

ERK:SPC  
F.#2005R00147

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

I N F O R M A T I O N

- against -

Cr. No. 05-0901 (NGG)  
(T. 15, U.S.C., §§ 78j(b)  
and 78ff; T. 18, U.S.C.,  
§§ 3551 et seq.)

GARY HERWITZ,

Defendant.

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THE UNITED STATES ATTORNEY CHARGES:

INTRODUCTION

\_\_\_\_\_At all times relevant to this Information, unless  
otherwise indicated:

Sirius Satellite Radio Inc.

1. Sirius Satellite Radio Inc. ("Sirius") was a publicly held corporation engaged in the business of providing satellite radio programming to consumers. The common stock of Sirius was traded on the National Association of Securities Dealers Automated Quotation System ("NASDAQ"), a national securities market that used computers, telephones and other instruments of communication in interstate commerce. Sirius maintained offices at 1221 Avenue of the Americas, New York, New York.

The Defendant

2. The defendant GARY HERWITZ was the President of, and a shareholder in, the accounting firm of Mahoney Cohen & Company, CPA, P.C. ("Mahoney Cohen"). Mahoney Cohen maintained offices at 1065 Avenue of the Americas, New York, New York. HERWITZ was a certified public accountant licensed in New York.

The "Howard Stern Show" and Sirius

3. Howard Stern ("Stern"), a radio talk show host, was a client of Mahoney Cohen. In or about and between March 2004 and September 2004, Sirius engaged in discussions with representatives of Stern regarding the prospect of moving the "Howard Stern Show" from traditional broadcast radio to Sirius. On or about September 20, 2004, Sirius presented a written offer to Stern to broadcast his show on Sirius's satellite network for a term of five years (the "Sirius offer").

4. Following this offer, on or about and between September 20, 2004 and October 1, 2004, representatives of Sirius and Stern engaged in negotiations concerning potential contract terms. In the context of these negotiations, Stern sought advice concerning the financial implications of the proposed agreement from Mahoney Cohen's CEO, who had served for the past nineteen years as Stern's personal accountant.

The Insider Tip

5. On or about September 21, 2004, Mahoney Cohen's CEO informed the defendant GARY HERWITZ that Sirius had made an offer to Stern to move his radio show to Sirius, and that Mahoney Cohen's CEO would be occupied working on the transaction. In addition, Mahoney Cohen's CEO informed HERWITZ that the information regarding Stern and Sirius was confidential.

6. On or about September 23, 2004, Mahoney Cohen's CEO informed HERWITZ that negotiations between Stern and Sirius were still ongoing.

The Defendant's Duty of Confidentiality

7. The defendant GARY HERWITZ had a duty to maintain the confidentiality of the information he received from Mahoney Cohen's CEO pertaining to the Sirius offer and the ongoing negotiations between Sirius and Stern, and to abstain from trading in Sirius securities because (1) as Mahoney Cohen's President and a shareholder, HERWITZ owed a fiduciary duty to keep confidential, and to abstain from using for his personal benefit, any and all client information he learned during the course of a Mahoney Cohen client representation, and (2) as a certified public accountant, HERWITZ had a professional duty to his firm's clients to maintain the confidentiality of Mahoney Cohen's client information.

The Defendant's Stock Purchase

8. On or about September 30, 2004, the defendant GARY HERWITZ purchased 25,000 shares of Sirius common stock while in possession of material non-public information concerning Sirius, to wit: the Sirius offer and the ongoing negotiations between Sirius and Stern. HERWITZ purchased these shares at a market price of \$3.19 per share. This purchase was in violation of HERWITZ's fiduciary duty to Mahoney Cohen and its clients and HERWITZ's professional duty as a certified public accountant.

The Sirius Announcement

9. On or about October 1, 2004, Stern and Sirius signed an agreement pursuant to which Sirius agreed to pay approximately \$500 million over a period of five years to Stern to produce and broadcast the "Howard Stern Show" on Sirius beginning January 2006.

10. On or about October 6, 2004, during his morning radio program, Stern announced that he was moving the "Howard Stern Show" to Sirius. Within minutes of this announcement, Sirius issued a press release entitled "Howard Stern and SIRIUS Announce The Most Important Deal in Radio History," which stated, among other things, that "'King of All Media' Howard Stern and SIRIUS (NASDAQ: SIRI) announced today an epic agreement whereby Stern will move to SIRIUS beginning January 1, 2006."

11. The public announcement of the agreement between Stern and Sirius had a substantial effect on the market for Sirius common stock. The price of Sirius common stock had closed at \$3.35 on October 5, 2004, the day before the announcement. Following the announcement, on October 6, 2004, the stock reached an intra-day high of \$4.29, representing a 28% price increase from the previous day's closing, and an increase of 37% from the price at which the defendant GARY HERWITZ purchased the stock on September 30, 2004. The trading volume of Sirius stock also spiked from approximately 72 million shares traded on October 5, 2004 to approximately 344 million on October 6, 2004, making Sirius the most actively traded stock on the NASDAQ that day.

#### SECURITIES FRAUD

12. On or about and between September 21, 2004 and September 30, 2004, both dates being approximate and inclusive, within the Southern District of New York, the defendant GARY HERWITZ did knowingly and willfully use and employ manipulative and deceptive devices and contrivances, directly and indirectly, in violation of Rule 10b-5 of the Rules and Regulations of the SEC (Title 17, Code of Federal Regulations, Section 240.10b-5), in that HERWITZ did knowingly and willfully, directly and indirectly, (a) employ devices, schemes, and artifices to defraud; (b) make untrue statements of material fact and omit to state material facts necessary in order to make the statements

made, in light of the circumstances under which they were made, not misleading; and (c) engage in acts, practices, and courses of business which would and did operate as a fraud and deceit upon members of the investing public, in connection with the defendant GARY HERWITZ's purchases of Sirius common stock, and by use of the means and instrumentalities of interstate commerce and the mails.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 3551 et seq.)

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ROSLYNN R. MAUSKOPF  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK