No. __-_____

In the Supreme Court of the United States

NICOLAS MARTIN, *Petitioner,*

v.

CARL BLESSING, *ET AL., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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APPENDIX TO PETITIONER NICOLAS MARTIN'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF *CERTIORARI* TO THE SECOND CIRCUIT

THEODORE H. FRANK
ADAM EZRA SCHULMAN
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848

LAWRENCE J. JOSEPH
Counsel of Record
D.C. Bar No. 464777
1250 Connecticut Ave., NW, Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: lj@larryjoseph.com

Counsel for Petitioner Nicolas Martin

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARL BLESSING ET AL.,	:	
	:	
Plaintiffs,	:	
	:	**09 CV 10035 (HB)**
- against -	:	
	:	**OPINION &**
SIRIUS XM RADIO INC.,	:	**ORDER**
	:	
Defendant.	:	

Hon. Harold Baer, Jr., District Judge:

At the eve of trial, the parties in this class action antitrust litigation executed a settlement agreement dated May 12, 2011 (the "Settlement" or "Settlement Agreement"). Class counsel now moves for final approval of the Settlement Agreement and for an award of attorneys fees and costs. I held a final approval hearing on August 8, 2011 at which class counsel, Defendant's counsel, and numerous class members presented their views. I have considered their oral and written submissions and for the reasons described below the motions are GRANTED.

I. The legal standard

Class action settlements are subject to court approval. Fed. R. Civ. P. 23(e). Approval hinges on whether the settlement is "fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores Inc. v. VISA U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005), *cert. denied*, 544 U.S. 1044. A court must consider both the substantive and procedural aspects of the settlement, *i.e.* "the settlement's terms and the negotiating process leading to settlement." *Id.* The analysis is framed by the "strong judicial policy in favor of settlements, particularly in the class action context." *Id.*

II. A presumption of fairness is appropriate

The Settlement merits a presumption of fairness where it was the culmination of a complicated litigation over the course of several years between "experienced, capable counsel after meaningful discovery." *Id.* As noted in a previous opinion, class counsel has experience in class action antitrust litigation, and undeniably "engaged in the discovery necessary [for] effective representation of the class's interests." *McReynolds v. Richards-Cantave*, 588 F3d 790, 804 (2d Cir. 2009) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). The discovery process involved the exchange of literally millions of documents, several instances of court intervention to resolve adversarial differences, numerous third-party subpoenas, depositions of 17 fact witnesses and 6 expert witnesses, and interrogatories. Sabella Decl. ¶ 22-31. The parties first began settlement

discussions in November 2010, but were unable to reach an accord. Sabella Decl. ¶ 50. They then, in concert with the pretrial schedule, went on to brief a number of substantive motions, and on the eve of trial, after substantial efforts towards trial preparation, finally settled. The Settlement is entitled to a presumption of fairness.

III. The Settlement's terms favor approval

I have reviewed the Settlement's substantive terms and conclude that they demonstrate sufficient fairness, adequacy, and reasonableness. While each of the "*Grinnell*" factors considered by the Circuit as the path to fairness supports this conclusion,[1] I address only those factors that relate to the main objections raised in opposition to final approval.[2] I also note that all class members had the opportunity to opt out of the settlement.

The risk of establishing liability was significant

One might conclude that class counsel did well to reach a settlement at all in view of the questionable liability in this case. More than one government agency assessed the merger and concluded that it did not have unlawful anti-competitive effects. The Department of Justice Antitrust Division closed its investigation by saying that "[a]fter a careful and thorough review of the proposed transaction, the Division concludes that the evidence does not demonstrate that the proposed merger of XM and Sirius is likely to substantially lessen competition, and that the transaction therefore is not likely to harm consumers." Sabella Decl. Ex. 9. The Federal Communications Commission (FCC) approved the merger – albeit with limited precautions such as the 3-year price cap. On July 27, 2011, however, the FCC concluded that it was *not* necessary to extend the price cap, in part because numerous competitive alternatives have arisen since 2008 which allayed any antitrust concerns that had previously justified the price-cap. *See* Sabella Reply Decl. Ex. 1. While these findings are not dispositive, Plaintiffs' case would have at least in part required convincing a jury that two federal agencies were wrong. Even had I concluded that the agencies' opinions were inadmissible, Defendant would doubtless have proffered the same underlying admissible evidence that led the agencies to conclude that there was no antitrust violation, or put another way, the merger did not lessen

