SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK

Plaintiff,

- v -

SIRIUS XM RADIO INC.,

Defendant.

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INDEX NO. 453325/2023

MOTION DATE 12/20/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 57, 77, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 114, 120, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 182, 183, 184

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

Upon the foregoing documents, Petitioner's motion for summary judgment is granted in part and denied in part and Respondent's cross-motion for summary judgment is granted in part and denied in part.

Background and Procedural Posture

This matter involves a special proceeding initiated by the Attorney General's office ("Petitioner") against Sirius XM Radio Inc ("Respondent" or "Sirius") for alleged fraud in violation of Executive Law 63(12), deceptive business practices and unlawful service offer practices, and violations of the Restore Online Shoppers' Confidence Act ("ROSCA"). The Attorney General's office filed its Petition on December 20, 2023. On January 23, 2024, the action was removed to Federal Court. Upon Order of the Honorable Jed S. Rakoff in United

States District Court, Southern District, the matter was remanded back to State Court on February 22, 2024.

Respondent offers satellite radio and streaming services to customers on a subscription basis. The main contention by Petitioner is that Respondent has made its cancellation process unduly burdensome on consumers in an attempt to discourage cancellations. Key factors that Petitioner alleges make the cancellation process unduly burdensome include the requirement that customers engage with a live agent and the multi-step process that Sirius uses for cancellation requests. Respondents claim that many customers who purportedly call to cancel their subscription are in reality looking to get a discount on their service, and their customer service agents are directed to respond accordingly by offering deals before proceeding to cancel the subscription. Ultimately, it is this dynamic and these policies that Petitioner's claims hinge on.

The Petitioner seeks injunctive relief, restitution, and penalties. More specifically, they request a permanent injunction stopping Respondent from engaging in the cancellation practices at issue here, an order directing an accounting from Respondent relating to customers who have cancelled or attempted to cancel a Sirius subscription, monetary restitution to aggrieved customers, an order directing Respondent to disgorge profits resulting from the cancellation procedures, civil penalties levied against Respondent, and costs. The Respondent has cross-moved to dismiss two claims of the petition under CPLR § 3211 and for summary judgment in their favor under CPLR § 3212.

Standard of Review and Statutory Framework

Actions brought under Executive Law ("EL") § 63(12) are brought as special proceedings. *See People v. Apple Health & Sports Clubs*, 206 A.D.2d 266, 268 (1st Dept. 1994). A special proceeding is "governed by the same standards that apply to a motion for summary

judgment." *People v. Telehublink Corp.*, 301 A.D.2d 1006, 1007 (3rd Dept. 2003); CPLR § 409(b). Under this standard, the test is "whether the pleadings raise a triable issue of fact." *White v. Scrofani*, 161 A.D.2d 398, 400 (1st Dept. 1990).

Petitioner's Standard Under the Executive Law

Petitioner seeks permanent injunctive relief pursuant in part to EL § 63(12), which states that "[w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people […] for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages." Petitioner also seeks restitution and damages under Executive Law § 63(12). The General Business Law ("GBL") § 349 also authorizes the Petitioner to seek injunctive and restitutive relief for "deceptive acts or practices in the conduct of any business, trade or commerce." GBL § 349(a) and (b).

When bringing an action under either EL § 63(12) or GBL § 349, it is not necessary to establish proof of scienter or reliance. *People v. Trump Entrepreneur Initiative LLC*, 137 A.D.3d 409, 417 (1st Dept. 2016). The "test for fraud is whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v. Northern Leasing Sys., Inc.*, 193 A.D.3d 67, 75 (1st Dept. 2021). Because the Petitioner is the Attorney General, rather than a private plaintiff, under GBL § 349 they have broad enforcement powers, including the ability to "seek injunctive relief without a showing of injury." *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 324 (2002).

Cross-Motion to Dismiss Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Cross-Motion for Summary Judgment Standard of Review

The party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Penthouse Terraces, Inc. v. McGrath*, 163 A.D.2d 144, 146 (1st Dept. 1990). When considering a summary judgment motion, the "motion court should draw all reasonable inferences in favor of the nonmoving party" and the purpose is "[i]ssue finding, not issue determination." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dept. 1992). Mere conclusory statements are insufficient to support or defeat a motion for summary judgment. *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016).

