednesday he was ready to make concessions, such as capping prices to win federal approval of its proposed purchase of [XM]...

* * *

"We're preparing to make concessions, and we're willing to work with the FCC on doing it," [defendant and CEO] Karmazin testified at a hearing held by the House Judiciary Committee's new antitrust task force ... when he was asked by Rep. Ric Keller if he would agree to price restrictions for a period of time, Karmazin responded "yes."

40. The Merger Agreement between Sirius and XM severely limits Sirius' ability to pursue any other strategic alternatives to the Merger. For example, the Merger Agreement contains an unlawful "no solicitation" provision. This provision dictates that the Company and the Individual Defendants may not solicit, initiate or knowingly facilitate any proposal for acquisition or furnish any person with confidential information. It also imposes a termination fee of \$175 million which must be paid to XM if Sirius no longer recommends the Merger to shareholders.

41. Although the Merger announcement promises "Enhanced Financial Performance," this will not be the case. Based on even the limited information Plaintiffs have, the combined

company will be saddled with the liability that XM currently faces in the securities class actions, the AGT Action and the SEC investigation. Moreover, XM insiders who engaged in illegal backdating, the basis of the SEC investigation, stand to gain positions in the combined company, endangering the value of the shares owned by Plaintiffs. Historically, companies whose managements have engaged in backdating have been given a discount in their market value.

42. Plaintiffs have not even been advised about the full extent by which the combined company's forecasted profits is expected to be dampened by: (i) the substantial concessions that Sirius will be forced to agree to obtain regulatory approval; (ii) the costs incurred from the illegal backdating committed by XM insiders; (iii) the liability faced in the securities class actions and the SEC investigation; and (iv) the guaranteed profits owed to AGT that XM is allegedly liable for in the AGT Action.

43. On November 13, 2007, Sirius shareholders voted to approve the Merger.

**DEFENDANTS FAILED TO DISCLOSE ALL MATERIAL INFORMATION
CONCERNING THE MERGER**

44. The Proxy, filed jointly by Sirius and XM, failed to include an evaluation of the Merger from Sirius' position. This alone establishes a violation of the Individual Defendants' duty of candor. In order to fulfill their duty of candor, the Individual Defendants must disclose information regarding Sirius as a stand-alone company and how that information would be affected in a Merger with XM. The Proxy, however, is silent as to any analysis of this key information needed for an informed vote by Plaintiffs.

45. The Proxy suffers from further numerous material deficiencies, the most glaring of which is the Board's failure to inquire about any other strategic alternative or transaction, and the resulting failure to obtain and maintain the best value for Plaintiffs. For example, a primary driver of a merger with XM would be to acquire subscribers, build revenues and build a larger base to spread costs. As such, Plaintiffs could not cast an informed vote on the Merger without disclosures on the acquisition's effect on the marginal benefit of each such subscriber, in terms of, among other things, revenues, reach and brand recognition, versus the marginal costs of each such subscriber. These revenues, costs and projections must be weighed by Plaintiffs to determine whether it would be preferable to acquire subscribers through XM or acquire them as a stand-alone Company.

46. Moreover, the Proxy contains incomplete financial information and inadequate information concerning the Merger process. For example, the Proxy does not disclose what authority, if any, Karmazin was granted when pursuing the meetings with XM's management prior to December 2006. Nor does the Proxy disclose the information Karmazin was privy to that prompted the meeting with XM or anything related to Karmazin's motives in approaching XM's CEO in February 2006.

47. The Proxy selectively discloses numbers used to value Sirius and XM, and consistently evaluates the deal in the aggregate, as opposed to considering the fairness of the deal to Plaintiffs as public shareholders of Sirius. Finally, the Proxy omits information used by the Board to determine that the Merger was the one and only strategic option that should be explored prior to entering into the Merger Agreement.

48. The Merger is contingent upon obtaining appropriate approvals from various governmental agencies. Despite the sudden announcement of a shareholder meeting to approve the Merger, the Proxy does not contain any indication that such approvals are forthcoming or what factors the Board weighed in concluding the Merger was the best choice for shareholders given the antitrust issues it identified. Additionally, Karmazin has made it clear he is willing to compromise the business model of the post-Merger company to obtain the necessary regulatory approvals. However, no disclosures were made detailing the concessions he, any of the Individual Defendants or the Company have made to the government agencies overseeing the Merger, what effect these concessions will have on the future profits of the post-Merger company or the effects upon share value.

49. The Proxy glances over the regulatory approval problem. It discloses that the legal counsel of both Sirius and XM analyzed the possibility of the Merger obtaining the necessary regulatory approvals. But neither these analyses nor the results are disclosed. Plaintiffs should know how defendants weighed the regulatory risks of not obtaining regulatory approval.