[1] These include "(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action through trial; (7) the ability of defendants to withstand greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation." *Authors Guild v. Google, Inc.*, 770 F.Supp.2d 666, 674, (S.D.N.Y. 2011) (Chin, J.) (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir.1974)).

[2] The Court counted a total of 85 objectors (not all of whom properly submitted objections), which comprises less than 0.0005% of the class, a fact that favors approval. *See Banyai*, 2007 WL 927583, at *9 ("[A] small number of objections received when compared to the number of notices sent weighs in favor of approval.") (citing *D'Amato*, 236 F.3d at 86-7).

competition. Perhaps more important is whether the settlement was a fair one or whether it serves in large measure to do little for the class and a lot for counsel.

The award is reasonable and not illusory

Most of the objectors complain that the Settlement provides no meaningful relief. This assumes that they suffered a meaningful injury. "Such assumption cannot stand as a proper basis to evaluate the proposed settlement's fairness." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 66 (S.D.N.Y. 2003) (citing *Grinnell*, 495 F.2d at 458–59). As discussed above, it is far from certain that Plaintiffs would have prevailed on the merits. Even had they succeeded, there was a real risk that damages, split between over 15 million class members, would be so little that many members may not even have bothered to cash their checks.[3]

Many objectors argued that their award is similar to a disfavored "coupon" settlement. Unlike coupon settlements, however, it does not require class members to purchase something they might not otherwise purchase to enjoy its benefits; rather, the vast majority of class members will benefit in the course of their normal subscription payments, and former subscribers may benefit from a month of free radio or internet service. *See Dupler v. Costco Wholesale Corp.*, 705 F. Supp. 2d 231, 237 (E.D.N.Y. 2010) (approving settlement that awarded additional months on existing Costco memberships or temporary membership for those whose Costco membership had expired).

Some object that the award is illusory because Sirius XM would not have raised prices even without the Settlement. This theory fails because the evidence demonstrates that Sirius XM had every intention of raising prices beginning in August of this year, and had the go-ahead from the FCC to do so. In fact, the Settlement Agreement requires Sirius XM to forego some $180 million in fees. *See* Langenfeld Decl.; Brooker Decl. Speculation to the contrary is not grounds to reject the Settlement. The declarations and other material submitted to this Court strongly suggest that the $180 million calculation is not illusory, and represents, at a conservative estimate, 40% of the Plaintiffs' estimated best possible recovery – a result that is fair and reasonable in the antitrust context.[4] *See, e.g., In re Warfarin Sodium Anitrust Litig.*, 391 F.3d 561, 538 (3d Cir. 2004) (upholding approval of settlement equal to 33% of estimated damages).

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[3] *See* Sabella Decl. ¶¶ 71-72; Potter Decl. ¶3-7. Plaintiffs calculate that, if they could have convinced Defendant to provide a $180 million cash settlement (the rough equivalent of the Settlement value), the average class member would have received $12, depending on their subscription plans. *See* Docket Entry 116 at 20. Of course, this is not the most a verdict could have awarded.

[4] In antitrust cases, although plaintiffs would be entitled to treble damages, courts assess the value of the settlement as it compares to single, not treble, damages. *Am. Med. Ass'n v. United Healthcare Corp.*, No. 00 Civ. 2800 (LMM), 2009 WL 4403185, at *5 n.3 (S.D.N.Y. Dec. 1, 2009) (citing *Grinnell*, 495 F.2d at 459).

