UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING, *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, v. SIRIUS XM RADIO INC., Defendant.	Case No: 09-cv-10035 (HB) (RLE)

MEMORANDUM IN OPPOSITION TO MOTION TO REQUIRE APPELLANTS TO POST AN APPEAL BOND

David Stein
SAMUEL & STEIN
38 West 32nd St. Suite 1110
New York, NY 10001
Phone: (212) 563-9884
Email: dstein@samuelandstein.com

Theodore H. Frank (*pro hac vice*)
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Phone: (703) 203-3848
Email: tedfrank@gmail.com

Attorneys for Objector Nicolas Martin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs' motion (Dkt. No. 182) to require the appellants to post an appeal bond asks this court to apply the wrong standard of law; their argument that Mr. Martin's appeal is frivolous is based on a straw-man appeal that has nothing to do with the issues actually raised by Martin. The motion should be denied, and the Court should consider the propriety of sanctions.

Plaintiffs' theory of the availability of fees in an appeal bond has been rejected time and again by judges of this district. *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409 (WHP), 2010 U.S. Dist. LEXIS 27605, at *8-9 (S.D.N.Y. Mar. 5, 2010) (cited by plaintiffs in Memorandum in Support of Motion for Appeal Bond (Dkt. No. 183) at 4); *In re Initial Public Offering Secs. Litig.*, 721 F. Supp. 2d 210, 217 (S.D.N.Y. 2010); *In re AOL Time Warner, Inc.*, MDL No. 1500, 02-cv-5575 (SWK), 2007 U.S. Dist. LEXIS 69510, at *19 (S.D.N.Y. Sept. 19, 2007).

Mr. Martin filed his statement of issues for appeal (addendum B to Form C) with the Second Circuit on October 3, two days before the plaintiffs filed their motion for appeal bond, yet the plaintiffs invent a straw-man appeal that they knock down as frivolous because it is subject to an "abuse of discretion" standard of review. But five of the seven appellate issues listed in Mr. Martin's statement of issues (attached as Exhibit 1) are questions of law, which will be reviewed by the Second Circuit *de novo*. Plaintiffs do not, and cannot, argue that the issues actually raised by Mr. Martin's appeal are frivolous; indeed, their failure to address them entirely means that they have waived any claim that the appeal that Mr. Martin has actually made (as opposed to the one they falsely represent to the court that he has made) is

frivolous. The court should consider the propriety of sanctions against plaintiffs' counsel for their affirmative misrepresentations of fact in their motion.

Plaintiffs falsely characterize Martin's counsel as a professional objector. This is wrong: a professional objector is a for-profit objector that objects for the purpose of settling the objection for cash. Martin's counsel is non-profit, and has never withdrawn an objection in exchange for payment. But if this court has any concern that Martin is bringing his objection in bad faith, Martin and his counsel will be happy to stipulate to an injunction prohibiting them from withdrawing Martin's appeal in exchange for a cash payment. *That* is the appropriate remedy for an abusive appeal meant to extort plaintiffs, not an illegal appeal bond that punishes good-faith appellants.

The real purpose of this motion is to increase Mr. Martin's *pro bono* counsel's costs, and to create procedural obstacles to a meritorious appeal by inducing this court to commit reversible error. The motion must be denied.

I. An Rule 7 Appeal Bond in an Antitrust Case May Not Include Attorneys' Fees.

In *Adsani v. Miller*, 139 F.3d 67 (2d Cir. 1998), the Second Circuit set the standard to determine the question of what "costs" may be included in a Fed. R. App. P. 7 appeal bond. Significantly, the Court concluded that the "term 'costs' under Rule 7 may include the definition of 'costs' contained in the relevant substantive statute under which appeal is sought and are not limited by the enumeration of some 'costs' found in Rule 39." *Id.* at 75

n.9.[1] Thus, in *Adsani*, the Court examined the Copyright act underlying the litigation and found a fee-shifting provision, such that attorneys' fees could rightfully be considered part of Rule 7 "costs on appeal". *Id.* at 71.