Discussion

Because both parties have (given the nature of a special proceeding) essentially asked for summary judgment, a threshold issue for the Court to determine is whether there are any triable issues of fact. Here, for the reasons that follow, there are none. Summary judgment is proper for respondent as to the first, second, third, and fourth causes of action and summary judgment is proper for petitioner on the fifth cause of action.

I: Preliminary Issues

Respondents have raised several issues that go to the petition as a whole. More specifically, they have argued that the Petitioners are not able to recover on behalf of out-of-state consumers, that out-of-state customer complaints may not be considered as evidence for the Petitioner's arguments, and that this Petition raises certain Constitutional issues.

Petitioner May Not Recover on Behalf of Out of State Consumers but the Out of State Complaints May Be Considered as Corroborating the Other Evidence Presented

Much of the evidence that Petitioner brings in this case consists of customer complaints and affidavits. In their opposition papers, Respondent argues that many of these are inadmissible for several reasons: 1) many of the complaints describe transactions between out-of-state consumers speaking to out-of-state Sirius representatives; 2) not all of the customer complaints are authenticated and sworn affidavits; and 3) the affidavits from New York residents do not support the Petitioner's claims.

Respondent argues that complaints involving out-of-state customers and call center representatives are irrelevant in this proceeding because EL § 63 and GBL § 349 only authorize the Attorney General to address wrongdoing that occurred in New York State. Petitioner points to the fact that New York is the principal place of business for Sirius and argues that the cancellation policies at issue here were developed primarily in New York. The Attorney General

is authorized by the relevant statutes to recover on behalf of non-New York residents when a party uses "a New York business to complete the deceptive transactions at issue." *People v. H&R Block Tax Serv., Inc.*, 58 A.D.3d 415, 417 (1st Dept. 2009). But the Court of Appeals has held that, regarding the territorial reach of the GBL § 349, while the residency of a plaintiff or an aggrieved consumer is irrelevant, "the transaction in which the consumer is deceived must occur in New York" and that "originating a marketing campaign in New York in and of itself" is not sufficient. *Goshen*, at 324.

The issue is whether the scope of the EL and the GBL permit the Attorney General to recover for injuries that occurred out-of-state when the policies and procedures that led to that alleged injury were developed and implemented out of New York. That Respondent's principal place of business is in New York is not enough, in and of itself, to satisfy the territorial requirements of GBL § 349. Petitioner has argued that by developing, promoting, and maintaining the policies and standards at issue in this case, and by including a New York choice-of-law provision in the customer agreement that, in part, governs the cancellation procedure, there is sufficient nexus between the transactions with out-of-state parties and New York.

The Appellate courts have held several times that some part of the transaction itself must occur in New York. But what exactly constitutes some part of the transaction is not clearly delineated. *See Drizin v. Sprint Corp.*, 12 A.D.3d 245, 247 (1st Dept. 2004)(holding that maintaining an intentionally misleading service number is not a deceptive transaction that occurred in New York); *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63, 72 (2nd Dept. 2006) (holding that GBL § 349 is "strictly limited in its territorial reach to purchases made in New York"); *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 216 (3rd Dept. 2010) (holding that GBL § 349 "requires the deceptive transaction to have occurred in New York" when

declining a claim for allegedly deceptive practices related to advertised bonus minutes on a phone plan); *but see People v. Telehublink Corp.*, 301 A.D.2d 1006, 1009-10 (3rd Dept. 2003) (holding that GBL § 349 applied when the deceptive correspondence at issue was mailed from a New York address); *People v. H&R Block Tax Serv., Inc.*, 58 A.D.3d 415, 417 (1st Dept. 2009) (holding that GBL § 349 applied when a New York business was used to "complete the deceptive transactions at issue by administering their money market fund and [advising] customers that the New York Business would be their authorized agent").

Ultimately, the Respondent's practices are closer to the allegedly deceptive acts in *Goshen*, *Morrissey*, and *Drizin*. Respondent is a New York company with a New York choice of law provision in their governing customer agreement and the policies in question were devised by the New York team. But the actual transactions themselves consist of the interactions between the consumers and the Sirius agents, and to the extent that neither of these parties are in New York the transaction at issue did not occur in the state. Therefore, the Petitioner has not established the ability under the relevant case law to recover on behalf of out-of-state consumers who interacted with an out-of-state Sirius agent.

Respondent also argues that because many of the customer affidavits submitted by Petitioner are not sworn affidavits, the Court cannot consider them. Under CPLR § 3212(b), a court considering a motion for summary judgment may consider "other available proof, such as depositions and written admissions" alongside sworn affidavits. The unsworn affidavits may be considered as corroborating the sworn affidavits and other evidence that Petitioners put forth.

The Constitutional Issues Raised by Respondent do not Bar the Petition

The Respondent has argued that the Petition raises several constitutional issues, including dormant Commerce Clause issues (because Sirius XM's cancellation processes comply with

other states' settlement agreements) and that impeding them from offering additional deals and offers to customers during the cancellation process would infringe their First Amendment commercial speech. They also raise constitutional issues with ROSCA, which will be addressed below.

Under the Dormant Commerce Clause theory, a state law that burdens "the industry and business of other States", regardless of whether Congress has legislated on the matter, violates the Commerce Clause of the U.S. Constitution. *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023). The U.S. Supreme Court recently rejected that a state law with extraterritorial effects would almost on a per se basis violate the Constitution. *Id.*, at 390. Furthermore, as already addressed above, the Petitioner only has standing to recover for New York consumers, meaning that, if successful, the petition would involve the New York Attorney General remedying wrongdoing committed by a New York company, through policies developed in New York which impacted New York consumers. That the same policies may or may not be lawful in other states does not implicate the Dormant Commerce Clause.

Neither does this Petition involve undue burdens on the Respondent's free speech rights under the First Amendment. Several of the Petition's causes of action are based on allegedly fraudulent or misleading cancellation mechanisms. In order for commercial speech to be protected under the First Amendment, it "at least must concern lawful activity and not be misleading." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 565 (1980). Furthermore, to the extent that the Petition is based on laws that reach a company's conduct, rather than their speech, the First Amendment is not implicated. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (stating that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech");

II: Remaining Causes of Action

Here, the Court will turn to the issues not covered above and determine whether summary determination is warranted on the Petitioner's causes of action.

The Fraud Claims Brought by Petitioner Fail Because Respondent's Cancellation Policies and Procedures are not Materially Misleading nor do They Rise to the Level of Fraud under GBL § 349 or EL § 63(12)

Respondent argues that the first three causes of action in the Petition fail as a matter of law because there is "simply nothing deceptive about Sirius XM's cancellation process" and that while some customers might find the process frustrating or unfair, Petitioner has not alleged conduct arising to fraud or deception under GBL § 349 or EL § 63(12). For their part, Petitioner argues that the "undisputed facts also establish that Sirius's cancellation practices are fraudulent under Executive Law § 63(12) and deceptive and misleading under GBL § 349."

The test for fraud under EL § 63(12) is "whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v. GE*, 302 A.D.2d 314, 314 (1st Dept. 2003). This statute was "meant to protect not only the average consumer, but also the ignorant, the unthinking, and the credulous." *Id.* In order to obtain permanent injunctive relief, which Petitioner here does, they must show "a reasonable likelihood of a continuing violation based upon a totality of the circumstances." *People v. Greenberg*, 27 N.Y.3d 490, 496-97 (2016).

Because both parties have moved for summary judgment on this issue, the question becomes whether there are any triable issues of material fact for Petitioner's fraudulent claims. Petitioner here argues that Respondent's cancellation practices are fraudulent under EL § 63(12) because, while they promise consumers that they may "cancel your Subscription at any time", a

customer attempting to do so must "sit through a lengthy script during which agents are trained to rebuff cancellation requests." Respondent counters by contending that there is nothing misleading about their cancellation procedures and that "Sirius XM delivers what it promises: Customers may cancel any time, and to do so they must contact Sirius XM [who] never promised cancellation without conversation."

Here, there are no triable issues of material fact to the extent that Respondent's policies are alleged to be misleading. Sirius tells their customers that they may cancel at any time by contacting Sirius in the described manner. That Sirius, when contacted by customers requesting a cancellation, then engages in a conversation that offers some customers a different or better deal on their subscription before proceeding to cancellation is not deceptive or misleading, even to the ignorant, unthinking, or credulous consumer. It may be frustrating, but it is not deceptive. Petitioner claims that it is Respondent's official policies regarding cancellation requests that are deceptive or misleading under EL § 63(12), but these policies are, quite simply, depending on the customer's preferences aggravating at most, and not deceptive. Customers are told when signing up that they must speak to a live agent to cancel, and that is what they must do. There can be no triable issue of material fact regarding the cancellation process's status as misleading or deceptive.

Respondent's cancellation policies also create an atmosphere conducive to fraud, according to Petitioner, because they "leave ample room for agents to evade cancellation requests that are unambiguous." They argue that because Respondent incentivizes agents in part based on how many subscribers retain a subscription after indicating a desire to cancel, and because their instructions encourage customer service agents to treat anything short of giving up on their effort to cancel as "an invitation for more information and more questions", the policies

have violated EL § 63(12). Respondent, however, has submitted training materials and affidavits showing that they have taken steps to counter such a potential atmosphere. For instance, training material provided in the sworn affidavit of Jeffery Myers, the General Manager of Customer Care, tells agents to be "fast, friendly, and efficient" if they determine that a customer "simply no longer wants SiriusXM" and encourages the service agents to avoid frustrating those customers by not attempting to continue to offer them better deals. Other training material explicitly tells the customer service agents that "[r]emember, **it's ok to let a Customer leave** if we can no longer meet their needs!" (emphasis in original), and so on.

While incentivizing agents based in any degree on their retention rates certainly has the potential to create an atmosphere conducive to fraud, Respondents have introduced a plethora of material showing that they have taken repeated steps to avoid creating such an atmosphere. Petitioners have not shown that such an atmosphere was in fact created by Respondent, only that some of Respondent's policies have the potential to create such an atmosphere. Ultimately, there is no dispute of material fact on this matter, and Respondent's cancellation policies have not risen to the level of fraud under EL § 63(12).

For GBL § 349, the practices at issue must be "misleading in a material way" and "likely to mislead a reasonable consumer acting reasonably under the circumstances." *GE*, at 315. A court may conclude "as a matter of law" that certain conduct is materially misleading under GBL § 349. *People v. Orbital Publ. Group, Inc.*, 169 A.D.3d 564, 565 (1st Dept. 2019). For the reasons given above, Respondent's conduct has not been shown to rise to the level of fraud or be materially misleading under the standards of GBL § 349 or EL § 63(12).

Petitioner's GBL § 527-a Claim Fails Under a Traditional Reading of the Statute

Petitioner argues in their fourth cause of action that Respondent have violated GBL § 527-a, that such a violation is actionable by the Attorney General under GBL § 527-a(7), and that it would also constitute an illegal act under EL § 63(12). Respondent counters by arguing that Petitioner misconstrued the statute, and that Respondent is in fact in compliance with the statute.

GBL § 527-a was enacted in 2020 and the legislature's stated intent was to "end the practice of ongoing charging of consumer credit or debit cards or third-party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." 2020 N.Y. ALS 267, § 1. Ultimately, Petitioner alleges that Respondent violates this law because their cancellation mechanisms for automatic renewals are not "timely and easy-to-use." More specifically, Petitioner alleges that Respondent violates GBL § 524-a(2), which states in its entirety:

> A business that makes an automatic renewal offer continuous service offer shall provide a toll-free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that shall be described in the acknowledgment specified in paragraph c of subdivision one of this section.

Essentially, Petitioner argues that this provision requires a business's cancellation of automatic renewal be "cost-effective, timely, and easy-to-use", whereas Respondents contend that the conjunctive "or" in the statute means that this language describes an alternative cancellation method for when a business does not provide a toll-free telephone number, and electronic mail address, or a postal address only when the seller directly bills the consumer. Because this statute has not yet been interpreted by the courts, this presents an issue of first impression.

When engaging in statutory interpretation, legislative intent is "the great and controlling principle" and "the starting point in any case of interpretation must always be the language itself,

giving effect to the plain meaning thereof." *Matter of Peyton v. New York City Bd. Of Stds. & Appeals*, 36 N.Y.3d 271, 279 (2020). Generally speaking, when construing a statute "[t]he use of the disjunctive 'or' […] cannot be discounted or avoided; it denotes the important and elemental legislative demarcation." *In re Jacob*, 86 N.Y.2d 651, 678 (1995). In accordance with the established principles of statutory interpretation, this Court holds that GBL § 527-a(2) does not require that a business establish that every cancellation method they have for automatic renewal is cost-effective, timely, and easy-to-use. Rather, the legislature has designated three methods of cancellation that is deemed to satisfy the stated intent of protecting consumers from unwanted renewals, and if a business has failed to provide one of these three methods, the legislature designated a catch-all provision with certain requirements.

Therefore, under GBL § 527-a(2), if a business has provided a cancellation method for automatic renewals that consists of a toll-free telephone number, an electronic email address, or (only when the seller directly bills the consumer) a postal address, then a court need not engage in a "cost-effective, timely, and easy-to-use" analysis. Here, it is not a matter of dispute that Respondent offers a toll-free telephone number for cancellation and such number is described in the customer agreement that GBL § 527-a(1)(c) describes. Furthermore, as Respondent points out, GBL § 527-a(5) qualifies subsection (2) and states that the requirements within "shall apply only prior to the completion of the initial order for the automatic renewal or continuous service." Here, Respondent undisputedly provides a toll-free telephone number for customers to cancel their subscriptions in the customer agreements that are provided before the completion of their initial order for Sirius XM services. There is no valid claim under GBL § 527-a under the facts as stated.

The Illegal Acts in the Form of Violations of ROSCA Claim

The fifth cause of action alleges violations of the Restore Online Shoppers' Confidence Act ("ROSCA") that would give the Attorney General standing under EL § 63(12). Under this law, a seller of a negative option feature through the Internet must "provide[] simple mechanisms for a consumer to stop recurring charges from being placed on the consumer's credit card, debit card, bank account, or other financial account." 15 USC § 8403(3). Respondent opposes on two grounds: first, that ROSCA is unconstitutionally vague, and second, that their cancellation procedure satisfies the statute regardless.

ROSCA is Not Unconstitutionally Vague

Respondent argues that ROSCA, and more specifically the language in ROSCA requiring a cancellation method to be "simple", is unconstitutionally vague. There is a "strong presumption of constitutionality" for an enacted legislation. *Matter of the People of the State of N.Y. v. Quality King Distribs., Inc.*, 209 A.D.3d 62, 82 (1st Dept. 2022). But generally speaking, a law is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). When a statute involves economic regulations, however, it is "subject to a relaxed vagueness test." *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 187 (2nd. Cir. 2010). Under this relaxed vagueness standard, ROSCA is not unconstitutionally vague. That the FTC sees fit to issue guidance on interpreting ROSCA, and that they are hesitant to issue a list of specific prohibited cancellation practices because they fear "inadvertently provid[ing] a road map to tomorrow's deception" does not make the statute unconstitutionally vague. Negative Opinion Rule, 88 F.R. 24716, 24729 (Apr. 24, 2023).

Respondent's Cancellation Procedures Violate ROSCA

Therefore, the Court now turns to the issue of whether Sirius XM's cancellation practices violate ROSCA's simple mechanism requirement. This is at heart a largely fact-based analysis. As the federal district court remarked regarding the ROSCA claim when deciding to remand this case back to state court, "this case boils down to Sirius's contention that its cancellation procedures are simple and the State's contention that they are not." *People v. Sirius XM Radio Inc.*, 2024 U.S. Dist. LEXIS 93233 at *12 (SDNY May 23, 2024). And because this is a motion (and cross-motion) for summary judgment, the key factor is whether there are any disputes about material facts. For the reasons that follow, for undisputed reasons Respondent's policies violate ROSCA.

Respondent argues that their procedures are simple under ROSCA because their process is not unreasonably lengthy, difficult to understand, and their save attempts are acceptable under FTC guidance. Petitioners argue the opposite. Key to weighing the relevant facts is the guidance issued by the FTC. When an agency has been charged with administering a statute, New York courts are to accord the agency's construction deference so long as it is not "irrational or unreasonable." *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008). The FTC has issued a Statement providing guidance on the issue (the "2021 Statement") and on October 16, 2024, the FTC has adopted a final Rule that will regulate cancellation procedures going forward. But regardless of the new Rule, the 2021 Statement's guidance weighs in favor of Respondent's practices being violations of ROSCA.

First, the FTC compares the method for cancellation to that for signing up for the subscription. The 2021 Statement says that to meet the simple mechanism standard, "negative option sellers should provide cancellation mechanisms at least as easy to use as the method the consumer used to initiate the negative option feature" and that such sellers "should provide their

cancellation mechanisms at least through the same medium (such as website or mobile application) the consumer used to consent to the negative option feature." 86 F.R. 60822, 60826. It is not disputed that Respondents allow for a customer to sign up to a subscription without interacting with a live agent but require that a customer do just that in order to cancel. Given the inevitable wait times that come with a live customer service agent, and the again undisputed fact that Respondent's agents first go through an evaluation and offer process with the customer before proceeding to cancel, their cancellation procedure is clearly not as easy to use as the initiation method.

Secondly, there is the matter of how many additional offers Respondents make to customers before they proceed to cancellation. The FTC guidance states that "negative option sellers should not subject consumers to new offers or similar attempts to save the negative option arrangement that impose unreasonable delays on consumers' cancellation efforts." 86 F.R. 60822, 60826. Respondent's own training material tells their agents to use their "best judgment on the maximum number of offers to present to the Customer (usually 4 or 5 offers)", and subscribers in actuality may receive as many as seven retention offers in a call, offered one by one. Agents are also instructed to "think of every "No" simply as a request for more information." Respondents argue that multiple save offers are permissible in some circumstances under this FTC guidance. While that is true, the extent to which Respondents utilize multiple save offers in a call constitutes an unreasonable delay.

The three main areas of concern in the 2021 Statement for cancellations were the ease of cancelling compared to initial signup, the potential for delay caused by the use of multiple save offers, and the effectiveness of cancellation procedures. 86 F.R. 60822, 60826. Here, Respondent's policies fail to adequately satisfy two of the three areas of concern that the FTC

highlighted, and the reasons why they fail involve undisputed official policies by Respondent. The policies may not rise to the level of fraud as required for a violation of GBL § 349 or EL § 63(12), but they do fail the simple mechanism requirement of ROSCA and constitute a violation of that statute. Therefore, summary judgment for Petitioner on the fifth cause of action is granted. Because EL § 63(12) allows the Attorney General to seek injunctive and other equitable relief for repeated and persistent illegal conduct in the transaction of business, such a repeated and consistent violation of ROSCA forms a basis for EL § 63(12) relief, as sought by the Petitioner here. The Court has considered the parties' other arguments and found them unavailing. Accordingly, it is hereby

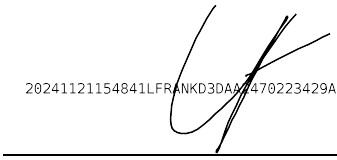
ADJUDGED that the respondent's cross-motion for summary judgment is granted as to the first, second, third, and fourth causes of action; and it is further

ADJUDGED that the petitioner's motion for summary judgment is granted as to the fifth cause of action; and it is further

ORDERED that an assessment of damages against respondent Sirius XM Radio Inc. is directed, and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office, who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).



11/21/2024
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
		GRANTED		**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**		**REFERENCE**