IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE SIRIUS XM SHAREHOLDER LITIGATION	))	Civil Action No. 7800-CS

OPINION

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STRINE, Chancellor.

I. Introduction

In 2009, Sirius XM Radio Inc. ("Sirius") — a company that creates and broadcasts subscription-based satellite radio — was struggling. Its stock was trading below $0.15 per share and it was facing an imminent requirement to repay certain outstanding Convertible Notes, which it lacked the cash flow to meet. To stabilize its shaky finances, Sirius negotiated a capital infusion from Liberty Media Corporation ("Liberty Media"). That infusion of $530 million (the "Investment Agreement") gave Sirius time to turn things around by developing new sources of revenue and expanding on-air talent. As nothing in life is free, and particularly not capital infusions into public corporations, Liberty Media received, among other things, preferred stock in Sirius that was convertible into a 40 percent common equity interest.

Although Sirius's board negotiated contractual provisions that limited Liberty Media's ability to take majority control of Sirius for three years, the Certificates of Designations for the preferred stock (the "Certificates of Designations") gave Liberty Media the right to designate directors to the Sirius board in proportion to its equity ownership as well as the right to consent to important corporate actions such as any merger, sale, or recapitalization of Sirius. Most important for present purposes, once the standstill period expired, the Investment Agreement specifically prevented the Sirius board from using a poison pill or any other charter or bylaw provision to interfere with Liberty Media's ability to purchase additional Sirius stock. Thus, under the Investment Agreement, Liberty Media secured the practical ability to take control of Sirius in 2012 without paying a premium to Sirius stockholders by purchasing the additional shares

needed to obtain control in the market. The Investment Agreement and its terms were publicly announced on February 17, 2009 and were the subject of numerous disclosures.

Over the next three years, Sirius's financial situation improved, and its stock rose to trade at a price of over $2 per share. When the standstill period expired on March 6, 2012, Liberty Media announced that it intended to acquire majority control of Sirius if it could obtain regulatory approval from the FCC and began purchasing additional stock on the open market. The plaintiffs sued and complained that the Sirius board had breached its fiduciary duties by adhering to the provisions of the Investment Agreement, which precluded them from blocking Liberty Media's acquisition of control with a poison pill or by other means. The plaintiffs also alleged that Liberty Media had breached its fiduciary duties as a controlling stockholder by purchasing shares on the open market to acquire majority control of Sirius without paying a premium.

The defendants have moved to dismiss the complaint, arguing, among other things, that the plaintiffs' claims are time-barred. Their motion to dismiss is granted. The statute of limitations for breach of fiduciary duty is three years. The plaintiffs filed their claims more than three years after the Investment Agreement was signed and publicly disclosed. Reasonable Sirius stockholders were on full notice in 2009 that Liberty Media would be able to acquire majority control without interference from the Sirius board after the standstill period expired in 2012. The plaintiffs have identified no reason why they did not challenge the Investment Agreement within the required limitations period, nor have the plaintiffs identified any action the board could have taken to block Liberty Media that was not specifically foreclosed by the Investment Agreement.

The plaintiffs may not sue at this late date, especially given the undisputed reality that Liberty Media put $530 million at risk for over three years by investing in Sirius, in reliance on the contractual consideration it received in return.

The plaintiffs sought to avoid dismissal by claiming that, regardless of the bargain struck in the Investment Agreement in 2009, Liberty Media still owed a duty of fairness at the end of the standstill period in 2012 to only obtain control through a transaction that was approved as fair by the independent Sirius directors. The only act that the plaintiffs point to as a breach of that alleged duty that occurred within the statute of limitations is the fact that Liberty Media purchased shares on the open market to achieve majority ownership. But that is exactly what Liberty Media bargained for in the Investment Agreement before it invested in Sirius — it accepted a restriction on its ability to purchase additional shares for three years and in return, received a commitment that the Sirius board would not interfere with its ability to purchase shares on the open market after the standstill period expired. Thus, although artfully repackaged, this is still an attack on the terms of the Investment Agreement that the board negotiated in 2009. The plaintiffs are therefore only alleging that Liberty Media exercised its contractual right to purchase shares. Absent fraud or the use of material, non-public information to gain an advantage in trades, Delaware's common law of corporations — i.e. equitable fiduciary duty law — does not preclude a stockholder from acquiring a majority stake by making open market purchases. At a time before it had any influence over Sirius, much less any fiduciary obligation to it, Liberty Media gave valuable consideration in exchange for the

right to make open market purchases after the standstill period expired. Liberty Media's decision to do so, without more, provides no basis for a cause of action against it.