Unfortunately for the plaintiffs, as multiple courts of this district have recognized, federal antitrust law does not provide for fee-shifting to any "prevailing party" as the Copyright Act does. Rather, fee-shifting is "available only to plaintiffs who prove an antitrust injury" and accordingly is not available from appellant class members in this case. *In re Currency Conversion Fee Antitrust Litig.*, 2010 U.S. Dist. LEXIS 27605, at *7-8; *accord In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06–md–1775, 2010 U.S. Dist. LEXIS 27242, at *4-5 (E.D.N.Y. Mar. 22, 2010); *accord Azizian v. Federated Dept. Stores Inc.*, 499 F.3d 950, 959-60 (9th Cir. 2007).

Seemingly in recognition of the fact that the Clayton Act attorney fees avenue is not available, plaintiffs ask for fee-shifting under Fed. R. App. P. 38. But plaintiffs do not, and cannot, cite to any Second Circuit law permitting a Fed. R. App. P. 7 appeal bond to include anticipated Fed. R. App. P. 38 fees. The several courts of this Circuit that have confronted this argument have held that it would be improper for potential Fed. R. App. P. 38 sanctions to form the basis for granting attorneys' fees as part of a Rule 7 appeal bond. "As recognized by a number of other courts, including attorneys' fees [pursuant to Rule 38] in [a] Rule 7 bond would be improper." *In re Initial Public Offering Secs. Litig.*, 721 F. Supp. 2d at

[1] This holding conflicts with that of the majority of other circuits to consider the issue. *See e.g., Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295 (5th Cir. 2007); *In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985); *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 at *3 (3d Cir. Jun. 10, 1997). Martin reserves the right to ask the Second Circuit to conform to the majority rule. But even under the Second Circuit's idiosyncratic standard, an appeal bond for fees is illegal in this case.

217. *Accord In re Currency Conversion Fee Antitrust Litig.*, 2010 U.S. Dist. LEXIS 27605, at *8-9; *In re AOL Time Warner, Inc.*, 2007 U.S. Dist. LEXIS 69510, at *19 ("This Court agrees with the courts discussed above. Sanctioning appellants under Appellate Rule 38 is a matter for the court of appeals, and including potential Appellate Rule 38 sanctions in the amount of an appeal bond risks infringing on that authority and saddling appellants with a potentially prohibitive bond."); *Curtis & Assocs., P.C. v. Bushman*, No. 09-cv-890, 2011 U.S. Dist. LEXIS 23905, at *9-11 (E.D.N.Y. Mar. 9, 2011); *In re American President Lines, Inc.*, 779 F.2d 714 (D.C. Cir. 1985).[2]

What is more, the plaintiffs cite a case out of the Eastern District of Texas, *Vaughn v. Am. Honda Motor Co.*, 627 F.Supp.2d 738 (E.D. Tex. 2007), that was subsequently overruled in its entirety by the Fifth Circuit. *Vaughn v. Am Honda Motor Co.,* 507 F.3d 295, 299 (5th Cir. 2007). Not only was the district court overruled, but Judge Pauley in *In re Currency Conversion* explicitly followed the Fifth Circuit's reversing opinion. 2010 U.S. Dist. LEXIS 27605, at *8. What the plaintiffs have misleadingly portrayed as the operating procedure of this circuit is at most a procedure of the a minority of circuits.[3] Those circuits are wrong. The remedy for a

[2] *Tri-Star Pictures, Inc. v. Unger*, 32 F.Supp.2d 144 (S.D.N.Y.), *aff'd* 198 F.3d 235 (2d Cir. 1999) does not support the plaintiffs' position, as the court there found that the underlying statute, the Lanham Act, allowed for fee-shifting, not Rule 38.

[3] And even under the First Circuit standard, plaintiffs failed to carry their burden supporting a claim for $200,000. Some of the cases cited by plaintiffs did not award attorneys fees as part of Rule 7 bonds. *E.g. In re Pharm. Indus. Average Wholesale Price Litig.*, 520 F.Supp.2d 274, 279 (D. Mass. 2007) (refusing to award $70,000 sought as security for attorneys fees and $700 in expenses because, as is the case here, class counsel failed to submit any evidentiary authority backing up their estimated fees or costs); *Barnes v. Fleetboston Fin. Corp.*, No. 01-cv-10395(NG), 2006 U.S. Dist. LEXIS 71072, at *9 (D. Mass. Aug. 22, 2006) (refusing to award $30,000 sought as security for attorneys fees because plaintiffs failed to provide an evidentiary basis for the fee). Plaintiffs cite two Eighth Circuit cases (Memo at 6 n.4), but neither has anything to do with appeal bonds.

frivolous appeal is a motion to dismiss the appeal, rather than to ask the district court to evaluate the appeal and issue a punitive appeal bond. *Vaughn*, *supra*; *American President Lines*, *supra*.

