No. 13-169

In the Supreme Court of the United States

NICOLAS MARTIN,

Petitioner,

v.

CARL BLESSING, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF ON *IN RE DRY MAX PAMPERS LITIGATION*

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. NW, #236
Washington, DC 20036
(703) 203-3848

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 669-5135
lj@larryjoseph.com

Counsel for Petitioner

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PETITIONER'S SUPPLEMENTAL BRIEF

Petitioner Nicolas Martin respectfully files this supplemental brief pursuant to this Court's Rule 15.8 to explain the relevance to Martin's petition for a writ of *certiorari* of *In re Dry Max Pampers Litig.*, __ F.3d __, 2013 U.S. App. LEXIS 15930, 2013 WL 3957060 (6th Cir. Aug. 2, 2013) ("*Pampers*"),[1] which the Sixth Circuit issued on the same day that Martin petitioned this Court. In a separate motion, Martin will move to supplement the Questions Presented in his petition, based on issues on which *Pampers* and the Sixth Circuit split from the Second Circuit's decision in this action.

INTRODUCTION

By way of background, this litigation arises out of an antitrust class-action suit brought by plaintiffs Carl Blessing *et al.* (hereinafter, "Class Representatives") against defendant Sirius XM Radio, Inc. ("Sirius" and collectively with Class Respondents, hereinafter "Respondents"). As described in Martin's petition for a writ of *certiorari* (at 6), the *Blessing* settlement enjoined Sirius from raising its list price through December 31, 2011, entitled class members with lapsed subscriptions to one free month of service without a reactivation fee, and provided class counsel $13 million in attorneys' fees. Martin and other class members objected to the settlement and appealed the District Court's approval of the settlement, *id.,* which the Second Circuit affirmed. *Id.* at 7-8.

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[1] The *Pampers* decision is reproduced in the Appendix to this Supplemental Brief ("Suppl. App.") at 1a-20a.

In *Pampers,* the putative class representatives sued Proctor & Gamble ("P&G") for injury from rashes allegedly caused by a new type of diaper. After the Consumer Product Safety Commission cleared the diapers of having caused rashes, the parties settled 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. There, as here, the objectors challenged the settlement as favoring class counsel over the class. Suppl. App. 3a-5a.[2]

REASONS TO GRANT THE WRIT

The Sixth Circuit's *Pampers* decision splits with the Second Circuit's *Blessing* decision in three ways that undermine the settlement and attorney-fee award that the District Court approved and the Second Circuit upheld. *First,* on the threshold issue of the presumption to afford class-action settlements, *Pampers* is less deferential to the parties (Section I.A). *Second,* on the central issue of valuing the settlement, *Pampers* puts the burdens of both production and proof on the settling parties, whereas *Blessing* puts those burdens on the objectors (Section I.B). *Third* (and related to the first two), *Pampers*

[2] In addition, the *Pampers* objectors argued that the $1,000 per child awarded to class representatives rendered their representation inadequate under Rule 23(a)(4). *Id.* at 5a.

rejects any artificial bifurcation of attorney-fee settlement funds from class-relief funds (Section I.C).

Of these three splits, the second is the most central development because it provides a path for a reviewing court to scrutinize the parties' claim that the settlement provided the class $180 million in relief. Without the opportunity to dislodge the $180 million figure, the *Blessing* objectors appear greedy, begrudging class counsel less than seven percent ($13 million) of a total recovery of $193 million. Before *Pampers,* any attempt to disprove the parties' over-valuation of the settlement would present fact-bound inquiries that are unlikely candidates for this Court's review. With *Pampers,* the fact-bound issue dissolves into the purely legal issue of competing allocations of the burdens of proof and production, an issue ideal for this Court's review (Section II).