Other objectors raised concerns about the adequacy of the award as compared to the requested $13 million in attorneys fees and costs. There appeared some suspicion that, once class counsel was assured that it would recover fees and costs, they lost their incentive to pursue the class claims. This theory overlooks the fact that our legal system relies upon attorneys to uphold their ethical obligations to do everything reasonable in support of their clients' cause, regardless of their compensation scheme. Nothing in the record supports the proposition that Class Counsel fell below that basic professional standard, nor that the attorneys relaxed their pursuit of class interests with the promise of payment. Indeed, the amount of attorneys fees was not negotiated and agreed upon until after the Settlement was finalized. Sabella Decl. ¶ 55. The Settlement here has been compared to a "shakedown" by more than one objector, and there appears some suspicion that class actions are mere vehicles for attorneys to seek large fee awards. However, nothing suggests that Class Counsel here went beyond what the law allows. Whatever abuse the objectors believe the class action scheme works or indeed has worked here, it is a legislative problem and not a ground which permits this Court to set aside the settlement.

The Settlement's release is not overbroad

The Settlement Agreement releases Defendant from all claims by class members "arising out of, based on or relating to the merger that formed Sirius XM." Docket Entry 96 ¶ 8(a). It includes claims that class members did not or could not know were available at the time of the Settlement Agreement – the type of claim that some state laws preserve unless expressly waived (*i.e.* it cannot be released through a "general" release). *See* Docket Entry 96 ¶ 8(b). The scope of the release is consistent with the parameters established in this Circuit. A class action settlement may release "claims not presented and even those which could not have been presented as long as the released conduct arises out of the identical factual predicate as the settled conduct." *Wal-Mart*, 396 F.3d at 106.[5] The released claims here are limited to those claims that arise out of the merger that formed Sirius XM – a common factual predicate that defines the scope of the release with acceptable breadth.

The objectors also argue that "released claims" is referred to as a defined term, but nowhere is it defined. It is true that there is no official definition, but it is clear from the text – and both Defendant and Class Counsel agree – that "released claims" refers to those claims described in paragraph 8(a). I would be remiss to assume that other courts are unable to understand what is clear from the text of the release. This technical drafting oversight threatens no real risk to future litigants, and is insufficient to hold up the approval process.

[5] Indeed, "[b]road class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-Mart*, 396 F.3d at 106.

IV. The request for attorneys fees and costs is reasonable

The motion for attorneys fees and costs provoked numerous and impassioned objections. The requested $13 million award understandably raised concerns, especially when compared to the very modest award provided to each class member. However, upon closer inspection, the award when compared to the Settlement as a whole is not unfair. I have reviewed the attorney expense sheets as well as the attorney time-keeping records, and found nothing to suggest exorbitant rates nor double billing nor padding of any kind. 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, and appropriate in view of the criteria established in *Goldberger v. Gleason*, 160 F.3d 858 (2d Cir. 1998). Again, the fee is a separate obligation that will not come out of the Settlement amount, and was negotiated after the terms of the Settlement had been agreed upon. *See McBean v. City of New York*, 233 F.R.D. 377, 392 (S.D.N.Y. 2006) (Lynch, J.) (where "money paid to the attorney is entirely independent of money awarded to the class, the Court's fiduciary role in overseeing the award is greatly reduced, because there is no conflict of interest between attorneys and class members").

The Clerk of the Court is instructed to close this matter and remove it from my docket.

SO ORDERED

August 24, 2011
New York, New York

Hon. Harold Baer, Jr.
U.S.D.J.

11-3696-cv (L)
Blessing et al., v. Martin

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of December, two thousand twelve.

PRESENT: ROBERT D. SACK,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

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CARL BLESSING, EDWARD A. SCERBO, JOHN CRONIN, CHARLES BONISIGNORE, ANDREW DREMAK, TODD HILL, CURTIS JONES, JOSHUA NATHAN, JAMES SACCHETTA, DAVID SALYER, SUSIE STANAJ, PAUL STASIUKEVICIUS, SCOTT BYRD, GLENN DEMOTT, MELISSA FAST, JAMES HEWITT, RONALD WILLIAM KADER, EDWARD LEYBA, GREG LUCAS, KEVIN STANFIELD, TODD STAVE, PAOLA TOMASSINI, JANEL STANFIELD, BRIAN BALAGUERA, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