II. Even If Rule 38 Fees Could Be Included in a Rule 7 Appeal Bond, the Issues Raised in Martin's Appeal Are Not Frivolous, and Plaintiffs Fail to Make Any Argument That They Are.

At the heart of plaintiffs' contention that Mr. Martin's appeal is frivolous is the theory that his appellate issues will be reviewed under the "abuse of discretion" standard. But this argument ignores Martin's actual appeal: Mr. Martin is challenging specific conclusions of law made by this Court that will be reviewed *de novo* by the Court of Appeals. If the Second Circuits concludes that this Court has made an error of law, it will naturally follow that the approval of the settlement was an abuse of discretion. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 98 (2d Cir. 2007) ("A district court by definition abuses its discretion when it makes an error of law.") (*quoting Koons v. United States*, 518 U.S. 81, 100 (1996)). Thus, the plaintiffs' thesis that the "abuse of discretion" standard is a highly deferential standard has no application to most of Mr. Martin's appellate issues.

By neglecting to address the actual issues raised in Mr. Martin's statement of issues, the plaintiffs have effectively conceded that the issues are non-frivolous. Instead of addressing the arguments Martin actually made, plaintiffs attack a straw-man, misrepresenting the appeal as a generic challenge to the approval of settlement and the award of fees. Perhaps some appellants are engaging in such weak arguments, but Martin is not. Plaintiffs have no basis to claim that they might receive Rule 38 sanctions against Martin, and have misled the court by failing to present Martin's actual appellate arguments,

even though the plaintiffs had those arguments in hand when they filed their brief. In doing so, they have acted far more vexatiously than Martin has by filing a notice of appeal.

Martin's appeal raises numerous questions of law supported by precedent. A good-faith legal argument that has been adopted by another court is by definition not frivolous: after all, the argument is "warranted by existing law." Fed. R. Civ. Proc. 11(b)(2). Other parts of his appeal propose a reasonable statutory interpretation or ask the Second Circuit to conform its law to the Third Circuit. Again, these are arguments "warranted by… a nonfrivolous argument for the extension, modification, or reversal of existing law," and are by definition not frivolous. *Id. See also Securities Industry Ass'n v. Clarke,* 898 F.2d 318, 321–22 (2d Cir. 1990); *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 110–12 (2d Cir. 1987) (litigant's argument "far from frivolous," even though it was contrary to Second Circuit precedent, because of precedential support for the argument from other federal courts of appeals).

This Court concluded that because the relief does not "require class members to purchase something they might not otherwise purchase," that the relief was not coupon relief for purposes of 28 U.S.C. § 1712.[4] To Mr. Martin's knowledge, this is not a theory that has been adopted by the Second Circuit or any other appellate court. Coupon settlements are characteristically problematic for three reasons: (1) they often do not provide meaningful compensation to class members; (2) they often fail to disgorge ill-gotten gains from the defendant; and (3) 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). Although the fact most class members would likely purchase

[4] *Blessing v. Sirius XM Radio Inc.*, No. 09-cv-10035 (HB), 2011 U.S. Dist. LEXIS 94723, at * 12 (S.D.N.Y. Aug. 24, 2011).

services even without the price freeze allays problem (1) to some extent, problems (2) and (3) remain. The defendant fails to disgorge ill-gotten gains and those class members who would prefer not to continue to do business with the defendant (even if they are only a minority) receive nothing. The language of §1712(a) is unambiguous: attorneys' fees "***shall*** be based on the value to class members of the coupons that are redeemed" (emphasis added) rather than the theoretical value of the coupons available for redemption. There is no exception in §1712 for coupons for services that class members might have purchased anyway. Martin believes in good faith that this court applied the wrong standard of law, and that this will require reversal. Even if the Second Circuit ultimately disagrees, the position is not frivolous.

Second, as Mr. Martin noted in his objection (Dkt. No. 130), that there are this many objectors is "extraordinary". Objection at 8. His contention that the Court should not have drawn an inference in favor of the settlement given the presence of 85 objectors is supported by law, commentary, and public policy. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995); *ALI Principles* § 3.05 comment *a* at 206; *contra D'Amato v. Deutsche Bank,* 236 F.3d 78, 86–87 (2d Cir. 2001). It is not frivolous to ask for this modification of Second Circuit law.

In re Bluetooth Headset Prods. Liab. Litig., 2011 U.S. App. LEXIS 17224 (9th Cir. Aug. 19, 2011) recently sustained an objection of the Center, holding that "clear-sailing" and "kicker" clauses are signs "that class counsel have allowed pursuit of their own self-interest… to infect the negotiations," making the settlement potentially unfair. *Id* at *28-29. Conversely, this Court appears to view it as a factor in favor of settlement that the attorneys fees were segregated from the class fund. *Blessing,* 2011 U.S. Dist. LEXIS 94723, at * 17 ("[T]he 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."). Martin would like the Second Circuit to reconcile these competing views of the law. Martin believes that this appeal on a legal question is meritorious, requiring reversal. Perhaps the Second Circuit will choose to create a circuit split with the Ninth Circuit and reject Martin's argument, but that does not make the argument frivolous.

Fourth, courts have held that class counsel must file its fees papers a sufficient amount of time before the objection deadline to constitute reasonable notice under Rule 23(h)(1) and to allow class members to exercise their 23(h)(2) right of objection. *E.g. In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988 (9th Cir. 2010) (reversing approval as matter of law). These principles were violated by the procedural schedule in this case because objections were due Tuesday, July 19, but the legal basis and evidence for the settlement and fee request was not filed until late in the day Friday, July 15, and not made available to the class until Monday, July 18. Perhaps the Second Circuit will choose to create a circuit split with the Ninth Circuit and reject Martin's argument, but that does not make the argument frivolous.

Martin raises several other potential issues in his appeal, but these four are more than enough to show that the appeal is not frivolous. In short, Martin raises numerous questions of law in his appeal that the plaintiffs do not, and cannot, characterize as frivolous. Even if

Rule 38 fees were permissible in a Rule 7 appeal bond, the plaintiffs have no hope of obtaining Rule 38 fees: Martin's appeal is not frivolous.[5]

III. This Appeal Is Brought in Good Faith: Neither Martin Nor His Counsel Are Professional Objectors.

Plaintiffs distort the facts by calling Martin's non-profit counsel, the Center for Class Action Fairness LLC, a "professional objector" and implying that case law regarding professional objectors applies to Martin. This is wrong: a "professional objector" is a ***for-profit*** attorney who files objections to blackmail plaintiffs' attorneys for payment in exchange for withdrawing his or her objections. Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150; AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.05 *comment* a (2010). But the Center is a non-profit that has ***never*** settled an objection for *quid pro quo* payment. Frank Decl. ¶ 5; *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 807 (N.D. Ohio 2010) ("the Court is convinced that Mr. Frank's goals are policy-oriented as opposed to economic and selfserving") (cited by plaintiffs' Memo at 12).[6] The Center is simply not a professional

[5] The plaintiffs further demonstrate that they do not believe the appeal is frivolous when they claim it will take $200,000 in attorneys' fees to resolve the appeal. *Cf. Budget Rent A Car System Inc. v. Consolidated Equity*, 428 F.3d 717 (7th Cir. 2005) (rejecting $4,626.50 request for attorneys' fees under Rule 38 as "exorbitant"). Plaintiffs cannot have it both ways: either the appeal requires substantial attorney time to resolve, is thus not frivolous, and thus does not permit an appeal bond for fees; or, if the appeal is frivolous, then they cannot possibly justify an expenditure of $200,000. As it is, they provide no evidentiary support for the claim of $200,000.

[6] Plaintiffs rely on language from *Lonardo* that the Center's argument was "long on ideology and short on law." The argument that *Lonardo* criticized—that it is problematic to

objector. Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litigation Report (Aug. 12, 2011) (distinguishing the Center from professional objectors); Brunet, 2003 U. CHI. LEGAL F. at 437 n.150 (public interest groups are not "professional objectors").

Mr. Frank, who founded the Center, is a member of the American Law Institute; his *pro bono* work on behalf of class members has won national acclaim. *See, e.g.*, Rachel M. Zahorsky, "Unsettling Advocate," ABA J. (Apr. 2010); David Freddoso, "Days numbered for trial lawyers getting outrageous paydays," WASH. EXAMINER (Aug. 24, 2011); Allison Frankel, "Legal Activist Ted Frank Cries Conflict of Interest, Forces O'Melveny and Grant & Eisenhofer to Modify Apple Securities Class Action Deal," AMERICAN LAWYER LIT. DAILY (Nov. 30, 2010). The Center does not bring bad-faith frivolous objections—as it is, with limited resources, it cannot bring many of the meritorious objections it wishes to bring. Susan Beck, "Man on a Class Action Mission," THE AM. LAWYER (May 2011); Frank Decl. ¶¶ 3-5.