I. *BLESSING* AND *PAMPERS* SPLIT ON SEVERAL ISSUES INTEGRAL TO EVALUATING THE FAIRNESS OF CLASS-ACTION SETTLEMENTS

As signaled above, *Pampers* splits with *Blessing* in three significant ways: (a) the presumptions that courts afford to class settlements, (b) allocating the burdens of proof and production between the settling parties and class objectors for establishing fairness, and (c) a reviewing court's deference to the settling parties' bifurcation of funds between the settlement and any attorney-fee award. The following three sub-sections discuss these three splits between the Sixth and Second Circuits.

A. Courts Should Not Afford Class-Action Settlements a Presumption of Fairness, Reasonableness, and Adequacy

In this litigation, the District Judge and the Second Circuit relied on Circuit precedent to hold that a proposed settlement was "presumed fair, reasonable, and adequate if it culminate[d] from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery." Pet. App. 2a-3a (*quoting McReynolds v. Richards-Cantave,* 588 F.3d 790, 803 (2d Cir. 2009)); *accord id.* 37a (same). By contrast, the Sixth Circuit's *Pampers* decision properly recognizes that that presumption extends only to the *amount of the total settlement* in class relief and attorneys' fees, not to the *allocation* between the class and class counsel. Suppl. App. at 7a. The divide between these two positions centers on the Second Circuit's and District Court's anachronistic and counter-factual recall of an era when "our legal system relie[d] upon attorneys to uphold their ethical obligations to do everything reasonable in support of their clients' cause, regardless of their compensation scheme." Pet App. at 41a. Martin respectfully submits that Congress ended our legal system's misplaced reliance on class counsel with the enactment of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"). Courts now must engage in a more skeptical review of proposed settlements.

Ironically, the District Judge mused that the objectors' claims of "abuse [from] the class action scheme … is a legislative problem and not a ground" for his rejecting the settlement. Pet. App. 42a. Whereas the District Court would blame Congress:

> The award, as noted above, may well signal a defect in the system, but if so the Congress has to fix it. Perhaps they should, but for now, under the law as I read it, the settlement is reasonable under both the lodestar and percentage method of calculation,

Id. at 43a, Martin respectfully submits that the lower courts refused to implement CAFA, the very law that Congress enacted to resolve class-action abuses that not only "undermine the national judicial system," Pub. L. No. 109-2, §2(a)(4), 119 Stat. at 5, but also undermine "public respect for our judicial system." *Id.* §2(a)(2)(C), 119 Stat at 4. In fact, CAFA confirmed what Martin alleges here, namely that class members "often receive little or no benefit, and are sometimes harmed, where … counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Id.* §(a)(3)(A), 119 Stat. at 4. Against that backdrop of legislative action that the District Court ignored or sidestepped, musing on legislative fixes rings hollow.

Martin respectfully submits that the Second Circuit carried its pre-CAFA, settlement-deference precedents into the CAFA era without the reflection and reconsideration that CAFA required. In *McReynolds* (on which both lower courts relied), the Second Circuit carried forward in 2009 a pre-CAFA precedent that held that a "presumption of fairness, adequacy, and reasonableness *may* attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,* 396 F.3d 96, 116-17 (2d Cir. 2005) (emphasis added, interior quotation omitted).

Neither *Wal-Mart* nor the sources on which it relied address CAFA, which Congress enacted a month and a half after the Second Circuit decided *Wal-Mart.*

Although the Second Circuit did not expressly affirm the District Court on this point, the District Court expressly viewed the fact that parties settled a case as *lessening* courts' obligations to scrutinize the settlement's value. Pet. App. 43a-44a.[3] To the contrary, the Sixth Circuit held that "courts must be particularly vigilant for subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." Suppl. App. 8s (interior quotations omitted); *cf. Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) (Rule 23's protections of absent class members from "unwarranted or overbroad class definitions … demand undiluted, even heightened, attention in the settlement context"). Martin respectfully submits that *Pampers* better honors CAFA and Rule 23.

In summary, the lower courts here erred by deferring to the settling parties' (and particularly class counsel's) self-serving description of their settlement, at the expense of the class.

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[3] In certifying the class (which was before the settlement), the District Court required a heightened showing that the class was interested in the type of relief that class counsel ultimately secured for the class: "Absent a greater showing, this Court will not presume that all plaintiffs seek divestiture of the merged entity or an injunctive prescription over future prices, let alone value such relief more than damages." Pet. App. 19a.

B. The Settling Parties Bear the Burdens of Proof and Production on Class-Action Settlements' Fairness, Reasonableness, and Adequacy

A central, unifying theme of Martin's objections and those of many other objectors was that the "Settlement provided no meaningful relief" to the class, Pet. App. 39a, but the Second Circuit put the burdens of both proof and production squarely on the objectors:

> [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.

Id. at 3a-4a (emphasis added). By contrast, *Pampers* put both burdens squarely on the settling parties.

First, "'[t]he burden of proving the fairness of the settlement is on the proponents." Suppl. App. 9a (*quoting* 4 Newberg on Class Actions § 11:42 (4th ed.)). In failing to require the parties to prove their settlement fair, the Second Circuit also split with the Eleventh and Fifth Circuits. *See id.* (*citing Ault v. Walt Disney World Co.,* 692 F.3d 1212, 1216 (11th Cir. 2012); *In re Katrina Canal Breaches Litig.,* 628 F.3d 185, 196 (5th Cir. 2010)). But that is not the only facet of the split between *Pampers* and *Blessing*.

Second, and almost more importantly, *Pampers* put the burden of *production* on the settling parties. Like their counterparts in *Blessing,* Pet. App. 3a-4a, the *Pampers* plaintiffs argued 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.*, __ F.3d __, 2013 U.S. App. LEXIS 15930, 2013 WL 3957060 (6th Cir. 2013) (No. 11-4156). The Sixth Circuit flatly rejected this attempt to shift the burden of production to non-party objectors who lacked access to the discovery process and who (unlike defendants) did not hold data relevant to proving the settlement's value:

> We begin with the one-box refund program. Consumers cannot benefit from the program unless they have retained their original receipt and Pampers-box UPC code, in some instances for diapers purchased as long ago as August 2008. Greenberg sensibly asks who does this sort of thing. We have no answer. Neither do the parties—or more precisely they have offered none. The omission is conspicuous, for the refund program here is merely a rerun of the very same program that P&G had already offered to its customers from July 2010 to December 2010. P&G surely has data as to the numbers of consumers who obtained refunds during that time; P&G's counsel conceded as much at oral argument on appeal. And yet—even after Greenberg called out the parties on this very point in his objections to the district court—P&G chose not to provide that data in arguing that the settlement is fair.
>
> … Thus, 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 Greenberg's

> burden to disprove it. The parties did not carry that burden—which again (to his credit) P&G's counsel conceded at oral argument on appeal.

Suppl. App. at 9a-10a. Had they applied this standard here, the lower courts could not have upheld the $180 million valuation for freezing list prices from August 1 to December 31 vis-à-vis (a) claims of discounts off the list price (*i.e.,* that customers already paid *less than* the supposed settlement benefit); (b) a rate hike allegedly set *for August 1* (*id.* at 40a) when the Federal Communications Commission ("FCC") did not decline to extend FCC's price freeze *until July 27* (*id.* at 39a); and (c) Sirius' failing to identify which customers already had paid through December 31 and thus would not benefit from prices allegedly frozen for a short five-month period. These are not the only factual issues on which Sirius had – but declined to provide – the relevant information, but they suffice to show that the $180 million figure could not survive *Pampers* scrutiny (*i.e.,* placing the burdens of proof and production on the settling parties).

C. Courts Should Scrutinize the Settling Parties' Alleged Bifurcation of Funds between the Class and Class Counsel

In this litigation, the District Judge and the Second Circuit relied on the settling parties' claims that the class settlement and attorney-fee award were negotiated separately, from separate funds:

> [T]he attorneys' fees were negotiated only after the terms of the settlement were reached, and the fee award comes directly

> from Sirius XM, rather than from funds … earmarked for the class.

