

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 650762/2011

ONE TWELVE, INC.

VS.

SIRIUS XM RADIO INC.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO.

050762/11

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

Dated: 4/10/12



**BARBARA R. KAPNICK
J.S.C.**

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----x
ONE TWELVE, INC. and DON BUCHWALD,

Plaintiffs,

-against-

SIRIUS XM RADIO INC.,

Defendant.

-----x
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 650762/11

Motion Seq. No. 001

Plaintiffs One Twelve, Inc. and Don Buchwald brought this action to recover for payments they allege they are owed pursuant to the parties' letter agreement on licensing the Howard Stern Show and other related matters (the "Agreement") dated October 1, 2004. Defendant Sirius XM Radio Inc. now moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint, contending that its obligations turn on the interpretation of one particular phrase in the Agreement and its application.

Background

Howard Stern is a world-rekowned radio and entertainment personality. One Twelve, Inc. produces and distributes the Howard Stern Show. Don Buchwald is Stern's agent and serves as a consultant under the Agreement between One Twelve and Sirius Radio.

Prior to becoming Sirius XM Radio Inc., Sirius Satellite Radio Inc. ("Sirius Radio") operated a satellite digital audio radio service, and XM Satellite Radio Inc. ("XM Radio") operated its own,

completely separate, satellite radio service. On July 28, 2008, a subsidiary of Sirius Radio merged with XM Radio, and thereafter Sirius Radio changed its corporate name to Sirius XM Radio Inc. ("Sirius XM"). As of December 31, 2008, there were 9,153,115 subscribers to Sirius Radio and 9,850,741 to XM Radio.

XM Radio continued to operate under the name XM Satellite Radio Inc, as a separate corporation wholly-owned by Sirius during all times relevant to this action. Even after the merger, original Sirius Radio subscribers had radio systems specific to Sirius Radio and received, generally, only Sirius Radio programming; likewise, original XM Radio subscribers had radio systems specific to XM Radio and received only XM Radio programming. Sirius XM did create a premium or "Best Of" package, whereby Sirius Radio subscribers could purchase premium XM Radio programming on their Sirius Radio service, and vice versa. According to Sirius XM, the Howard Stern Show could only be heard by about 1 million XM subscribers who specifically subscribed to the "Best of" Sirius package.

In the Agreement between plaintiffs and Sirius Radio, whereby Sirius Radio lured Howard Stern and his radio program off of traditional ("terrestrial") radio and onto Sirius Satellite Radio, Sirius Radio agreed, *inter alia*, to pay plaintiffs "Performance Based Compensation." Essentially, plaintiffs could potentially receive up to five separate common stock awards, valued at \$75

million each for One Twelve and 10% of One Twelve's award for Buchwald, if certain subscriber thresholds were met.

Exhibit A to the Agreement, entitled "Serious Satellite Radio; Exhibit A - Subscriber Estimates,"¹ sets forth the "Siri Internal Estimates"² for years 2004 through 2010, the term of the Agreement. The Performance Based Compensation provided that if, during the term of the Agreement, "the total number of Sirius subscribers at the end of any calendar year exceeds the 'Siri Internal Estimate'" by a particular amount, then plaintiffs would receive Performance Based Compensation.

Specifically, the "Performance Based Compensation" provision on page 2 of the Agreement provides in relevant part, that

You [One Twelve, Inc.] shall receive a performance based stock award of \$75,000,000 if this Agreement remains in effect and, on or before December 31, 2010, . . .³ (ii) the total number of Sirius subscribers at the end of any

¹ Although this document may have originally been considered "confidential," the parties have submitted it unredacted, so it does not appear to require confidential treatment here.

² The Siri Internal Estimates were based in part on subscriber projections made by industry analysts at various large financial institutions, which are identified in Exhibit A below the Estimates.

³ All parties appear to agree that section (i), which has been excluded and refers to "HS-Generated Subscribers" or Howard-Stern generated subscribers, subscribers acquired through Stern's marketing or sales initiatives directed specifically toward Stern's fan base, is irrelevant for purposes of this motion.

calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 2,000,000 subscribers.

You shall receive a second performance based stock award of \$75,000,000 if this Agreement remains in effect and, on or before December 31, 2010, . . . (ii) the total number of Sirius subscribers at the end of any calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 4,000,000 subscribers.