Moreover, Martin has no interest in settling for money: he firmly believes this settlement is illegal, and wishes to have an appellate ruling on the legal and constitutional issues raised by this settlement. As Martin offered in his initial objection, he is willing to stipulate to an injunction forbidding him and his counsel from settling this objection for cash if there is any question in this Court's mind whether the Center is a "professional

---

segregate the attorneys' fee award from the class fund—was subsequently adopted by the Ninth Circuit in *Bluetooth,* 2011 U.S. App. LEXIS 17224 at *34-35. The Center's good-faith argument for the extension of existing law is no longer "short on law." (And even in *Lonardo*, the district court found the Center's objection sufficiently meritorious and helpful to the class to award attorneys' fees to the Center. That this decision about a successful objection is the best example plaintiffs can quote to criticize the Center is telling.)

objector." The entire factual premise underlying plaintiffs' motion and the cases they cite are simply inapplicable here.

Plaintiffs' complaint that the Center is "a political objector" (Memorandum in Support at 12) has no basis in law or public policy. The Court must decline the plaintiffs' invitation to impose an appeal bond that discriminates on the basis of political viewpoint. The First Amendment would prohibit as much. *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Impositions of appeal bonds are not immune from the strictures of the Constitution. *See Lindsey v. Normet,* 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *accord Adsani*, 139 F.3d at 76-77. Nothing in Fed. R. App. P. 7 permits plaintiffs to seek larger appeal bonds from objectors whose politics they do not like. In any event, the plaintiffs' *ad hominem* attacks made against the Center are transparently meritless. As plaintiffs' own exhibit shows, the Center (2009 expenditures: $54,898) is an exceedingly small part of the Donors Trust non-profit, which also gives money to Harvard University, Georgetown University, East Harlem Churches & Community Urban Center, and dozens of other non-profits. That Entity A gives money to both Non-Profit B and Non-Profit C hardly means that B and C share a unity of interests.

Neither the Center nor Frank has ever been sanctioned on appeal or at the trial-court level for frivolousness, vexatiousness, bad faith, or any other reason; in fact, Frank has yet to lose a federal appellate argument. Plaintiffs' footnote 17 cites twelve objections made by Frank. Eight of those objections were successful (resulting in a material modification of a settlement, a rejection of a settlement, or a reduction in attorneys' fees), and one is still pending—and plaintiffs omitted several other successful objections by the Center. Frank Decl. ¶ 7. That the Center has a track record of success in its objections is hardly evidence

that the Center objects vexatiously. The Center's mission demonstrates that this appeal is brought in good faith, not for purposes of extortion, and that Mr. Martin's attorney does not deserve the "professional objector" label plaintiffs falsely tar him with.

CONCLUSION

Second Circuit law, and the law of the majority of circuits to consider the question, does not permit an appeal bond for attorneys' fees against class-action objectors in an antitrust case. Second Circuit law, and the law of the majority of circuits to consider the question, does not permit an appeal bond that includes potential Rule 38 sanctions. Even if it were permissible to include Rule 38 fees in a Rule 7 appeal bond for Rule 39 costs, Rule 38 fees would not be available against Martin's appeal, because it is not frivolous, and plaintiffs waived any argument that it was by failing to address the arguments that Martin raised in his statement of issues to the Second Circuit.

Dated: October 18, 2011

Respectfully submitted,

/s/ David Stein

David Stein
SAMUEL & STEIN
38 West 32nd St. Suite 1110
New York, NY 10001
Phone: (212) 563-9884
Email: dstein@samuelandstein.com

/s/ Theodore H. Frank
Theodore H. Frank (*pro hac vice*)
CENTER FOR
CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tedfrank@gmail.com

Attorneys for Nicolas Martin

PROOF OF SERVICE

The undersigned hereby certifies that on this date, I caused the foregoing document to be served upon all counsel of record via ECF. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: October 18, 2011

/s/ Theodore H. Frank
Theodore H. Frank

Addendum B to Form C

Questions Presented

1. The district court held that the settlement was not subject to the restrictions of coupon settlements under the Class Action Fairness Act because the relief did not "require class members to purchase something they might not otherwise purchase." There is no language in 28 U.S.C. § 1713 creating an exception for coupons that do not "require class members to purchase something they might not otherwise purchase." Did the district court commit an error of law in failing to apply 28 U.S.C. § 1713 to the settlement approval and attorney-fee request?

Standard of Review: Questions of law are reviewed *de novo*. *E.g., United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

2. Was it clearly erroneous for the district court to find that a settlement that imposed a five-month-long injunction forbidding the defendants from charging class members more than $12.95/month for XM Select service or $16.99/month for XM Premier service was worth $180 million when class members already had the right to purchase the same service for $3.99/month or $77/year respectively?

Standard of Review: Findings of fact are reviewed for clear error. *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001).

3. Was it clearly erroneous for the district court to simultaneously hold that it would be difficult for the plaintiffs to prove market power and

that the parties had proven that Sirius XM would permanently significantly increase prices?

Standard of Review: Findings of fact are reviewed for clear error. *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001).

4. Multiple circuits and the American Law Institute hold that, given the lack of incentive for objecting, a court should not construe a small number of objectors to be support for the settlement. Did the district court err as a matter of law in holding that the presence of 85 objectors was "a fact that favors approval"?

Standard of Review: Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

5. The settlement contained both a "clear sailing" clause and a "kicker" clause protecting attorneys' fees from reduction, without any offsetting benefit to the class. *In re Bluetooth Headset Prods. Liab. Litig.*, 2011 U.S. App. LEXIS 17224 (9th Cir. Aug. 19, 2011), holds that such clauses are signs "that class counsel have allowed pursuit of their own self-interests… to infect the negotiations," making the settlement potentially unfair. Did the district court err as a matter of law in failing to consider these self-serving clauses in evaluating the fairness of the settlement?

Standard of Review: Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

6. Fed. R. Civ. Proc. 23(h) requires notice of the request for attorneys' fees to be directed to the class in a reasonable manner. Did the

notice of the request for attorneys' fees in this case violate Rule 23(h) when objections were due Tuesday, July 19, but the motion and supporting papers for attorneys' fees were filed only late in the day Friday, July 15, and not posted on the settlement website until Monday, July 18?

Standard of Review: Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

7. Under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), facial racial classifications imposed by federal entities are subject to strict-scrutiny review. Did the district court's class certification order imposing racial quotas on class counsel violate the Constitution?

Standard of Review: Questions of law are reviewed *de novo*. *E.g.*, *United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

DECLARATION OF THEODORE H. FRANK
IN OPPOSITION TO MOTION FOR APPEAL BOND

I, Theodore H. Frank, declare as follows:

1. I have personal knowledge of the facts set forth herein and, if called as a witness, could and would testify competently thereto.

2. I am an attorney admitted *pro hac vice* in this case and am a member of the bar of the United States Court of Appeals for the Second Circuit. I am an elected member of the American Law Institute. I am the founder of the non-profit Center for Class Action Fairness LLC ("the Center"), which represents Nicolas Martin *pro bono* in this matter. The goal of the Center is to protect class members in the class action settlement process from abuse of the class action system.

The Appeal Is Brought In Good Faith And Is Not Frivolous.

3. The Center does not object indiscriminately. It evaluates many more settlements than it objects to, and regularly rejects inquiries where it does not feel it has a good chance of establishing precedent generally useful to class members in future litigation. Because of this, it has an excellent track record, winning millions of dollars for class members, having many more successful than ultimately unsuccessful objections, and achieving a landmark decision last August in *In re Bluetooth Headset Prod. Liab. Litig.*, -- F.3d --, No. 09-56683 (9th Cir. Aug. 19, 2011).

4. Because one of the goals of the Center is to create good precedent and because the Center has limited resources (with more meritorious objections that it wishes to bring than it has the bandwidth to bring), the Center does not bring appeals unless it believes it has a substantial chance of success on appeal. The Center's appeals focus on legal issues of broad applicability beyond any specific case. Neither the Center nor I have ever been sanctioned for a frivolous appeal or a frivolous objection; indeed, I have argued four federal appeals without yet losing. I would not have taken on the expense and burden of appeal if I did not believe we could win and establish important

far-reaching precedent.