Pet. App. 5a-6a; *accord id.* at 41a. By contrast, the Sixth Circuit recognized in *Pampers* that defendants care only about the total settlement, not the allocation of settlement funds between the class and class counsel: "economic reality [is] that a settling defendant is concerned only with its total liability." Suppl. App. at 7a (interior quotations omitted alteration in original). That "means the courts must carefully scrutinize whether [class counsel's] fiduciary obligations [to the class] have been met" in allocating settlement funds between the class and class counsel. *Id.*

Martin respectfully submits that the "economic reality" recognized in *Pampers* – namely, that every dollar going to class counsel is a dollar *not* going to the class – is more consistent not only with reality but also with CAFA. Congress deemed it class-action abuse when class members "receive little or no benefit, and are sometimes harmed, where … counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." Pub. L. No. 109-2, §(a)(3)(A), 119 Stat. at 4; *see also* 28 U.S.C. §1712 (mechanisms for assessing the division between settlement value and attorney-fee awards). While *Pampers* is consistent with CAFA, the *Blessing* decisions below ignore it. The Second Circuit was wrong to divorce the issue of attorneys' fees from the fairness of the settlement.

As signaled in Section I.A, *supra,* the division of settlement funds matters in this case only if this Court reviews the $180 million valuation for the settlement. For if one *accepts* that figure, the class would parsimoniously begrudge class counsel less

than seven percent of a total $193 settlement. If one accepts Martin's valuation of the settlement at closer to $13 million *total* (*i.e.,* $13 million for class counsel, and $0 for the class), then class counsel come out rather differently.

II. *PAMPERS* PROVIDES THE CIRCUIT SPLIT NEEDED TO UNDERMINE THE FICTION – AFFIRMED BY THE LOWER COURTS HERE – THAT THIS SETTLEMENT WAS WORTH $180 MILLION TO THE CLASS

At the time that Martin prepared his petition for a writ of *certiorari,* the valuation of the settlement was hopelessly tied up in fact-bound questions that posed unlikely vehicles for this Court's review (*e.g.,* did Sirius indeed plan to raise prices on August 1, did Martin request an evidentiary hearing, what amount of Sirius customers would or would not benefit from the frozen list price): "We do not grant a *certiorari* to review evidence and discuss specific facts." *U.S. v. Johnston,* 268 U.S. 220, 227 (1925); S. Ct. Rule 10. For that reason, prior to *Pampers,* Martin decided that he could not press the fictional nature of the settlement's $180 million valuation in this Court.

Unlike the factual issues that underlie the $180 million valuation, however, the *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), and the legal nature of those issues "also [goes] to the quantum of proof required. *Mondaca-*

Vega v. Holder, 718 F.3d 1075, 1098 n.4 (9th Cir. 2013) (*citing U.S. v. Gill,* 280 F.3d 923, 929-31 (9th Cir. 2002)). By requiring the settling parties not only to bear the burden of proof but also to bear the burden of production when an objector "calls them out" on a specific factual issue on which the settling parties (usually the defendant) holds the relevant information, Suppl. App. 9a, *Pampers* thus presents a purely legal issue integral to this Court's reopening the entire *Blessing* settlement.

The split between the circuits is stark. Under the law applied in the Second Circuit, courts rely on objectors to seek access to discovery, evidentiary hearings, and the opportunity to present expert testimony. By contrast, the Sixth Circuit requires the settling parties to produce the relevant information and to prove that the proposed settlement is fair. Based on the foregoing, Martin will move this Court to amend the Questions Presented to include the fairness of the settlement and fee award. This Court should decide which of these competing standards the lower courts must use to assess class-action settlements.

CONCLUSION

The petition for a writ of *certiorari* should be granted. For the reasons set out in the accompanying motion for leave the supplement the Questions Presented, this Court also should consider the fairness of the settlement and fee award as Questions Presented here.

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Respectfully submitted,

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M St. NW, #236
Washington, DC 20036
(703) 203-3848

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for Petitioner