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 REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE QUESTIONS PRESENTED

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PETITIONER'S REPLY IN SUPPORT TO MOTION TO SUPPLEMENT THE QUESTIONS PRESENTED

Petitioner Nicolas Martin respectfully replies to the opposition that the class representatives Carl Blessing *et al.* (collectively, "Blessing") filed in opposition to the motion to amend the Questions Presented to address "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."

INTRODUCTION

As Blessing acknowledges, Martin sought review in the Second Circuit on whether "enjoining the defendants for five months from charging class members more than $12.95/month for XM Select service was worth $180 million when class members already had the ability to purchase the same service for $3.99/month," under the clear-error standard or review. Opp'n at 6. The evidentiary issues that Martin seeks to address in the proposed addition to the Questions Presented are fairly included within the foregoing issue that Martin raised below.

ARGUMENT

Blessing's only significant point is the claim that Martin did not present the burden-of-proof issue below.[1] Opp'n at 5 (*citing Springfield v. Kibbe,* 480 U.S. 257,

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[1] Although Martin's motion addresses the burdens of proof *and production,* Mot. at 1, 3-7, Blessing consistently focuses only on the burden of proof. Opp'n at 4-5, 7-8, 10-11, 15-16. While acknowledging that Blessing submitted evidence in support of the settlement, Martin respectfully submits that *In re Dry Max Pampers Litig.,* __ F.3d __, 2013 U.S. App. LEXIS 15930, 2013 WL 3957060 (6th Cir. Aug. 2,

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258-59 (1987); *Tacon v. Arizona,* 410 U.S. 351, 352 (1973)). Blessing's objection is misplaced for two reasons.

First, the burdens of proof and production are "fairly included" within the factual dispute that Blessing acknowledges: "the clearly-erroneous standard … does not prescribe the standard of review to be applied in reviewing a [factual] determination," *Bose Corp. v. Consumers Union,* 466 U.S. 485, 514 (1984), and thus allows federal courts to "perform a *de novo* review, independently examining the record to ensure … that the plaintiff has indeed satisfied its burden of proof." *Id.* at 491-92 (interior quotations omitted); *cf. Pelt v. Utah,* 539 F.3d 1271, 1291 (10th Cir. 2008) ("which party bears the burden of proof is an unavoidable element of Utah's *res judicata* arguments generally, and the adequate representation arguments specifically"). The evidentiary burdens that Martin asks this Court to include in a new Question Presented are fairly included within the factual dispute over the fairness of the settlement and the $180-million valuation.

Second, the decisions that Blessing cites acknowledge that "[t]here is doubtless no jurisdictional bar to our reaching" an issue not reached below,

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(Footnote cont'd from previous page.)

2013) ("*Pampers*") requires more than self-serving, *selective* disclosure when an objector "calls out" the settling parties on a discrepancy. *See* Mot. App. at 7a-8a. Blessing has consistently denied that defendant Sirius XM Radio, Inc. ("Sirius") even discounted subscriptions below its list price, *see* Blessing Br. in Opp'n at 1-2 n.2, but it is Sirius – like Proctor & Gamble in *Pampers* – that had the burden of coming forward to produce an honest and complete disclosure. *See* Mot. App. at 7a-8a. Unlike the Sixth Circuit, moreover, the Second Circuit took the settling parties' partial disclosure at face value, without probing on the issue.

Springfield, 480 U.S. at 297, and those cases presented prudential obstacles – which are absent here – to the Court's expanding the scope of review. In *Springfield,* the petitioner had failed to object to jury instructions, *id.,* and in *Tacon,* the only related issue raised below was purely factual. *Tacon,* 410 U.S. at 352. Here, by contrast, Martin seeks to address evidentiary burdens in a purely legal question that is fairly included in issues that Martin raised below. As such, the new question is "not a new claim …, but a new argument in support of what has been his consistent claim." *Lebron v. Nat'l RR Passenger Corp.,* 513 U.S. 374, 379 (1995). Instead, it is the split between the Second and Sixth Circuits that is new and justifies the new question.

CONCLUSION

For the foregoing reasons, if the Court either grants the petition for briefing on the merits or denies the petition, the Court should grant petitioner Martin's motion to supplement the Questions Presented. If the Court grants the petition and summarily decided the first Question Presented (*i.e.,* racial taint), then the motion will be moot because Martin can revisit the evidentiary issues on remand.

Dated: September 24, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

The undersigned certifies that, on this 24th day of September 2013, one true and correct copy of the foregoing document 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 24th day of September 2013, an original and ten true and correct copies of the foregoing document were served on the Court by Federal Express, next-day delivery.

Executed September 24, 2013, at Washington, DC,

/s/ Lawrence J. Joseph

Lawrence J. Joseph