50. The Proxy does not fairly disclose the process by which the Individual Defendants determined that 4.6 Sirius shares for every XM share was a fair exchange or why that ratio should not be changed despite the changed market conditions since the execution of the Merger Agreement

over a year ago. Plaintiffs must be provided information that the 4.6:1 ratio agreed to in February is a beneficial transaction.

PLAINTIFFS COULD NOT CAST INFORMED VOTES UNTIL FURTHER DISCLOSURES ON THE ACCRETIVE AND DILUTIVE EFFECTS OF THE MERGER

51. The Proxy does not fully disclose the accretive and dilutive impacts the Merger will have upon the Plaintiffs. As stated above, The Proxy fails to disclose Sirius' revenues and costs per subscriber, XM's revenues and costs per subscriber, or how those numbers were reconciled by the Board to reach the conclusion that the Merger was the best option for Sirius. The Proxy's disclosures on the forecasted contributions from XM to the combined post-Merger company are not sufficient without information on Sirius and XM as stand-alone companies. Since XM is involved in securities class action lawsuits alleging inaccurate projections related to its cost per subscriber, this issue is highly relevant for a reasonably informed vote on the Merger.

52. No detailed forecasts are given regarding the subscriber base for either of the individual companies or of the post-Merger company in the Proxy nor is there any information disclosed as to whether Sirius was winning the market contest with XM to sign-up subscribers and whether its subscriber acquisition costs were expected to rise or fall. As subscribers are the lion's share of the companies' revenues, this information is highly relevant to Plaintiffs.

CONFLICTS OF INTEREST AND SELF-DEALING

53. By reason of their positions with Sirius, the Individual Defendants are in possession of non-public information concerning the financial condition and prospects of Sirius, and especially the true value and expected increased future value of Sirius and XM including the companies' assets and prospects as a combined company, which they have not disclosed to Plaintiffs. Moreover, despite their duty to maximize shareholder value, the defendants have clear and material conflicts of interest and are acting to better their own interests at the expense of Plaintiffs.

54. Defendant Karmazin, as it has been shown, was very interested in pursuing a deal with XM. Specifically, without further discloses, it seemingly appears that Karmazin's initially contacted XM's CEO without the necessary Board authorization to negotiate a deal on behalf of Sirius. Therefore, on information and belief, Karmazin was only acting on his behalf to protect his

reputation in the entertainment industry. Without further disclosures, Karmazin had clear conflicts of interest in pursuing this deal.

55. If certain Individual Defendants, including Karmazin, do not continue with the post-Merger company, they stand to gain substantially more compensation from termination clauses in their employment agreements in the short term than they would otherwise be entitled to, creating a financial conflict of interest.

56. There are also insufficient disclosures on the amount of stock options controlled by the Individual Defendants in the Proxy, the vesting schedule of these options, how that schedule will be affected by the Merger or whether they would be entitled to immediately vest those options if they do not continue as directors of the post-Merger company.

57. The proposed Merger is wrongful, unfair and harmful to Plaintiffs, and represents an effort by defendants to aggrandize their own financial position and interests at the expense of and to the detriment of Plaintiffs. The Merger is an attempt to deny Plaintiffs of their rights while usurping the same for the benefit of defendants.

58. In light of the foregoing, the Individual Defendants must, as their fiduciary obligations require:

- Withdraw their consent to the Merger and allow the shares to trade freely – without impediments;
- Act independently so that the interests of Plaintiffs will be protected, including, but not limited to, the retention of truly independent advisors and/or the appointment of a truly independent Special Committee; and
- Adequately ensure that no conflicts of interest exist between defendants' own interests and their fiduciary obligation to maximize stockholder value or, if such conflicts exist, to ensure that all conflicts be resolved in the best interests of Plaintiffs as Sirius public stockholders.

XM IS RIDDLED WITH UNEXPLAINED LIABILITY

59. Between July 2005 and February 2006, XM allegedly issued false and misleading statements concerning the costs that it would incur to meet its promised goal of 6 million subscribers by the end of 2005. On February 16, 2006, XM announced that its subscriber acquisition costs had increased from \$64 in the fourth quarter of fiscal 2004 to \$89 in the fourth quarter of fiscal 2005. In

the weeks that followed, numerous securities class actions were filed against XM and certain of its directors and officers. These lawsuits remain pending against XM.

60. On August 31, 2006, the SEC commenced an investigation of XM's subscriber targets and the costs associated with attempting to reach those targets. In other words, the SEC is investigating the very same matters alleged in the securities class actions.

61. The SEC also initiated an investigation of XM's prior options grant practices. Apparently, XM insiders engaged in an illegal practice referred to as stock option backdating. Backdating involves the cherry-picking of stock-option grant dates—with the benefit of hindsight—to take advantage of lower exercise prices than the price on the actual grant date. The price of XM shares on the reported option-grant date, therefore, was lower than the share price on the actual day options were issued. This illegal practice brought XM insiders an instant paper gain.

62. Further, on May 8, 2007, the AGT Action was filed against XM. The lawsuit involves alleged breaches of contract related to the marketing of AGT products, as well as the sharing of technology between the firms. AGT alleges XM contractually promised to market AGT's consumer satellite radio products to XM's customers and share technology with AGT for proper development of those products. The AGT Action, however, alleges that XM has breached this contract, forcing AGT from the satellite radio business. AGT is seeking changes to XM's business practices and to ensure its alleged guaranteed profit margin.

63. The liability of XM and its directors from these actions will pass through to the post-Merger company and materially affect the share price of the stock owned by Plaintiffs, especially if the liable XM directors become directors of the post-Merger company. Companies whose boards have backdated have been known to suffer in the long run from a deflated market value.

64. The Proxy must disclose information about the liabilities the post-Merger company will assume from XM, how those liabilities will affect the management and business practices of the post-Merger company and how those liabilities will affect shareholder value. As it stands now, the Proxy does not even mention any of these liabilities.

FIRST CAUSE OF ACTION

Claim for Breach of Fiduciary Duties Against all Defendants

65. Plaintiffs repeat and reallege each allegation set forth herein.

66. The defendants have violated fiduciary duties of care, loyalty, candor and independence owed under Delaware law to Plaintiffs as public shareholders of Sirius and have acted to put their personal interests ahead of the interests of Plaintiffs.

67. By the acts, transactions and courses of conduct alleged herein, defendants, individually and acting as a part of a common plan, are attempting to advance their interests at the expense of Plaintiffs.

68. The Individual Defendants have violated their fiduciary duties by entering into the Merger Agreement without regard to strategic alternatives, information disclosed as material matters or the fairness of the transaction to Plaintiffs. Defendant Sirius directly breached and/or aided and abetted the other defendants' breaches of fiduciary duties owed to Plaintiffs.

69. As demonstrated by the allegations above, the Individual Defendants failed to exercise the care required, and breached their duties of loyalty, good faith, candor and independence owed to Plaintiffs because, among other reasons:

(a) they failed to properly disclose all material information a reasonable shareholder will need in casting an informed vote;

(b) they failed to properly value Sirius;

(c) they failed to properly value XM;

(d) they failed to properly ascertain the profitability of the combined company;

and

(e) they ignored or did not protect against the numerous conflicts of interest resulting from their own interrelationships or connection with the Merger.

70. Because the Individual Defendants dominate and control the business and corporate affairs of Sirius, and are in possession of private corporate information concerning Sirius' assets, business and future prospects, there exists an imbalance and disparity of knowledge and economic

power between them and Plaintiffs which makes it inherently unfair for them to pursue any proposed transaction wherein they will reap disproportionate benefits.

71. The Individual Defendants caused Sirius to aid and abet their breaches of fiduciary duties owed to Plaintiffs.

72. By reason of the foregoing acts, practices and course of conduct, the defendants have failed to exercise care, diligence and candor in the exercise of their fiduciary obligations toward Plaintiffs.

73. As a result of the actions of defendants, Plaintiffs will suffer irreparable injury as a result of defendants' self-dealing.

74. The Individual Defendants are engaging in self-dealing, are not acting in good faith toward Plaintiffs, and have breached and are breaching their fiduciary duties to Plaintiffs.

75. Unless the proposed Merger is enjoined by the Court, defendants will continue to breach their fiduciary duties owed to Plaintiffs, will not engage in arm's-length negotiations on the Merger terms, and did not supply to Plaintiffs sufficient information to enable them to cast informed votes on the proposed Merger and may consummate the proposed Merger, all to the irreparable harm of Plaintiffs.

76. Plaintiffs have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiffs be fully protected from the immediate and irreparable injury which defendants' actions threaten to inflict.

WHEREFORE, Plaintiffs demand preliminary and permanent injunctive relief in their favor and against defendants as follows:

A. Declaring and decreeing that the Merger Agreement was entered into in breach of the fiduciary duties of the defendants and is therefore unlawful and unenforceable;

B. Enjoining defendants, their agents, counsel, employees and all persons acting in concert with them from consummating the Merger, unless and until the Company and the Individual Defendants proceed into Merger negotiations compatible with their fiduciary duties and disclose all relevant information to Plaintiffs;

C. Directing the Individual Defendants to exercise their fiduciary duties to consummate a transaction which is in the best interests of Plaintiffs as Sirius shareholders;

D. Rescinding, to the extent already implemented, the Merger or any of the terms thereof;

E. Imposition of a constructive trust, in favor of Plaintiffs, upon any benefits improperly received by defendants as a result of their wrongful conduct;

F. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and

G. Granting such other and further equitable relief as this Court may deem just and proper

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