No. 13-169

In the Supreme Court of the United States

NICOLAS MARTIN, *Petitioner,*

vs.

CARL BLESSING, *ET AL., Respondents.*

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

PETITIONER'S MOTION TO SUPPLEMENT THE QUESTIONS PRESENTED

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MOTION TO SUPPLEMENT THE QUESTIONS PRESENTED

Pursuant to SUP. CT. R. 21, the petitioner Nicolas Martin respectfully moves this Court to grant leave to amend the Questions Presented in his petition for a writ of *certiorari* to address the split in authority between the Second Circuit here and the Sixth Circuit in *In re Dry Max Pampers Litig.,* __ F.3d __, 2013 U.S. App. LEXIS 15930, 2013 WL 3957060 (6th Cir. Aug. 2, 2013) ("*Pampers*"). As indicated by the date in the foregoing *Pampers* citation, the Sixth Circuit decided *Pampers* on the day that Martin filed his petition for a writ of *certiorari.* The split is significant to this litigation because – although Martin has numerous fact-bound objections to the underlying class-action settlement here – the *Pampers-Blessing* split concerns a purely legal, recurring, evidentiary issue on the allocation of the burdens of proof and production between the settling parties and class objectors. Given that Martin could not have raised the *Pampers-Blessing* split in his petition for a writ of *certiorari,* Martin respectfully submits that good cause exists to allow him to amend

the Questions Presented now. The Court has discretion to allow a new Question Presented and indeed could add the question itself, *sua sponte.*

STATEMENT OF THE CASE

1. In August 2011, the named plaintiffs Carl Blessing *et al.* and the defendant Sirius XM Radio Inc. ("Sirius") agreed to settle a pending class action, and petitioner Martin filed objections to the settlement as a class member under FED. R. CIV. PROC. 23(e)(5).

2. The class-certification order included a provision conditioning approval as class counsel on the commitment to "ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics," Pet. App. 35a (*citing In re JP Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007)) (hereinafter, the "Diversity Order"); *see also* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327 (2011), which Martin's objection challenged as unlawful discrimination based on race.

3. The proposed settlement (1) enjoined Sirius from raising its list price for monthly service from August 1 through December 31, 2011, (2) entitled class members with lapsed subscriptions to one free month of service without a reactivation fee, (3) waived the class' antitrust claims, and (4) provided class counsel $13 million in attorneys' fees.

4. Martin and many other class members filed objections to the proposed settlement on various substantive grounds, with most complaining that it "provided no meaningful relief" to the class. Pet. App. 39a. Martin (who paid $3.99 for

monthly service) claimed that an injunction freezing the monthly list price for a subscription at $12.95 was worse than illusory because Sirius deeply discounted its prices below the list price, thereby at the very least creating a subclass who would not benefit from the settlement's proposed list-price relief.

5. The District Court approved the settlement, Pet. App. 36a, accepting the parties' valuation of the settlement at $180 million for the class. *Id.* at 40a-41a.

6. The Second Circuit affirmed. Pet. App. 7a. In doing so, the Second Circuit upheld the settlement's valuation at $180 million and put the burden of proof and production on the objectors to demonstrate the settlement's unfairness, unreasonableness, or inadequacy:

> [A]lthough objectors now complain that the district court did not thoroughly evaluate the value of the settlement, *no one requested an evidentiary hearing to ascertain the settlement's value,* more time to identify expert witnesses, or an opportunity to present any witnesses.

Pet. App. at 3a-4a (emphasis added).

7. In addition to his objections based on the settlement's terms, Martin also objected to Diversity Order as unauthorized under Rule 23 and discriminatory. The District Court ignored this objection, but the Second Circuit held that Martin lacked standing to appeal the Diversity Order unless he could show that he had suffered an Article III injury-in-fact in the form of "actually inferior" legal services based on the Diversity Order. Pet. App. 7a.

8. At the time that Martin's counsel prepared the petition for a writ of *certiorari,* they believed that it would require a fact-bound inquiry – and thus a poor candidate for this Court's review – to disprove the lower courts' finding that the

settlement was worth $180 million. Based on that belief, Martin's petition presented only the question "whether an objecting class member – whose antitrust claims have been waived by a settlement negotiated by class counsel appointed by a racially conscious class-certification order … – has standing to challenge the class-certification order and, through it, the antitrust settlement." Pet. at i.

9. On August 2, 2013, the Sixth Circuit's *Pampers* decision[1] vacated a settlement proposed by the putative class representatives and Proctor & Gamble ("P&G") in a damages suit for injuries allegedly caused by a new type of diaper. The settlement called for the following relief from P&G: $2.73 million in attorneys' fees, $1,000 per affected child for the class representatives, $400,000 donated to non-profits, several inconsequential label and website changes, and renewed access to a one-box-per-customer refund program for customers who had retained the original receipt and UPC code from Pampers boxes purchased over a 38-month period. Mot. App. 3a-4a.

10. In contrast to the Second Circuit in *Blessing,* the Sixth Circuit rejected the attempt to put the burden of proof or production on the objectors, as argued by the plaintiffs-appellees there, who complained that the objector "never propounded a discovery request for data about P&G's earlier money-back guarantee program." Brief of Plaintiffs-Appellees, at 27 (Mar. 20, 2012), *In re Dry Max Pampers Litig.,* __

[1] The *Pampers* decision is reproduced in the Appendix to this motion ("Mot. App.") at 1a.

F.3d __, 2013 U.S. App. LEXIS 15930, 2013 WL 3957060 (6th Cir. 2013) (No. 11-4156). In direct conflict with the Second Circuit in *Blessing,* the Sixth Circuit in *Pampers* held that the settling parties bore the burdens of proof and production to demonstrate the settlement's fairness, reasonableness, and adequacy:

> The burden of proving the fairness of the settlement is on the proponents … [and] to the extent the parties here argue that the settlement was fair because the refund program has actual value for consumers, it was the parties' burden to prove the fact, rather than [the objector's] burden to disprove it.

Mot App. at 8a (interior quotations omitted).

11. Had *Pampers* been available before Martin petitioned this Court, the petition would have presented a *Pampers*-based question on the underlying settlement, as well as the current question presented on the Diversity Order. Unlike the many fact-bound questions that undermine the settlement's valuation at $180 million, the *Pampers-Blessing* split on the allocation of the burdens of proof and production with regard to a settlement's fairness, reasonableness, and adequacy presents purely legal, recurring issues appropriate for this Court's review.

ARGUMENT

The question that Martin proposes to add would provide a purely legal basis for this Court to reject the parties' claim that the settlement provided the class $180 million in relief, without miring the Court in the fact-bound arguments that would be required in the absence of the *Pampers-Blessing* split in authority. Without rejecting the $180 million figure, the *Blessing* objectors would have great difficulty in establishing the settlement's unfairness. If class counsel truly won $180 million

for the class, the attorney-fee award of $13 million would represent less than seven percent of the total $193 million in relief. With *Pampers,* however, the fact-bound issues dissolve into the purely legal issue of competing allocations of the burdens of proof and production,[2] an issue ideal for this Court's review. Moreover, this is a recurring issue, and the split between the Second and Sixth Circuits is both stark and (in the Second Circuit) virtually outcome-determinative against objectors.

REQUESTED RELIEF

Petitioner Martin respectfully requests that the Court grant leave to amend the current Question Presented to read as follows:

> Under FED. R. CIV. P. 23, district courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," may alter or amend class-certification orders prior to final judgment, and must ensure that class settlements are "fair, reasonable, and adequate" and review any attorney-fee awards. Non-party class members may object to any settlements that require court approval and have standing to appeal settlements based on those objections. Petitioner – a non-named class member – objected not only to this class-action settlement's terms and the attorney-fee award as contrary to the Class Action Fairness Act and Rule 23 but also to the district judge's standard class-certification order requiring class counsel to reflect the racial make-up of the class, *see* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327

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[2] Unlike the factual issues that underlie the $180 million valuation, *allocation of the burdens of proof and production* are legal issues, *Guajardo v. Texas Dept. of Crim. Justice,* 363 F.3d 392, 395 (5th Cir. 2004); *Estate of Abraham v. Comm'r,* 408 F.3d 26, 35 (1st Cir. 2005); *Coalition To Save Our Children v. Bd. of Educ.,* 90 F.3d 752, 759 (3d Cir. 1996); *In re Sorah,* 163 F.3d 397, 400 (6th Cir. 1998); *Mondaca-Vega v. Holder,* 718 F.3d 1075, 1098 n.4 (9th Cir. 2013).

(2011), which the petitioner alleges to violate this Court's holdings against racially conscious judicial proceedings. *See Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979). The district judge ignored many of petitioner's objections, including his objection to the class-certification order's race-based requirements. The Second Circuit affirmed, holding that petitioner lacks standing to challenge the order's race-based requirements and that the objectors' failure to "request[] an evidentiary hearing to ascertain the settlement's value, more time to identify expert witnesses, or an opportunity to present any witnesses" precluded their questioning the value of the settlement and thus its fairness. By contrast, the Sixth Circuit puts the burden of proof and production of such evidence on the settling parties.

The questions presented are:

(1) Whether an objecting class member – whose antitrust claims have been waived by a settlement negotiated by class counsel appointed by a racially conscious class-certification order as described above – has standing to challenge the class-certification order and, through it, the antitrust settlement?

(2) Whether the Second Circuit correctly allocated evidentiary burdens and presumptions – including the burdens of proof and production – in assessing the fairness, reasonableness, and adequacy of the class-action settlement and attorney-fee award?

CONCLUSION

For the foregoing reasons, the Court should grant petitioner Martin's motion to supplement the Questions Presented.

Dated: September 19, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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BRIEF FORM CERTIFICATE

Pursuant to Sup. Ct. Rules 21 and 33, I certify that the attached motion is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 7 pages, excluding this Brief Form Certificate, the Table of Authorities, the Appendix, the Table of Contents, and the Certificate of Service.

Dated: September 19, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 19th day of September 2013, one true and correct copy of the foregoing motion and its appendix was served by U.S. Priority Mail on the following counsel:

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(In addition to the foregoing service by mail, the undersigned also certifies that a PDF copy of the foregoing document were served via electronic mail on the parties' counsel of record.)

The undersigned further certifies that, on this 19th day of September 2013, an original and ten true and correct copies of the foregoing motion and its appendix were served on the Court by Federal Express, next-day delivery.

Executed September 19, 2013, at Washington, DC,

/s/ Lawrence J. Joseph
Lawrence J. Joseph