

JUDGE PRESKA

05 CV 10622

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

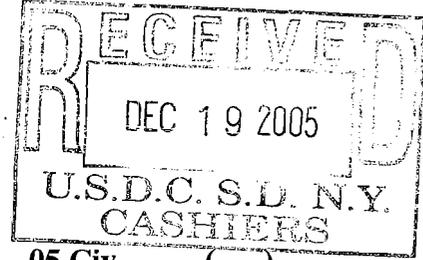
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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

GARY D. HERWITZ, and  
TRACEY A. STANYER,

Defendants.  
-----X



COMPLAINT

Plaintiff Securities and Exchange Commission, for its Complaint against defendants Gary D. Herwitz and Tracey A. Stanyer, alleges:

PRELIMINARY STATEMENT

1. The Commission charges Herwitz, former president of Mahoney Cohen & Company Inc., and Stanyer, a former executive vice president of Sirius Satellite Radio Inc., with committing securities fraud by engaging in illegal insider trading in Sirius stock. Illegal insider trading undermines the integrity of the nation's securities markets. Investors expect and deserve

a level playing field on which corporate officers do not exploit their positions of trust to trade illegally on the basis of material nonpublic information.

2. Herwitz and Stanyer engaged in illegal insider trading in advance of the October 6, 2004 announcement that Sirius had signed an agreement with radio broadcaster Howard Stern.

3. Herwitz purchased stock in Sirius after learning material, nonpublic information about the negotiations between Stern and Sirius. Stern was a client of Mahoney Cohen, which was counseling him in connection with his negotiations with Sirius. On or about September 21, 2004, Herwitz learned from Mahoney Cohen's chief executive officer, who also was Stern's longtime personal accountant, that Sirius and Stern were in negotiations and that Stern had received an offer from Sirius to begin broadcasting on the Sirius radio network. Herwitz was advised by his colleague to keep the information confidential. After learning this material nonpublic information, and in breach of his fiduciary or other duty arising out of a relationship of trust and confidence owed to the source of the information, and in violation of Mahoney Cohen's confidentiality policy, Herwitz purchased 25,000 shares of Sirius stock on September 30, 2004 on the basis of the information. Herwitz sold 22,500 of these shares between November 2004 and January 2005 for a profit.

4. Stanyer purchased stock in Sirius after learning material, nonpublic information about the agreement between Stern and Sirius. On or about October 5, 2004, a senior Sirius executive informed Stanyer that Stern had signed an agreement with Sirius. Stanyer was advised by the senior Sirius executive to keep the information confidential. Stanyer was aware that this information was confidential and nonpublic. After learning that Stern had signed an agreement

with Sirius, and in breach of his fiduciary or other duty arising out of a relationship of trust and confidence owed to Sirius, and in violation of Sirius's confidentiality policy, Stanyer purchased 29,120 shares of Sirius stock on October 5, 2004 on the basis of the material, nonpublic information. Stanyer sold all of these shares on October 7 and 8, 2004 for a profit.

5. On October 6, 2004, after Herwitz's and Stanyer's stock purchases, Stern announced publicly that he had signed a five year, \$500 million contract to begin broadcasting on the Sirius network in January 2006. Sirius also announced the deal publicly the same day. On October 6, 2004, the price of Sirius stock rose sixteen per cent.

6. Information that Stern was negotiating with Sirius or had received an offer from Sirius or had signed an agreement with Sirius was important to the reasonable investor because, among other things, it was a major development for Sirius's business and the market reacted positively to the news when it was publicly announced.

#### **VIOLATIONS**

7. By the conduct alleged herein, the Defendants, directly or indirectly, have engaged, and, unless enjoined, and restrained, will again engage, in transactions, acts, practices or courses of business that constitute a violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5].

#### **JURISDICTION AND VENUE**

8. The Commission brings this action pursuant to its authority under Section 21(d) of the Exchange Act [15 U.S.C. § 78u(d)] to enjoin the Defendants from engaging in the transactions, acts, practices, and courses of business alleged in this Complaint, for disgorgement of their ill-gotten gains and prejudgment interest thereon, and for civil penalties pursuant to the

Insider Trading and Securities Fraud Enforcement Act of 1988, Section 21A of the Exchange Act [15 U.S.C. § 78u-1]. In addition, pursuant to Section 21(d)(2) of the Exchange Act [15 U.S.C. § 78u(d)(2)], the Commission seeks an order barring Stanyer from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)].

9. This Court has jurisdiction over this action pursuant to Sections 21(d), 21(e), 21A, and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e), 78u-1, and 78aa].

10. The Defendants, directly or indirectly, singly or in concert, made use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or of the mails, or of any facility of any national securities exchange, in connection with the transactions, acts, practices, and courses of business alleged herein. Certain of the alleged transactions, acts, practices, and courses of business occurred in the Southern District of New York. Among other things, the headquarters of Sirius and Mahoney Cohen are in the Southern District of New York. Herwitz also resides in the Southern District in New York and placed his trade in Sirius through a broker located in the Southern District of New York.

#### **THE DEFENDANTS**

11. **Herwitz**, age 50, is a resident of Irvington, New York. During the relevant period, Herwitz served as the president of Mahoney Cohen. Herwitz is a certified public accountant licensed in New York. Herwitz resigned from Mahoney Cohen on June 15, 2005.

12. **Stanyer**, age 39, is a resident of Lake Orion, Michigan. During the relevant period, Stanyer was an executive vice president of Sirius in Sirius's Milford, Michigan office

who managed Sirius's alliance with DaimlerChrysler. On April 5, 2005 Stanyer invoked his Fifth Amendment privilege against self-incrimination during investigative testimony before Commission staff. On April 7, 2005, Sirius terminated Stanyer's employment.

### **RELEVANT ENTITIES**

13. **Mahoney Cohen** is a New York accounting firm that has approximately 220 employees in New York City and Miami and Boca Raton, Florida. It is a professional corporation organized under New York law. Mahoney Cohen provides accounting services to Stern.

14. **Sirius** is a Delaware corporation headquartered in New York, New York, whose common shares are traded on the NASDAQ under the symbol SIRI. The company provides satellite radio services in the United States through 132 channels of music, sports, talk, and other programming.

### **FACTS**

#### **Background**

15. Stern is the host of a daily radio broadcast, "The Howard Stern Show." The show is nationally syndicated and has the largest morning radio show audience in the United States.

16. In March 2004, Stern's agent commenced discussions with Sirius about Stern possibly moving his show to the company's satellite radio network. Between March and September 2004, Stern's agent continued conversations with Sirius.

17. In September 2004, Mahoney Cohen was counseling Stern on the negotiations.

18. On September 20, 2004, the Sirius board of directors authorized the company to enter an agreement with Stern based upon a draft term sheet.

19. On October 1, 2004, the Sirius board authorized execution of a revised agreement. Later the same day, both Stern and Sirius signed the agreement. Sirius agreed to pay approximately \$500 million to Stern's company, 112 Inc., to produce and broadcast the "Howard Stern Show" on Sirius for five years.

20. On October 6, 2004, at approximately 8:15 a.m. during a broadcast of "The Howard Stern Show," Stern announced that he had signed a five-year contract with Sirius to begin broadcasting on Sirius satellite radio in January 2006. The same day, at approximately 8:41 a.m., Sirius filed a Form 8-K with the Commission announcing the agreement.

21. The agreement was a very significant event for Sirius, which, as of October 6, 2004, had only 600,000 subscribers compared to its competitor XM Satellite Radio's 2.5 million subscribers. By securing the popular Stern, Sirius expected to enhance greatly its standing as a national satellite radio broadcast company. The company's October 6, 2004 press release announcing the news described it as "The Most Important Deal in Radio History." Indeed, the \$500 million contract with Stern represented the largest contract with an individual radio broadcaster in the young history of satellite radio. Sirius expected that a significant percentage of Stern's audience would subscribe to the Sirius radio network.

22. The announcement of Stern's contract with Sirius had a significant effect on the market for its securities. Sirius stock rose from \$3.35 at closing on October 5, 2004, the day before the announcement, to an intra-day high of \$4.29 on the day of the announcement, October 6, 2004, an increase of 28%, before closing at \$3.87 per share, an increase of 16% over the previous day's closing price. Similarly, volume in Sirius common stock increased from

approximately 72 million shares on October 5, 2004, to 344 million shares on October 6, 2004 making it the most actively traded stock on the NASDAQ that day.

**Herwitz Learned of the Sirius Offer from Stern's Accountant**

23. Herwitz was president of Mahoney Cohen and served on the executive committee of Mahoney Cohen. Mahoney Cohen was counseling Stern in his negotiations with Sirius.

24. On or about September 21, 2004, Herwitz learned about the Sirius negotiations and contract offer in the course of his employment with Mahoney Cohen. Specifically, Mahoney Cohen's chief executive officer, who was also Stern's long time personal accountant, told Herwitz that Stern was in negotiations with Sirius, that Sirius had made Stern an offer, and that he was working on the transaction. Herwitz's colleague admonished him to keep the information confidential.

25. On or about September 23, 2004, Mahoney Cohen's CEO again informed Herwitz that he was working on the transaction between Sirius and Stern.

**Herwitz Traded in Sirius Securities**

26. On September 30, 2004, Herwitz purchased 25,000 Sirius shares at \$3.19 a share.

27. Prior to March 2005, Herwitz did not inform anyone at Mahoney Cohen that he had purchased Sirius shares after learning of Sirius's offer to Stern but before the public announcement.

28. When Herwitz purchased Sirius shares on September 30, 2004, he was aware of material nonpublic information about Sirius's negotiations with, and offer to, Stern.

29. On November 19, 2004, December 22, 2004, and January 10, 2005, Herwitz sold a total of 22,500 Sirius shares for a profit.

### **Herwitz's Duty to Maintain the Confidentiality of Client Information**

30. As president of Mahoney Cohen, Herwitz owed a fiduciary or other duty arising from a relationship of trust and confidence to keep confidential the information he learned from his colleague about Sirius's negotiations with, and offer to, Stern. As an accountant, Herwitz also had a professional duty to maintain the confidentiality of Mahoney Cohen's client information.

31. Herwitz was provided a copy of Mahoney Cohen's policy regarding the confidentiality of client information upon joining Mahoney Cohen. During September and October 2004 and all other relevant times, Herwitz knew or was reckless in not knowing about the Mahoney Cohen policy regarding the confidentiality of client information.

32. The information that Stern was negotiating with Sirius and had received an offer from Sirius was confidential client information of Mahoney Cohen that was material and nonpublic.

33. When he purchased Sirius shares on September 30, 2004, Herwitz was aware of the material, nonpublic information that Stern was negotiating with Sirius and had received an offer from Sirius and he traded on the basis of it.

34. When he purchased Sirius shares on September 30, 2004 on the basis of material nonpublic information, Herwitz misappropriated Mahoney Cohen's confidential client information for his own use and benefit.

35. When Herwitz purchased Sirius shares on September 30, 2004, he acted with intent to defraud. He knew or recklessly disregarded the fact that the material information that Stern was negotiating with Sirius and had received an offer from Sirius was Mahoney Cohen's

confidential client information. Herwitz also knew or recklessly disregarded the fact that by purchasing Sirius shares on the basis of that material nonpublic information, Herwitz breached his fiduciary or other duty arising from a relationship of trust and confidence to Mahoney Cohen, its shareholders, and the firm's client, Stern.

**Stanyer Learned of the Sirius Offer from a Sirius Executive**

36. In early September 2004, Stanyer learned from a senior Sirius executive that Sirius executives were in negotiations with Stern. Stanyer learned this information in connection with his corporate duties at Sirius and was specifically cautioned that the negotiations were confidential.

37. On or about October 5, 2004, Stanyer learned from the senior Sirius executive that Sirius had signed an agreement with Stern.

**Stanyer Traded in Sirius Securities**

38. On October 5, 2004, Stanyer purchased 29,120 Sirius shares at prices ranging between \$3.28 and \$3.32 a share.

39. At the time Stanyer purchased Sirius shares on October 5, 2004, he was aware of material nonpublic information about Sirius's offer to Stern.

40. On October 7 and 8, 2004, Stanyer sold his 29,120 Sirius shares for a profit.

**Stanyer's Duty to Maintain Sirius Corporate Information Confidential**

41. As an officer of Sirius, Stanyer had a fiduciary or other duty arising from a relationship of trust and confidence with Sirius and its shareholders to maintain the confidentiality of Sirius's nonpublic corporate information.

42. Sirius's policies specifically required employees to maintain corporate information as confidential and prohibited employees from making any trade in Sirius securities without the written consent of the Sirius general counsel. Stanyer was provided a copy of this policy upon joining Sirius and the policy was posted on Sirius's internal website.

43. During the relevant period, Stanyer knew or was reckless in not knowing about Sirius's confidentiality and insider trading policy.

44. As of October 5, 2004, the information that Stern had signed an agreement with Sirius was material and nonpublic.

45. In contravention of Sirius's confidentiality and insider trading policy, Stanyer did not obtain authorization from anyone at Sirius to make his October 5 purchases of Sirius securities.

46. Stanyer did not inform anyone at Sirius that on October 5, 2004 he purchased Sirius securities.

47. When he purchased Sirius shares on October 5, 2004, Stanyer was aware of the material, nonpublic information that Stern had signed an agreement with Sirius, and he traded on the basis of it.

48. When Stanyer purchased Sirius shares on October 5, 2004, he acted with intent to defraud. He knew or recklessly disregarded the fact that the material information that Stern had signed an agreement with Sirius was Sirius's confidential nonpublic information. Stanyer also knew or recklessly disregarded the fact that, by purchasing Sirius shares on the basis of that material, nonpublic information, Stanyer breached his fiduciary or other duty arising from a relationship of trust and confidence owed to Sirius and its shareholders.

**FIRST CLAIM FOR RELIEF**

**Defendant Herwitz Violated Section  
10(b) of the Exchange Act and Rule 10b-5**

49. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 48, above.

50. Herwitz, directly or indirectly, singly or in concert, by the use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or by use of the mails, or of any facility of any national securities exchange, in the offer or sale, and in connection with the purchase or sale, of Sirius securities: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of, or otherwise made, untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices and courses of business which operated or would operate as a fraud or deceit upon other persons.

51. By reason of the foregoing, Herwitz, directly or indirectly, singly or in concert, violated, and unless enjoined will again violate, Section 10(b) of the Exchange Act and Rule 10b-5.

**SECOND CLAIM FOR RELIEF**

**Defendant Stanyer Violated Section  
10(b) of the Exchange Act and Rule 10b-5**

52. The Commission realleges and incorporates by reference the allegations contained in paragraphs 1 through 48, above.

53. Stanyer, directly or indirectly, singly or in concert, by the use of the means or instruments of transportation or communication in, or the means or instrumentalities of, interstate commerce, or by use of the mails, or of any facility of any national securities exchange, in the offer or sale, and in connection with the purchase or sale, of Sirius securities: (a) employed devices, schemes, or artifices to defraud; (b) obtained money or property by means of, or otherwise made, untrue statements of material fact or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engaged in transactions, acts, practices and courses of business which operated or would operate as a fraud or deceit upon other persons.

54. By reason of the foregoing, Stanyer, directly or indirectly, singly or in concert, violated, and unless enjoined will again violate, Section 10(b) of the Exchange Act and Rule 10b-5.

## **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff respectfully requests a Final Judgment:

### **I.**

Permanently enjoining each defendant, and their agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, and each of them, from violating Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5];

### **II.**

Ordering each defendant to disgorge his ill-gotten gains and to pay prejudgment interest thereon;

### **III.**

Ordering each defendant to pay civil money penalties pursuant to Section 21A of the Exchange Act [15 U.S.C. § 78u(d)(3) and § 78u-1];

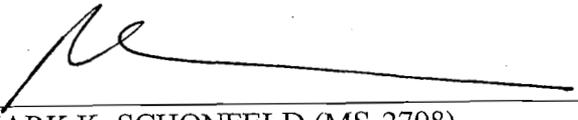
### **IV.**

Ordering that Stanyer be barred from acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]; and

V.

Granting such other relief as the Court shall deem just and proper.

Dated: New York, New York  
December 19, 2005



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