5. While many "professional objectors" are accused of bringing bad-faith objections solely to extract extortionate settlements from class counsel by the threat of delay, this is not the business model of the Center for Class Action Fairness, which is funded solely by charitable donations and court-awarded attorneys' fees. The Center has never agreed to a *quid pro quo* settlement of an objection, and asks its clients to confirm that they are objecting for the benefit of the class as a whole rather than for personal profit before agreeing to represent them. Moreover, federal tax law presents strict limits on the amount of revenue the Center can bring in through attorneys' fees. Neither Mr. Martin nor the Center wishes to settle this appeal for a personal payout: we wish to win on the merits. But if this Court has any question whether the Center is bringing this objection in good faith, the Center and Mr. Martin are willing to stipulate to an injunction prohibiting the Center from settling Mr. Martin's objection in exchange for a cash payment. This same offer was made in our initial objection; the fact that the plaintiffs have sought an appeal bond, rather than a stipulation, demonstrates that their concern is not that the Center will seek to extort the plaintiffs but that the Center is bringing a meritorious appeal.

6. This appeal is brought in good faith. The issues Mr. Martin wishes to raise in his appeal are not only non-frivolous, but many have been adopted by other appeals courts, and are of great importance to the law of class action settlements.

7. In footnote 17, plaintiffs identify twelve cases where I have objected on behalf of myself or a client. One of these, *Bachman v. A.G. Edwards, Inc.*, No. 09-cv-00057 (E.D. Mo.), is incorrect: I did not appear in federal court in that case, as a review of the docket will confirm. The majority of the remaining eleven objections were successful in whole or part; CCAF requested attorneys' fees twice and was awarded attorneys' fees twice.

In re HP Inkjet Printer Litig., No. 05-cv-3580 (N.D. Cal.)	**Partially successful**: court reduced attorneys' fees from $2.3M to $1.5M; appeal pending in Ninth Circuit.
In re Grand Theft Auto Video Game Consumer Litig., No. 06-md-01739 (S.D.N.Y.)	**Successful**: court decertified class and refused to approve settlement.
Lonardo v. Travelers Indemnity Co., No. 06-cv-00962 (N.D. Ohio)	**Partially successful**: parties modified settlement to shift $2M from fee request to class. CCAF awarded attorneys' fees.
Draucker Dev. & True Commc'ns Inc. v. Yahoo! Inc., No. 06-cv-02737 (C.D. Cal.)	Unsuccessful.
Bronster v. AOL, LLC, No. 09-cv-03568 (C.D. Cal.)	District court approved; appeal pending in Ninth Circuit.
In re Apple Inc. Sec. Litig., No. 06-cv-05208 (N.D. Cal.)	**Successful**: parties modified settlement to provide additional $2.5M to class. CCAF awarded attorneys' fees.
In re Bluetooth Headset Prods. Liab. Litig., No. 07-md-01822 (C.D. Cal.)	**Successful**: Ninth Circuit vacated settlement approval on appeal.
In re TD Ameritrade Accountholder Litig., No. 07-cv-02852 (N.D. Cal.)	**Successful**: court upheld objections.
Robert F. Booth Trust v. Crowley, No. 09-cv-05314 (N.D. Ill.)	Pending in N.D. Illinois.
True v. Am. Honda Motor Co., No. 07-cv-00287 (C.D. Cal.)	**Successful**: court upheld objections.
In re Classmates.com Consol. Litig., No. 09-cv-00045 (W.D. Wash.)	**Successful**: court upheld objections.

Plaintiffs separately list *Dewey v. Volkswagen of Am.*, which is pending on appeal in the Third Circuit, No. 10-3618, where we fully expect to prevail on the question of settlement fairness after successfully objecting to the $22.5 million fee request at the district court level. Plaintiffs omit several other successful CCAF objections, including, *inter alia*, *Sobel v. Hertz Corp.*, No. 06-CV-0545-LRH-RAM (D. Nev.) (rejecting settlement); *Weeks v. Kellogg Co.*, No. 09-CV-08102 (MMM) (RZx) (C.D. Cal.) (reducing common-fund attorney fees and restructuring *cy pres*); and *Stetson v. West Publishing*

Corp., CV-08-00810-R (C.D. Cal.) (rejecting settlement). I fail to see why plaintiffs think citing this list of cases is remotely damning.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 18, 2011, in Arlington, Virginia.

/s/ Theodore H. Frank
Theodore H. Frank