Of course, it is natural for the plaintiffs to want the company in which they are invested — Sirius — to have all of the upside but none of the downside that comes with real world commercial transactions. But that desire is not indulged by the law, which recognizes that for commercial transactions to facilitate wealth creation, they must be enforced fairly and in a manner that recognizes that both sides gave consideration. Thus, the plaintiffs are not entitled to watch Sirius take over half a billion dollars in capital from Liberty Media, sit on the sidelines benefitting from the investment Liberty Media made in Sirius until after the statute of limitations expires, and then belatedly seek to deprive Liberty Media of the benefits of the contract it received in exchange.

II. Background

In keeping with the procedural setting of a motion to dismiss, the relevant facts are drawn from the plaintiffs' second amended complaint (the "Complaint") and the documents it incorporates.[1] In February 2009, Sirius was struggling to obtain funds to repay certain outstanding Convertible Notes in a frozen credit market and desperately needed an immediate capital infusion to avoid bankruptcy. To weather the storm, Sirius negotiated the Investment Agreement with Liberty Media to provide it with a total of $530 million in loans. In return, Liberty Media received preferred stock convertible to 40

[1] *See* Second Am. V. Compl. [hereinafter Compl.]. These documents include: 1) the Investment Agreement itself; 2) the Certificates of Designations; and 3) the Sirius XM, Annual Report (Form 10-K) (March 10, 2009).

percent of the outstanding shares of Sirius common stock. The Certificates of Designations gave Liberty Media the right to designate directors to the Sirius board in proportion to its equity ownership, which at all relevant times constituted five members of the thirteen-person board.[2] Liberty Media also received the contractual right to consent to certain important corporate actions including any grant or issuance of Sirius equity securities, any merger or sale of all or substantially all of Sirius's assets, any acquisition or disposition of assets above certain thresholds other than in the ordinary course of business, any incurrence of debt in amounts greater than a stated threshold, and any amendment to the Sirius certificate of incorporation or bylaws in a manner that materially adversely affected Liberty Media.[3]

As part of the deal, Liberty Media agreed to a standstill provision that prohibited it from increasing its ownership interest in Sirius beyond 49.9 percent for a period of three years,[4] and Sirius agreed that after the standstill period expired it would not adopt a poison pill or any other defensive measure that could affect Liberty Media's ability to purchase additional Sirius stock. The Investment Agreement provided:

> Anti-Takeover Provisions. From and after the date hereof, [Sirius] shall not (i) amend, modify or rescind the resolution specified in Section 2.1(f) and Exhibit C attached hereto or (ii) adopt any "poison pill" or shareholder rights plan, or any charter or bylaw provision, in any case that would materially adversely affect [Liberty Media's] ability to acquire and dispose of Equity Securities from time to time to a Liberty Party or, after the third anniversary of the Closing Date, in block transactions or otherwise (subject to complying with Section 4.1 and Section 4.2 hereof) or that otherwise

[2] Certificates of Designations, § 11 Voting Powers; Compl. ¶ 46.
[3] Certificates of Designations, § 12 Special Class Vote Matters; Compl. ¶ 47.
[4] Investment Agreement § 4.1; Compl. ¶ 49.

> would impose material economic burdens on [Liberty Media's] ability to do so (an "Anti-Takeover Provision").[5]

The Investment Agreement was announced in a press release on February 17, 2009. That day, Sirius filed a Form 8-K describing the Investment Agreement, and it included additional disclosure in its Form 10-K on March 10, 2009. The Form 10-K included the following as one of the risk factors: "[Liberty Media] has significant influence over our business and affairs and its interests may differ from ours." To further explain that risk factor, the Form 10-K stated:

> As a result, [Liberty Media] has significant influence over [our] business and affairs. The interest of [Liberty Media] may differ from the interests of other holders of our common stock. The extent of [Liberty Media's] stock ownership in us also may have the effect of discouraging offers to acquire control of us and may preclude holders of our common stock from receiving any premium above market price for their shares that may be offered in connection with any attempt to acquire control of us.[6]

The Form 10-K included the Investment Agreement as an exhibit.

During the years after Liberty Media's investment, Sirius's financial performance improved and Sirius stockholders reaped the benefits. Sirius's share price rose from below $0.15 in February 2009, when it signed the Investment Agreement with Liberty Media, to over $2 in May 2011. Sirius also increased its subscriber base to record levels. When he resigned in late 2012, Sirius CEO Mel Karzamin stated that "Sirius[] has never

[5] Investment Agreement § 3.2(b); Compl. ¶ 52.
[6] Sirius XM, Annual Report (Form 10-K) (March 10, 2009).

been better positioned than it is today . . . and [its] financial position has never been stronger."[7]

The standstill period in the Investment Agreement expired on March 6, 2012. Shortly thereafter, Liberty Media informed Sirius that it planned to acquire more than 50 percent of the company's outstanding stock. Liberty Media then began to buy substantial quantities of shares of Sirius common stock in the open market, in what the plaintiffs refer to as a "creeping takeover."[8] Karmazin, the CEO of Sirius at the time, told stockholders at the May 22, 2012 annual meeting that he didn't "want [Liberty Media] to get control of the company that way without paying a premium,"[9] but acknowledged that "there's nothing [the Sirius board] can do" to prevent Liberty Media from doing so.[10] The Sirius board did not attempt to have the Anti-Takeover Provisions invalidated and did not implement a poison pill to block Liberty Media from taking majority control, because it viewed itself as bound by the Investment Agreement.

Liberty Media also sought FCC permission to take control over Sirius's satellite broadcasting licenses. Liberty Media needed this regulatory approval before it could acquire a majority interest in Sirius.[11] Liberty Media filed an application with the FCC for de facto control of the licenses on March 20, 2012. A company can apply to take de facto control of another company's licenses when its stake is below 50 percent but it has

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[7] Compl. ¶ 87.
[8] Compl. ¶¶ 75, 99.
[9] Compl. ¶ 75.
[10] Compl. ¶ 77.
[11] *See* Communications Act of 1934, 47 U.S.C. § 310(d).

actual operating control of the company, and it can apply to take de jure control when it is above that threshold. The eight non-Liberty appointed directors on the Sirius board opposed the de facto application, however, and the FCC rejected it on May 4, 2012, noting that Liberty Media had not yet indicated that it would take specific actions that would establish its intent to exercise actual control, such as converting its preferred stock.[12] On August 17, 2012, Liberty Media filed a new application with the FCC for de jure control of the licenses, asserting that it would convert its preferred stock and purchase additional common shares to own more than 50 percent of Sirius within sixty days of FCC approval.[13] The application was publicly disclosed on October 2, 2012. This time, the Sirius board did not contest the application, and it was approved by the FCC on January 3, 2013. Liberty Media then purchased additional Sirius stock on the open market, converted its preferred stock into common stock, and announced on January 17, 2013 that it had obtained a majority of the outstanding Sirius common stock.[14]

III. Complaint

This consolidated action was originally filed in August 2012 by Sirius stockholders against Liberty Media and the Sirius board of directors. The plaintiffs have twice amended their Complaint, most recently on January 28, 2013, after Liberty Media announced that it had acquired a majority of Sirius's outstanding common stock. The current Complaint includes four counts: Counts I and II allege that Liberty Media and the

[12] Compl. ¶¶ 69-72.
[13] Compl. ¶¶ 79-80.
[14] Compl. ¶ 93.

Sirius board, respectively, breached their fiduciary duties of loyalty; Count III seeks a declaratory judgment that the Anti-Takeover Provisions of the Investment Agreement are unenforceable; and Count IV seeks a declaratory judgment that the anti-takeover provisions of 8 *Del. C.* § 203 apply to Liberty Media.

The allegations in the Complaint focus on two time periods: 2009, when the Investment Agreement was entered into, and 2012, when the standstill period expired and Liberty Media began purchasing Sirius shares in the open market. The defendants moved to dismiss the Complaint on various grounds. Because the motion can be resolved without addressing all of the defendants' theories, the court focuses solely on the clearest arguments for dismissing the Complaint.

IV. Legal Analysis

The standard of review under Court of Chancery Rule 12(b)(6) is well settled. "The timeliness of claims may be determined on a motion to dismiss if the facts pled in the complaint, and the documents incorporated within the complaint, demonstrate that the claims are untimely."[15] When evaluating a motion to dismiss, all well-pled allegations of fact must be accepted as true and all reasonable inferences must be made in favor of the plaintiffs, but conclusory allegations unsupported by specific facts need not be accepted

[15] *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *6 (Del. Ch. Jan. 24, 2005) (internal citations omitted); *see also Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993) (finding it "well settled that where the complaint itself alleges facts that show that the complaint is filed too late, the matter may be raised by defendants' motion to dismiss").

as true.[16] The court may consider documents that are "integral" to the Complaint on a motion to dismiss.[17] Here, the plaintiffs have incorporated the Investment Agreement and subsequent public filings with the SEC into their Complaint by referring to and relying on them in their briefs.[18] Thus, those documents may be considered for purposes of the motion to dismiss.

A. The Plaintiffs' Claims Are Time-Barred

Unless timely filing is excused by a recognized tolling doctrine, a plaintiff must file a claim for breach of fiduciary duty within three years of the conduct that gives rise to the claim.[19] Although claims for breach of fiduciary duty brought in this court are governed by the equitable doctrine of laches, rather than by strict application of the statute of limitations that applies at law, equity follows the law when that is sensible, and the statute of limitations will apply by analogy.[20] Thus, claims filed beyond the statutory

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[16] *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998).

[17] *Vanderbilt Income & Growth Assoc's v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612-13 (Del. 1996) (discussing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 68-70 (Del. 1995)). A document is integral if it is the "source" of the facts pled. *Orman v. Cullman*, 794 A.2d 5, 16 (2002).

[18] Compl. ¶ 40 (quoting Sirius's March 10, 2009 10-K filed with the SEC); Compl. ¶¶ 50, 52 (quoting provisions of the Investment Agreement).

[19] *U.S. Cellular Inv. Co. of Allentown v. Bell Atl. Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996) (citing 10 *Del. C.* § 8106).

[20] *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998); *see also Sunrise Ventures, LLC v. Rehoboth Canal Ventures, LLC*, 2010 WL 363845, at *6 (Del. Ch. Jan. 27, 2010) (noting that the statute of limitations serves as "the outermost limit of when a claim may timely proceed").

limitations period are presumptively barred.[21] The doctrine of laches recognizes that equity does not aid those who slumber on their rights;[22] therefore, a party seeking equitable relief may need to file with greater alacrity than is required by the analogous statute of limitations to preserve its entitlement to relief, because to allow that party to wait while the defendant endures the market risk would itself be inequitable.[23] Thus, laches may bar a plaintiff in equity before the analogous statute of limitations has run, but a filing after the analogous statute of limitations has run cannot be justified except in the "rare"[24] and "unusual"[25] circumstance that a recognized tolling doctrine excuses the late filing.[26] In other words, a plaintiff in equity cannot file beyond the statute of limitations unless a tolling doctrine exists that would justify an equally late filing in a court of law. After the statute of limitations has run, defendants are entitled to repose and are exposed to prejudice as a matter of law by a suit by a late-filing plaintiff who had a fair opportunity to file within the limitations period.

Here, the chronology relevant to a laches analysis is indisputable. The core of the plaintiffs' Complaint — the Anti-Takeover Provisions contained in the Investment

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[21] *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 1594085, at *12 (Del. Ch. June 29, 2005) ("[W]here the analogous statute of limitations at law period has run, a plaintiff is barred from bringing suit without the necessity of the court engaging in a traditional laches analysis.").

[22] *Reid v. Spazio*, 970 A.2d 176, 182 (Del. 2009).

[23] *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *5 (Del. Ch. July 24, 2009); *Territory of U.S. Virgin Islands v. Goldman, Sachs & Co.*, 937 A.2d 760, 808 (Del. Ch. 2007); *Certainteed Corp. v. Celotex Corp.*, 2005 WL 217032, at *7 (Del. Ch. Jan. 24, 2005).

[24] *Gordon Scott Levey v. Brownstone Asset Mgmt.*, --- A.3d ---, 2013 WL 4525770, at *16 (Del. Aug. 27, 2013).

[25] *IAC/InterActiveCorp v. O'Brien*, 26 A.3d 174, 177-78 (Del. 2011).

[26] *Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 2012 WL 3201139, at *15 (Del. Ch. Aug. 7, 2012), *reargument denied*, 2012 WL 4503731 (Del. Ch. Oct. 1, 2012).

Agreement — were agreed to and disclosed to the public in 2009.[27] Now, more than three years later, the plaintiffs seek to challenge those provisions.[28] They have offered no persuasive explanation for their delay. Instead, the plaintiffs insist that their Complaint challenges actions taken by the Sirius board after the standstill period expired in 2012, specifically the board's failure to adopt a poison pill that would prevent Liberty Media from obtaining a majority stake in the company.[29] The plaintiffs took the same position at oral argument.[30]

But, "[u]nder Delaware law, a plaintiff's cause of action accrues at the moment of the wrongful act — not when the harmful effects of the act are felt — even if the plaintiff is unaware of the wrong."[31] Here, the board made the decision to take Liberty Media's capital in 2009, and, in an arm's-length transaction, agreed that in exchange they would

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[27] Compl. ¶ 39-40 (referring to the February 17, 2009 press release announcing the Investment Agreement to Sirius shareholders and subsequent disclosure in public SEC filings).

[28] Compl. ¶ 138 (alleging that the Sirius board "abdicated their management responsibilities and unremitting fiduciary duties by entering into a contract which contains the Dead Hand Provision"); *see also* Pls.' Br. in Opp'n at 28 ("Plaintiffs challenge the agreement to the Dead Hand Provision in the Investment Agreement and its subsequent use to neuter the Sirius Board's directorial authority.").

[29] Pls.' Br. in Opp'n at 36 (challenging "Defendants' conduct after the Standstill expired in March 2012 — not the act of entering into the Investment Agreement in 2009"); *see also* Pls.' Br. in Opp'n at n.17 (explaining that "Plaintiffs here do not challenge the validity of the Investment Agreement itself, only Defendants' post-Standstill conduct").

[30] Oral Arg. Tr. 74:9-14 ("Our challenge is to the conduct in 2012. . . . the contract in 2009 . . . we're not challenging that contract. . . . We're challenging conduct in 2012."); *see also* Oral Arg. Tr. 22-23 (denying that the plaintiffs challenge the Investment Agreement).

[31] *In re Coca-Cola Enterprises, Inc., S'holders Litig.*, 2007 WL 3122370, at *5 (Del. Ch. Oct. 17, 2007); *see also Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) ("This Court has repeatedly held that a cause of action 'accrues' under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action."); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *3 (Del. Ch. July 17, 1998) ("The general law in Delaware is that the statute of limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action.").

not adopt a poison pill or any other anti-takeover measures against Liberty Media after the standstill period expired. The terms of that deal were fully disclosed in 2009. The board's actions in 2012 were anticipated by and, in fact, required under the Investment Agreement. Therefore, the board's inability to block Liberty Media's so-called "creeping takeover" was merely the manifestation of the bargain struck between Sirius and Liberty Media in 2009.[32] If the plaintiffs ever had a meritorious claim that the Anti-Takeover Provisions in the Investment Agreement were unenforceable, an issue that the court does not reach, then they had it in 2009.

This case is similar to the circumstances in *Hokanson v. Petty*.[33] In 2003, Altiva Corporation, faced with a difficult financial situation, negotiated a capital infusion from a third party, Exactech. In exchange, Exactech received, in addition to preferred stock, a Buyout Option permitting Exactech to purchase all outstanding Altiva common stock at any time during a specific period at a price to be determined by a preset formula. Four years later, when Exactech decided to exercise its contractual rights contained in the Buyout Option, the *Hokanson* plaintiffs challenged the price as too low. In an attempt to avoid dismissal, the *Hokanson* plaintiffs focused their allegations on the board's failure to negotiate a higher price at the time of the buyout, instead of on the contract provisions negotiated and disclosed years earlier which constrained the board's discretion to do so.[34]

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[32] The plaintiffs acknowledge in their Complaint that the Anti-Takeover Provisions in the Investment Agreement "prevent[ed] the directors from taking any action that might impede Liberty's continued acquisition of Sirius stock." Compl. ¶ 84.
[33] *Hokanson v. Petty*, 2008 WL 5169633 (Del. Ch. Dec. 10, 2008).
[34] *Id.* at *4-5.

This court dismissed that claim as time-barred, because "[t]he material decisions about the transaction, including the price and transaction form, were made then and cannot be challenged now."[35] The court concluded that "[p]arties cannot repudiate their contracts simply because they wish they had gotten better terms" and described the Buyout Option as "the cost of capital for Altiva at a time when, as plaintiffs acknowledge, it was facing financial ruin."[36] The plaintiffs here, like those in *Hokanson*, cannot ignore the reality created by the Investment Agreement; that reality included the fact that the Sirius board was contractually precluded from blocking Liberty Media from acquiring more shares in the open market.

The plaintiffs' contention that they either were unaware of the consequences of the Anti-Takeover Provisions or "lulled into repose"[37] until the standstill period expired is even less convincing. The Investment Agreement makes plain that, after the standstill period ended, Sirius could not take any action to prevent Liberty Media from acquiring a majority of shares if Liberty Media so chose. The Investment Agreement was timely and repeatedly disclosed in 2009, and its plain terms made clear that once the standstill period expired, Liberty Media could acquire majority control of Sirius by making open market purchases without interference from the Sirius board. Because reasonable Sirius stockholders were on full notice of the Investment Agreement's terms, there is no excuse

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[35] *Id.* at *5.

[36] *Id.* at *6 (adding that "[t]he $25 million minimum valuation was a protective provision that Altiva was able to negotiate for the sake of its shareholders, and it protected them here. The fact that it was not enough to ensure a payout to all Altiva shareholders is not a license to deny Exactech the benefits of its bargain").

[37] Pls.' Br. in Opp'n at 29.

for the plaintiffs' failure to challenge the Anti-Takeover Provisions within the three-year statute of limitations.

B. The Plaintiffs Fail To State A Claim Separate From Those That Are Time-Barred

At oral argument, the plaintiffs were given ample opportunity to identify any claim they had that was not dependent on their attack on the validity of the Investment Agreement. Despite their respected counsel's best efforts, the plaintiffs were unable to muster an argument that any of the director-defendants had failed to do anything that was within the realm of options not prohibited by the Investment Agreement to prevent Liberty Media from becoming a majority stockholder. That is to say, the plaintiffs' claims against the Sirius director-defendants for breach of fiduciary duty were entirely dependent on the plaintiffs' attack on the Investment Agreement, and were thus time-barred by laches.

The plaintiffs did passionately argue that one aspect of their claim against Liberty Media itself was not time-barred. They argued that even if Liberty Media had specifically negotiated as a non-controlling stockholder for this contractual right, Liberty Media was still subject to a "duty of fairness" as of the end of the standstill period.[38] Because, upon the expiration of the standstill period, Liberty Media was no longer proscribed from obtaining control over Sirius, the plaintiffs argued that Liberty Media

[38] Oral Arg. Tr. 48:19-22 ("It allowed him to take action without the board interfering. That's not the same as saying he can do so without regard to his own duty of fairness."); 51:24-52:1 (stating that the Sirius directors owed "[a] duty of fairness in whatever [they]'re doing"); 58:12-15 ("They have a duty of fairness, Your Honor.").

owed a broad duty of fairness that precluded it from buying additional shares in the marketplace except in a transaction that was approved as fair by the Sirius board of directors. This is an odd notion that was accompanied by suggestions that although Liberty had no obligation to make an "any and all shares" offer — such as if a European mandatory bid rule applied that would require a stockholder that had crossed a certain ownership threshold to make an offer for all outstanding shares[39] — it still had to proceed to acquire majority control by means of some transaction that was negotiated by directors not controlled by it and on terms fair to the Sirius stockholders other than itself.[40] Put differently, the plaintiffs argued that although Liberty Media put over $530 million at risk in a transaction that precluded it from exercising control for three years but that permitted it to buy more shares after that period without obstruction by Sirius's board of directors and to become a controlling stockholder if it could buy sufficient shares in the market at that time, Liberty Media was in fact required — as a matter of fiduciary duty — to only buy majority control after a new negotiation with the Sirius board.

This claim does not survive the defendants' motion to dismiss for two reasons. First, even considered this way, the claim is time-barred. Because the Investment Agreement was the product of an arm's-length negotiation between Liberty Media —

[39] The Takeover Directive, which was adopted in the European Union in 2004, requires a stockholder that acquires a substantial stake in a corporation, typically around 30 percent, to make an offer "to all the holders of [that corporation's] securities for all of their holdings at [an] equitable price." Council Directive 2004/25, art. 5, 2004 O.J. (L 142) 12, 17 (EC). For more discussion of this provision, see Andrew Zwecker, *The EU Takeover Directive: Eight Years Later, Implementation But Still No Harmonization Among Member States On Acceptable Takeover Defenses*, 21 TUL. J. INT'L & COMP. L. 233, 244, 256 (2012).

[40] Oral Arg. Tr. 46:8-22, 48:9-49:20, 52:17-53:18, 57:11-58:15.

which at that time was not a stockholder of Sirius of any kind, much less a controlling one — and Sirius's board of directors and the Investment Agreement clearly granted Liberty Media the ability to make open market purchases without interference from Sirius after the standstill period expired, the plaintiffs are in fact challenging the failure of the Sirius board to negotiate a good contract in 2009. This is made still plainer by the plaintiffs' acknowledgement that the Investment Agreement only permitted Liberty Media to buy additional shares of Sirius common stock during the third and final year of the standstill period if Liberty Media initiated a cash tender offer for all outstanding shares of Sirius common stock with the prior written approval of the independent Sirius directors.[41] That requirement terminated with the standstill period.

Second, the plaintiffs' allegation that Liberty Media breached fiduciary duties it supposedly owed as a controlling stockholder simply by making open market purchases to acquire a majority of Sirius's voting shares — after fully disclosing its intention to do so — fails to state a cognizable claim. The plaintiffs are unable to point to anything Liberty Media did that involved control over Sirius's board or misuse of its resources in connection with those purchases, and they do not argue that Liberty Media was trying to effect a going-private transaction.[42] Although one can imagine circumstances in which a

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[41] *See* Oral Arg. Tr. 43:5-18 (discussing the specific procedures required if Liberty Media sought to purchase additional shares before the standstill period expired); *see also* Investment Agreement § 4.1(b) (not indicating any required procedures if Liberty Media sought to purchase additional shares after the standstill period expired).

[42] The focus must be on whether Liberty Media took some action to control or dominate the Sirius board, because "a shareholder owes a fiduciary duty only if it owns a majority interest in or *exercises control over* the business affairs of the corporation." *Kahn v. Lynch Commc'n Sys.*, Inc., 638 A.2d 1110, 1113-14 (Del. 1994) (quoting *Ivanhoe Partners v. Newmont Mining Corp.*,

stockholder in Liberty Media's situation could breach its fiduciary duties by making open market transactions, they would involve circumstances where that stockholder, for example, had access to material, non-public information and used that information to unfairly advantage itself at the expense of the sellers.[43] By contrast, as the plaintiffs concede, the price Liberty Media paid was likely inflated by its own announcement that it was going to make sizable market purchases,[44] and the plaintiffs do not allege that Liberty Media engaged in fraud in its purchase transactions. Rather, the plaintiffs argue that Liberty Media breached some vague duty of fairness by not refraining from acquiring majority control until it negotiated terms acceptable to the Sirius directors not affiliated with it because someone who could be considered to own a controlling block of shares has a duty to pay a fair price to top up to a majority position. That is, the plaintiffs argue that Liberty Media breached its fiduciary duties as a controlling stockholder by not relinquishing the contractual right it had secured in 2009 — before it was a stockholder of Sirius — to be able to acquire Sirius stock after the expiration of the standstill period without being impeded by the Sirius board.

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535 A/2d 1334, 1344 (Del. 1987)) (emphasis added); *see also Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (1989) ("For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct."); *In re Sea-Land Corp. S'holders Litig.*, 1987 WL 11283, at *5 (Del. Ch. May 22, 1987) (explaining that "the *potential* ability to exercise control is not equivalent to the actual *exercise* of that ability.").

[43] *See, e.g.*, *Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 837-40 (Del. 2011) (analyzing *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949)); *In re Oracle Corp.*, 867 A.2d 904 (Del. Ch. 2004), *aff'd*, 872 A.2d 960 (Del. 2005) (same).

[44] Oral Arg. Tr. 36:7-36:11 (acknowledging that a company's stock price "[t]ypically" goes up when a buyer announces its intention to purchase a large amount of that company's stock on the open market).

Asked to cite cases supporting this novel contention, the plaintiffs cited cases that stand for nothing close to it. The plaintiffs cited *In re Morton's Restaurant Group, Inc., Shareholders Litigation*, where this court held that a large, but minority, stockholder that appointed a minority of directors to the board was not a controlling stockholder, so a merger recommended by that stockholder was not subject to the entire fairness standard of review, and even if it was, the large stockholder had no conflict of interest.[45] That case did not deal with either open market transactions or the enforcement of fairly negotiated contractual rights, and it bears no apparent relevance to this case. The plaintiffs also cited *Louisiana Municipal Police Employees' Retirement System v. Fertitta* (hereinafter *Landry's*), where a corporation entered into a cash-out merger agreement with an entity controlled by its controlling stockholder (who was also the corporation's Chairman and CEO).[46] When it began to look as though the merger would not happen, the controlling stockholder instead began making open market purchases of stock to attain a majority at a price well below the proposed merger price, and the board did not use a poison pill to stop him from doing so.

But *Landry's* was not a situation where, before it became an investor, the controlling stockholder specifically negotiated for the right to make open market purchases without being impeded by a poison pill, and there, the board had the option of using one. In fact, Chancellor Lamb clarified that "there is *no per se* duty to employ a poison pill to block a [controlling] stockholder" and that it was only when the failure to use a poison pill taken

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[45] --- A.3d ---, 2013 WL 4106655 (Del. Ch. July 23, 2013).
[46] 2009 WL 2263406 (Del. Ch. July 28, 2009).

"*together with other suspect conduct*" that an inference of board disloyalty was raised.[47] Unlike in *Landry's*, the plaintiffs in this case have not alleged any additional suspect conduct by Liberty Media or the Sirius board and do not argue that the Sirius board failed to act. Indeed, the record indicates that the Sirius board used every tool available to them — including their refusal to sign off on Liberty Media's de facto application to the FCC — to stop Liberty Media from attaining majority control.[48] The plaintiffs' only real complaint is that the Sirius board did not implement a poison pill, a tool that the Sirius board was contractually barred from using under the Investment Agreement. The plaintiffs' argument, then, is not that the Sirius board failed to act in 2012, but rather is a challenge to the board's actions when it signed the Investment Agreement more than three years ago in 2009. Thus, *Landry's* does not support the plaintiffs' novel argument either.

The plaintiffs do cite one case that is relevant, *Superior Vision Services, Inc. v. Reliastar Life Insurance Co.*, where a controlling stockholder that refused to waive its contractual right to prevent the corporation from issuing a dividend payment was sued for breach of fiduciary duty.[49] At oral argument, the plaintiffs quoted Vice Chancellor Noble, stating that "questions of control by a significant shareholder should be assessed at the board level in terms of whether the board's capacity to exercise its judgment

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[47] *Landry's* at *8 n.34 (emphasis added). In *Landry's*, the other suspect conduct included terminating a merger agreement to allow the controlling stockholder to avoid paying the reverse termination fee.
[48] Compl. ¶ 68-70.
[49] 2006 WL 2521426 (Del. Ch. Aug. 25, 2006).

independently has been impaired."[50] But there is actually a more pertinent part of that decision, in which Vice Chancellor Noble refused to find that a specific and fairly negotiated contractual right could be limited by and subject to fiduciary duty concerns, "[w]ithout more."[51] There, as here, the court noted that "[the defendant] received a bundle of contractual rights … when it invested in [the corporation]. Now, after its funds have been paid to [the corporation], [the plaintiffs] want[] to change the scope of [the defendant's] contractual rights and the certainty for which [the defendant] thought it had successfully bargained."[52] The court dismissed the plaintiff's claim against the controlling stockholder for breach of fiduciary duty.

This court will not innovate to alter our common law of corporations in the drastic manner the plaintiffs seek. There are many situations when corporations enter into contractual arrangements that have important implications for corporate control in conceivable future situations; for example, debt instruments commonly give creditors rights that, if used, may result in their assuming control.[53] The use of such rights to obtain control in the situations specifically contemplated by those contracts does not

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[50] *Id.* at *4 n.38.
[51] *Id.* at *5.
[52] *Id.* at *5 n.43.
[53] *See* D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315, 321-23 (2005) (discussing contingent control provisions); *see also* Steven N. Kaplan & Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, 70 REV. ECON. STUD. 281, 290 (2003) (finding contingent control provisions in 18 percent of cases).

constitute a fiduciary breach.[54] As this court has explained, even "[a] controlling shareholder is not required to give up legal rights that it clearly possesses; this is certainly so when those legal rights arise in a non-stockholder capacity."[55] The plaintiffs have not alleged any actions by Liberty Media beyond the mere exercise of its contractual right to purchase additional shares of Sirius stock on the open market to acquire a majority stake. But that alone does not constitute a breach of any duty;[56] therefore, the plaintiffs have failed to state a claim upon which relief could be granted.

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[54] *In re CNX Gas Corp. S'holders Litig*., 4 A.3d 397, 409 (Del. Ch. 2010) ("When a controller exercises contractual or statutory rights as a third-party lender, its actions are not subject to fiduciary review.").

[55] *Odyssey Partners, L.P. v. Fleming Cos.*, 735 A.2d 386, 414 (Del. Ch. 1999) (quoting *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995)).

[56] To this point, it is notable that even when a controlling stockholder attempts to effectuate a going private transaction by way of a tender offer addressed to the remaining stockholders with the intent of squeezing them out, Delaware law is not settled that the controller owes any generalized duty to pay a "fair" price. *See* R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 6.36 (2009) ("Delaware courts have generally held that tender offerors, even those who stand in a fiduciary relationship with the target corporation's shareholders, have no duty to offer a 'fair' price since the target corporation's shareholders may either accept or reject the offer."); EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 203.5.1 (2009) ("Indeed, there are indications in the case law that even a fiduciary has no duty to offer a 'fair' price in a tender offer as long as the offer is not coercive and there is no disclosure violation."); *see also Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009) (quoting *In re Aquila Inc.*, 805 A.2d 184, 190 (Del. Ch. 2002)) ("Delaware law does not impose a duty of entire fairness on controlling stockholders making a non-coercive tender or exchange offer to acquire shares directly from the minority holders."); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6 (Del. Ch. June 19, 2001) (quoting *In re Ocean Drilling & Exploration Co. S'holders Litig.*, 1991 WL 70028 (Del. Ch. Apr. 30, 1991)) ("[A]s a general principle our law holds that a controlling shareholder extending an offer for minority-held shares in the controlled corporation is under no obligation, absent evidence that material information about the offer has been withheld or misrepresented or that the offer is coercive in some significant way, to offer any particular price for the minority-held stock."); *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 40 (Del. 1996) ("In the case of totally voluntary tender offers, as here, courts do not impose any right of the shareholders to receive a particular price."). If it is not clear that there is any duty to pay a fair price when a controller seeks to take a company private by using a tender offer, it would be an even greater stretch for

Unlike the plaintiffs, this court does not embrace the novel proposition that this outcome leaves Liberty Media able to "abuse" Sirius's other stockholders without accountability.[57] If, as majority stockholder, Liberty Media causes Sirius to enter into self-dealing transactions with itself, a going private transaction in which the rest of the Sirius stockholders would be squeezed out, or any variety of other conceivable transactions, Liberty Media will be subject to accountability as a controlling stockholder and potentially face scrutiny under the entire fairness doctrine. But the fact that Liberty Media simply made open market purchases that increased its level of ownership to over 50 percent does not support a claim for breach of fiduciary duty because those purchases did not involve any use of fiduciary power by Liberty Media at all.

V. Conclusion

For the foregoing reasons, the defendants' motion is granted and the Complaint is dismissed. IT IS SO ORDERED.

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this court to hold that a substantial stockholder owes a fiduciary duty to pay a "fair" price if it makes open market purchases to secure majority control without any intent to squeeze out the remaining stockholders, much less if it does so in accordance with fully-disclosed contractual rights it secured in exchange for substantial value before it became a stockholder.

[57] *See* Oral Arg. Tr. 58:7-9 ("That's not a reason to say, oh, but then Liberty can abuse its rights as a shareholder."); *see also* Oral Arg. Tr. 39:2-12.