You shall receive a third performance based stock award of \$75,000,000 if this Agreement remains in effect and, on or before December 31, 2010, . . . (ii) the total number of Sirius subscribers at the end of any calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 6,000,000 subscribers.

You shall receive a fourth performance based stock award of \$75,000,000 if this Agreement remains in effect and, on or before December 31, 2010, . . . (ii) the total number of Sirius subscribers at the end of any calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 8,000,000 subscribers.

You shall receive a fifth performance based stock award of \$75,000,000 if this Agreement remains in effect and, on or before December 31, 2010, . . . (ii) the total number of Sirius subscribers at the end of any calendar year exceeds the "Siri Internal Estimate" year-end subscriber target set forth on Exhibit A for such year by more than 10,000,000 subscribers.

All parties agree that the Siri Internal Estimate for December 2006 was exceeded by more than 2 million Sirius subscribers, and in January 2007 Sirius transferred \$75 million in common stock to One Twelve and \$7.5 million to Buchwald. There is no dispute that this first Performance Based Compensation provision has been fulfilled. Nor is there any dispute that during 2007, the Sirius subscribers

did not exceed the Siri Internal Estimate by 4 million subscribers and, therefore, no additional compensation was owed for that year. The dispute arose during 2008, when the Sirius-XM merger took place. If only subscribers to Sirius Radio are considered under the Agreement to constitute "Sirius subscribers," there is no dispute that the second Performance Based Compensation is not triggered. Even if the roughly 1,000,000 subscribers to the XM Radio system who purchased the premium package giving them access to the Howard Stern radio show were counted, the number of "Sirius subscribers" still would not exceed the Siri Internal Estimates for 2008 by more than 4 million and the second provision for Performance Based Compensation would not be triggered. However, if the more than 9 million original XM Radio subscribers are counted, all five Performance Based Compensation provisions are triggered and Sirius XM would owe One Twelve an additional \$300 million, and Buchwald an additional \$30 million.

Discussion

In the Agreement, "Sirius" is defined as "Sirius Satellite Radio Inc." Although the term "Sirius subscriber" is used throughout the Agreement, it is not separately defined. Plaintiffs contend that when Sirius Radio and XM Radio merged, the XM Radio subscribers became "Sirius subscribers," and thus should be counted for purposes of calculating the second, third, fourth and fifth Performance Based Compensation Awards at year-end 2008, 2009 and 2010.

Sirius XM disagrees, arguing that the language of the Agreement is completely unambiguous and, therefore, the Court should apply its clear meaning without resort to extrinsic evidence. Only the intent and plain meaning at the time the parties entered into the Agreement is relevant, they argue, and while "Sirius" is a defined term, the fact that "Sirius subscribers" is not separately defined means that it should be ascribed its plain and ordinary meaning. Even after the merger, according to Sirius XM, in order to receive the Sirius radio service, one must still subscribe to the Sirius Service; in order to receive the XM radio service, one must still subscribe to the XM Service. They are not one and the same and, therefore, the Court may not treat them as such in interpreting the Agreement, defendant argues.⁴

Sirius XM also argues that the parties' intent not to include XM subscribers as "Sirius subscribers" is confirmed by the "XM Merger" provision - the only place in the Agreement that mentions or even refers to "XM" or a potential merger. The merger provision provides that

In the event Sirius merges with XM Satellite Radio,
Sirius shall pay you [One Twelve] a fee of \$25,000,000,

⁴ Although Sirius XM also points to Exhibit A and argues that the financial institution projections referred to therein are based on separate analyst reports, and that in those reports Sirius customers and XM customers are discussed separately, as evidence that the parties did not consider the customer bases as one, Sirius XM has already argued that the term is unambiguous and the Court should not rely on extrinsic evidence.

whereupon the HS [Howard Stern] Programs may be broadcast to all subscribers of the surviving company.

There is no dispute that after the merger, Sirius paid a fee of \$25 million to One Twelve and \$2.5 million to Buchwald as provided for in the XM Merger provision. Sirius XM contends that the use of the words "all subscribers of the surviving company" in the XM Merger provision, instead of "Sirius subscribers," which is used in all other provisions of the Agreement, evidences that the parties did not contemplate subscribers acquired in a possible XM merger being treated in the same fashion as all other Sirius subscribers.

In opposition, plaintiffs emphasize that during the negotiations of the Agreement, Stern was approached by both Sirius and XM to join them. His move, they argue, was expected to fundamentally change satellite radio for whichever company he joined. The Agreement, they say, reflects the intention of the parties that Stern would share in the successes of the company which he was committing to help build.

Plaintiffs posit that the term "all subscribers of the surviving company" used in the Merger provision refers to Sirius XM as the surviving company and, since Sirius XM is the parent company of the merged subsidiaries, Sirius XM subscribers are Sirius subscribers as referred to in the Agreement. Plaintiffs deny that

a reasonable interpretation could permit the term "Sirius subscriber," in which Sirius is defined as Sirius Satellite Radio Inc., to also mean individuals who subscribe to Sirius' radio service.

Further, according to plaintiffs, the XM Merger provision should not be seen as excluding additional compensation. The "merger fee," they argue, was an additional bonus that Sirius agreed to pay as part of an overall arrangement to be able to defer a significant portion of the fixed compensation, and was not intended to substitute for the Performance Based Compensation.

While plaintiffs believe that the plain terms of the Agreement demonstrate the parties' intent to count all the subscribers of Sirius XM Radio Inc., without any exceptions, when calculating the Performance Based Compensation, they argue that if the Court finds the term ambiguous, the extrinsic evidence of the parties' negotiations,⁵ the purpose of the performance-based stock awards, and Sirius' public statements⁶ will evidence this intent.

⁵ Plaintiffs argue that the parties' negotiations and conduct indicate that they intended One Twelve and Buchwald to benefit from the success of the company and be invested in making it better, which is why the targets were set so high.

⁶ Plaintiffs point to various public statements, including Sirius' 2009 Form 10-K, a New York Post ad, a 2010 press release, and others, in which Sirius XM makes no differentiation when referring to its subscribers between Sirius subscribers and XM subscribers.

Finally, plaintiffs argue that there are issues of fact that preclude summary judgment. First, they contend that evidence submitted by Sirius XM to show the parties' intent at the time of the agreement is extrinsic and essentially admits that the Court must resort to extrinsic evidence to interpret the Agreement. Second, plaintiffs contend there is an issue of fact with respect to whether the Sirius Service and the XM Service were wholly separate, because when it was seeking government approval for the merger, Sirius represented to the FCC that they would be integrated into a single entity.

Unless a material term of the Agreement is ambiguous, the Court need not resort to use of extrinsic evidence to interpret the contract. A contract must be enforced as the parties made, understood and intended it at the time of its execution, with consideration given to the entire contract and the relationship of the parties and circumstances under which it was executed. See *Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 432-33 (1st Dept 2011) (citing to *Kass v Kass*, 91 NY2d 554, 556 [1998]).

Here, while it may be true that Stern and Buchwald hoped and expected to reap the benefits from any significant growth that Sirius experienced after they entered into the Agreement, that

subjective expectation cannot suffice to override the clear, unambiguous language of the Agreement.

At the time the parties entered into the Agreement, it is clear that the only subscribers that the parties considered part of the "total number of Sirius subscribers" for purposes of calculating "Performance Based Stock Compensation" were those individuals who subscribed to the Sirius radio system. Although plaintiffs argue that those subscribers acquired by merger with XM became "Sirius subscribers" for these purposes, such an interpretation cannot be supported by a reading of the Agreement as a whole.

Plaintiffs' assertion that "Sirius subscribers" meant any customers who subscribed to a subsidiary of Sirius Radio and, therefore, now that Sirius XM is a subsidiary of Sirius Radio its subscribers are considered Sirius subscribers, does not lead to a different result. The *only* subscribers to Sirius - either the radio service or the company - at the time the parties entered into the Agreement were those who subscribed to the Sirius satellite radio service.

Most importantly, to the extent the parties contemplated the relevance of new subscribers acquired by merger at all, they

provided for their consideration under an entirely separate section entitled "XM Merger." The Agreement provides specific compensation to plaintiffs in the case of a merger with XM, and refers to those subscribers as "subscribers of the surviving company." To find in plaintiffs' favor, then, would require this Court to ignore this explicitly distinct treatment of subscribers acquired by merger. Accordingly, the plain language of the Agreement is inconsistent with any reading that the parties intended subscribers acquired by merger with XM to be considered when calculating plaintiffs' "Performance Based Stock Compensation."

Defendant Sirius XM Radio Inc.'s motion for summary judgment is, therefore, granted and the Complaint is dismissed with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: April 16, 2012



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.