-v.-

SIRIUS XM RADIO INC.,
Defendant-Appellee,

11-3696-cv (Lead)
11-3729-cv (Con)

11-3834-cv (Con)
11-3883-cv (Con)
-v.- 11-3908-cv (Con)
11-3910-cv (Con)
11-3916-cv (Con)
11-3965-cv (Con)
11-3970-cv (Con)
11-3972-cv (Con)

MARVIN UNION, ADAM FALKNER, NICOLAS MARTIN, JILL PIAZZA, KEN WARD, RUTH CANNATA, LEE CLANTON, CRAIG CANTRALL, BEN FRAMPTON, KIM FRAMPTON, JOEL BROIDA, JOHN SULLIVAN, SHEILA MASSIE, JASON M. HAWKINS, STEVEN CRUTCHFIELD, SCOTT D. KRUEGER, ASSET STRATEGIES, INC., CHARLES B. ZURAVIN, JENNIFER DEACHIN, RANDY LYONS, TOM CARDER, JOHN IRELAND, JEANNIE MILLER, MICHAEL HARTLEIB, BRIAN DAVID GOE, DONALD K. NACE, CHRISTOPHER BATMAN,
Objectors-Appellants,

LINDA MROSKO, LANGE M. THOMAS,
Objectors.

- - - - - - - - - - - - - - - - - - - -x

FOR PLAINTIFFS-APPELLEES: JAMES J. SABELLA (Jay W. Eisenhofer, Richard S. Schiffrin, Shelly L. Friedland, Grant & Eisenhofer P.A., New York, New York, Mary S. Thomas, Grant & Eisenhofer P.A., Wilmington, Delaware, Reuben Guttman, Grant & Eisenhofer, Washington, District of Columbia, Paul F. Novak, Milberg LLP, Detroit, Michigan, Herman Cahn, Anne Fornecker, Milberg LLP, New York, New York, Nicole Duckett, Milberg LLP, Los Angeles, California, Christopher B. Hall, Edward S. Cook, P. Andrew Lampros, Cook, Hall & Lampros, LLP, Atlanta, Georgia, on the brief).

FOR DEFENDANTS-APPELLEE: TODD R. GEREMIA (John M. Majoras, Thomas Demitrack, on the brief), Jones Day, New York, New York.

FOR OBJECTORS-APPELLANTS: THEODORE H. FRANK, Center for Class Action Fairness LLC, Washington, District of Columbia, PAUL S.

ROTHSTEIN, Gainesville, Florida (Michael Hartlieb, pro se, Brian David Goe, pro se, N. Albert Bacharach, Jr., Gainesville, Florida, R. Stephen Griffis, Hoover, Alabama, Charles M. Thompson, Birmingham, Alabama, Joseph Darrell Palmer, Law Offices of Darrell Palmer P.C., Solana Beach, California, Steve A. Miller, Denver, Colorado, on the briefs).

FOR AMICUS CURIAE: Michael E. Rosman, Michelle A. Scott, for Center for Individual Rights, Washington, District of Columbia.

Meriem L. Hubbard, Joshua P. Thompson, for Pacific Legal Foundation, Sacramento, California.

Appeal from the United States District Court for the Southern District of New York (Baer, J.).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment and order of the district court are **AFFIRMED**.

Objectors-appellants appeal from the district court's August 25, 2011 final order and judgment approving the settlement of this class action, and its August 25, 2011 order awarding class counsel $13 million in attorneys' fees and expenses. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

This Court reviews for abuse of discretion a district court's approval of a proposed class action settlement, D'Amato v. Deutsche Bank, 236 F.3d 78, 85 (2d Cir. 2001), and its award of attorneys' fees, In re Nortel Networks Corp. Sec. Litig., 539 F.3d 129, 134 (2d Cir. 2008).

Collectively, objectors argue, inter alia, that the district court erred when it: (1) found that the proposed settlement was fair, reasonable, and adequate; (2) found that the attorneys' fee award was reasonable; and (3) directed the sole candidate for class counsel to address diversity concerns in staffing the case. We address each of these arguments in turn.

1. The Proposed Settlement

A district court's approval of a settlement is contingent on a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); see also 28 U.S.C. 1712(e) (2006) (judicial scrutiny of coupon settlement requires finding that the settlement is "fair, reasonable, and adequate"). This entails a review of both procedural and substantive fairness. See, e.g., D'Amato, 236 F.3d at 85. With respect to procedural fairness, a proposed settlement is presumed fair, reasonable, and adequate if it culminates from "arm's-length negotiations between experienced, capable counsel after meaningful discovery." McReynolds v. Richards-Cantave, 588 F.3d 790, 803 (2d Cir. 2009) (internal quotation marks omitted). A proposed settlement is substantively fair if the nine factors outlined in City of Detroit v. Grinnell Corp. weigh in favor of that conclusion. See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 117 (2d Cir. 2005) (citing Grinnell, 495 F.2d 448, 463 (2d Cir. 1974)).

Here, the proposed settlement provided, in part, that defendant-appellant Sirius XM Radio Inc. ("Sirius XM") would not raise its prices for five months. Furthermore, class members

received no cash remedy. The case was settled on the eve of trial, after nearly three years of litigation, including extensive fact and expert discovery. Moreover, competent counsel appeared on both sides, and settlement was reached only after contentious negotiations. Thus, the district court did not abuse its discretion when it presumed the proposed settlement was procedurally fair, see McReynolds, 588 F.3d at 803, and objectors presented no evidence to rebut that presumption.

The record also supports a finding of substantive fairness. The district court conducted a fairness hearing, where it considered objectors' arguments. The district court's opinion and order approving the proposed settlement also noted that it had considered the oral and written submissions of the objectors. Moreover, although 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.

Finally, the Grinnell factors supported the district court's determination that the proposed settlement was substantively fair. In particular, it became apparent that, were the case to go to trial, plaintiffs' likelihood of success was slim. We acknowledge that valuing nonmonetary antitrust settlements -- much like the price freeze here -- is an inherently imprecise business, see Merola v. Atl. Richfield Co., 515 F.2d 165, 172 (3d Cir. 1975) (courts should apply their "informed economic judgment" and any "probative evidence of the

monetary value" of the remedy when assessing nonmonetary antitrust settlement value), and as the record provides a factual basis for its finding, we hold that the district court did not abuse its discretion when it concluded that the proposed settlement was substantively fair.

2. Reasonableness of the Attorneys' Fee Award

Except as otherwise required by statute, fees awarded pursuant to a class action suit must be calculated as either a "percentage of the fund" or by applying the lodestar method. See, e.g., Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 436 (2d Cir. 2007); Wal-Mart Stores, 396 F.3d at 121. The reasonableness of a fee calculated by either of these methods, however, is determined by the factors outlined in our decision in Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000). See Masters, 473 F.3d at 436.

Objectors contend that the $13 million fee was unreasonable because of the clear-sailing and reversionary provisions written into the settlement, and in light of the limited recovery to the class. To the extent objectors argue that the clear-sailing and reversionary provisions suggest improper collusion between class counsel and Sirius XM, we note that such provisions, without more, do not provide grounds for vacating the fee. See Malchman v. Davis, 761 F.2d 893, 905 & n.5 (2d Cir. 1985) (addressing clear-sailing provision), abrogated on other grounds, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). Moreover, the fee was negotiated only after settlement terms had been decided and did not, as the district court found,

reduce what the class ultimately received. See id. (such factors favored respecting the fee); Thompson v. Metro. Life Ins. Co., 216 F.R.D. 55, 71 (S.D.N.Y. 2003) (same). Finally, the district court independently inspected applicable time and expense records before judging the reasonableness of the requested fee, which -- after accounting for expenses -- represented less than sixty percent of the lodestar calculation. Thus, as the record supports a finding that the $13 million award was reasonable, the district court did not abuse its discretion in granting the fee award.

Objectors also argue that the price freeze offered in the proposed settlement was the equivalent of a "coupon" and, therefore, should have been subject to the attorneys' fee provisions applicable to coupon settlements under the Class Action Fairness Act of 2005 ("CAFA"). See § 1712(a)-(c). We need not, however, decide this issue. Even assuming that the coupon provisions of CAFA were applicable, the district court's approval of the proposed settlement and the attorneys' fee award was appropriate. As noted, the 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 (or coupons) earmarked for the class.

Thus, even assuming the price freeze was the equivalent of a coupon, no "portion of [the] attorney's fee award . . . is attributable to the award of the coupons." § 1712(a). Where "a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's

fee award shall be based upon the amount of time class counsel reasonably expended working on the action." § 1712(b)(1); see also S. Rep. No. 109-14, at 30 (2005) ("[T]he proponents of a class settlement involving coupons may decline to propose that attorney's fees be based on the value of the coupon-based relief provided by the settlement. Instead, the settlement proponents may propose that counsel fees be based upon the amount of time class counsel reasonably expended working on the action."). The district court approved the fee award after determining it was reasonable under the lodestar method, which reflects "the amount of time class counsel reasonably expended working on the action," and is therefore consistent with CAFA. § 1712(b), (c)(2).

3. Diversity of Class Counsel

In the class certification order, the district court requested that class counsel consider diversity when staffing the case,[1] a provision objectors now contest. To establish standing to bring a claim, a plaintiff must show (1) injury-in-fact, (2) causation, and (3) redressability. Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221, 228 (2d Cir. 2012). An injury-in-fact is a "'concrete and particularized' harm to a 'legally protected interest.'" Selevan v. N.Y. Thruway Auth., 584 F.3d 82, 89 (2d Cir. 2009); see also W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP, 549 F.3d 100, 107 (2d Cir. 2008) ("[P]laintiff must have personally suffered an injury."). Although objectors allege

[1] The class certification order stated that class counsel "should ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics." Opinion and Order at 14, Blessing v. Sirius XM Radio Inc., No. 09-cv-10035 (S.D.N.Y. Mar. 29, 2011), ECF No. 85.

that staffing a case with an eye to diversity "may interfere with [counsel's] ability to provide the best representation for the class," J.A. 829, they never contend that class counsel's representation was actually inferior. As objectors failed to state an injury-in-fact, we find that they lack standing to challenge the district court's diversity request in its class certification order.

We have considered objectors' remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the orders and judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of March, two thousand thirteen,

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Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonisignore, Andrew Dremak, Todd Hill, Curtis Jones, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Paul Stasiukevicius, Scott Byrd, Glenn Demott, Melissa Fast, James Hewitt, Ronald William Kader, Edward Leyba, Greg Lucas, Kevin Stanfield, Todd Stave, Paola Tomassini, Janel Stanfield, Brian Balaguera, Individually and on behalf of all others similarly situated,

Plaintiffs - Appellees,

v.

Sirius XM Radio Inc.,

Defendant - Appellee,

v.

Marvin Union, Adam Falkner, Nicolas Martin, Jill Piazza, Ken Ward, Ruth Cannata, Lee Clanton, Craig Cantrall, Ben Frampton, Kim Frampton, Joel Broida, John Sullivan, Sheila Massie, Jason M. Hawkins, Steven Crutchfield, Scott D. Krueger, Asset Strategies, Inc., Charles B. Zuravin, and Jennifer Deachin, Randy Lyons, Tom Carder, John Ireland, Jeannie Miller, Michael Hartleib, Brian David Goe, Donald K. Nace, Christopher Batman,

Objectors - Appellants,

Linda Mrosko, Lange M. Thomas,

Objectors.

ORDER

Docket Nos: 11-3696 (Lead)
11-3729 (Con)
11-3834 (Con)
11-3883 (Con)
11-3908 (Con)
11-3910 (Con)
11-3916 (Con)
11-3965 (Con)
11-3970 (Con)
11-3972 (Con)

Appellant Nicholas Martin filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk