No. __-_____

# In the Supreme Court of the United States

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NICOLAS MARTIN, *Petitioner,*

v.

CARL BLESSING, *ET AL., Respondents.*

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

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

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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

To the Honorable Ruth Bader Ginsburg, as Circuit Justice for the Second Circuit:

Pursuant to Supreme Court Rules 13.5, 22.2, and 30.3, petitioner Nicolas Martin respectfully applies for a sixty-day extension of the time within which to petition this Court for a writ of *certiorari* to the U.S. Court of Appeals for the Second Circuit. This application sets for several factors that justify an extension, the most pressing of which is the recent Ninth Circuit decision in *In re HP Inkjet Printer Litig.,* __ F.3d __, 2013 WL 1986396 (9th Cir. May 15, 2013), which squarely conflicts with the Second Circuit's decision here, thereby complicating the decision and analysis of what issues to press in the petition for a writ of *certiorari* late in the drafting process. By order dated March 5, 2013, the Second Circuit denied Martin's timely petition for rehearing *en banc.* Without an extension, the petition for a writ of *certiorari* is due on June 3, 2013. Petitioner files this application more than ten days before the current deadline for the petition for a writ of *certiorari.*

## BACKGROUND

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,[1] and petitioner Martin filed objections to the settlement as a class member under FED. R. CIV. PROC. 23(e)(5). After the U.S. District Court for the Southern District of

[1] The other named class plaintiffs are Carl Blessing, Edward A. Scerbo, John Cronin, Todd Hill, Charles Bonsignore, Andrew Dremak, Curtis Jones, Joshua Nathan, James Sacchetta, David Salyer, Susie Stanaj, Scott Byrd, Paul Stasiukevicius, Glenn Demott, Melissa Fast, James Hewitt, Ronald William Kader, Edward Leyba, Greg Lucas, Kevin Stanfield, Todd Stave, Paola Tomassini, Janel Stanfield, and Brian Balaguera.

New York approved the settlement (App. 1a-5a), Martin (and several other objectors[2]) filed timely appeals.

2. By Order dated December 20, 2012 (App. 6a-14a), the Second Circuit affirmed the district court's decision, and by Order dated March 5, 2013 (App. 15a-16a), the Second Circuit denied Martin's timely petition for rehearing *en banc*.

3. The class-certification order included an idiosyncratic provision of the district judge 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," to be achieved by quotas ensuring a minimum number of racial minorities and women. App. 13a (*citing In re JP Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007)); *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 that required decertification.

4. In the settlement, Sirius agreed to an injunction freezing its list price for a monthly subscription at $12.95 in place of implementing an allegedly planned $2.00-per-month increase, which the district court accepted as providing $180

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[2] The other class members who appealed approval of the settlement to the Second Circuit are Marvin Union, Adam Falkner, 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, and Christopher Batman.

million in relief for the class (App. 3a), without considering that deep discounting enabled many class members – including Martin, who pays $3.99 per month – do not pay list price for Sirius service, Court of Appeals App. at 821.

5. The district court also approved an attorney-fee award of $13 million, which Martin challenged for the district court's reliance on the parties' self-serving valuation of the injunction's expected or face value, without using the "value to class members of coupons that are redeemed" required by 28 U.S.C. §1712(a) under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"). Nor did the district court provide the enhanced scrutiny of the coupon settlement required by CAFA. *Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646 (7th Cir. 2006) (Wood, J.).

6. This coupon was the only "benefit" of the settlement, but if Martin and other class members, redeemed the coupon, he would pay about $100 more than if he did not redeem the coupon and instead purchased discounted Sirius services. This is precisely the scenario Congress complained about in CAFA: settlements 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, §2(a)(3)(A), 119 Stat. at 4. The correct valuation of a redeemed coupon was negative, and the only beneficiaries of the settlement were class counsel and the defendant.

7. The settlement agreement also included a "clear-sailing" clause, under which Sirius agreed not to challenge any attorney-fee award up to $13 million, as well as a "kicker" under which any court-imposed fee reduction would revert to

Sirius, rather than to the class, which Martin challenged as benefiting class counsel at the expense of the class under *In re Bluetooth Prods. Liab. Litig.,* 654 F.3d 935, 947-49 (9th Cir. 2011).

8. With respect to the settlement and the attorney-fee award, the Second Circuit accepted the settling parties' self-serving bifurcation of the class relief and attorney-fee negotiations as rendering CAFA wholly inapposite, App. 12a, which splits with the Ninth Circuit's *Inkjet* and *Bluetooth* decisions' requirement to use a settlement's actual value under §1712, regardless of the theory used to calculate the attorney-fee award.

9. With respect to the diversity order, the Second Circuit held the order did not inflict an "injury in fact" on the class objectors in the form of particularized injury to a legally protected interest (App. 13a-14a), and thus held that objectors lacked standing to challenge the diversity order.

10. Although the nonprofit public-interest firm Center for Class Action Fairness represented Martin in the proceedings below, Martin and the Center have only recently engaged the undersigned counsel *pro bono* for proceedings before this Court.

11. On May 15, 2013, the Ninth Circuit issued its *In re HP Inkjet Printer Litig.,* __ F.3d __, 2013 WL 1986396 (9th Cir. 2013) decision, in which the majority held that §1712(a)'s requirements to base class-action attorney-fee awards on coupon settlements' actual value apply regardless of what method a court uses to set an attorney-fee award. This creates an additional circuit split with the Second

Circuit decision in this case, and will require a rewriting of the *certiorari* petition.

12. During the period of his engagement (*i.e.,* the tail end of April and the month of May) leading up to the current deadline for Martin to petition this Court for a writ of *certiorari,* the undersigned counsel has been engaged to draft a motion for summary disposition in a state-court preemption challenge to a local zoning ordinance; an *amicus* brief on the Administrative Procedure Act's anti-supersession clause, 5 U.S.C. §559, before the Occupational Safety & Health Review Commission; and two extensive motions for a preliminary injunction in federal courts. In addition, for approximately a week beginning May 8, the undersigned counsel had coordinate with consultants and vendors to recover and port all files and software onto a new computer after the motherboard of his prior computer failed suddenly. Finally, the undersigned counsel has major appellate briefs due on June 14 and 21, respectively, in the U.S. Court of Appeals for the District of Columbia Circuit.

**ARGUMENT**

With the foregoing background, petitioner Martin respectfully submits that a 60-day extension is necessary and appropriate for four reasons.

First, this case presents several critical questions regarding a district court's authority under Rule 23 not only to condition the assignment of class counsel on staffing the matter in proportion to the "race and sex metrics" of the class but also to approve a settlements and set attorney-fee awards where the settlement qualifies as a "coupon settlement" under CAFA. This case raises these issues squarely and in a manner ripe for this Court's review:

- Under CAFA and Rule 23, the Second Circuit's *Sirius* decision splits with the Ninth Circuit's decisions in *Bluetooth* and *Inkjet* on whether clear-sailing agreements require heightened scrutiny for possible collusion and whether lodestar-based attorney-fee awards can sidestep CAFA's §1712(a) for coupon-style relief, respectively.
- With respect to the diversity order, the Second Circuit splits with a line of cases from the D.C. Circuit (and this Court) under which involuntary participants like Martin in discriminatory schemes have standing to challenge the discrimination, even though they do not themselves suffer discrimination. *Lutheran Church-Missouri Synod v. F.C.C.,* 141 F.3d 344, 350 (D.C. Cir. 1998); *Barrows v. Jackson,* 346 U.S. 249, 259 (1953). Moreover, denying review based on prudential third-party standing would ignore that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 628 (1991); *see also Campbell v. Louisiana,* 523 U.S. 392, 307-98 (1998); *Vasquez v. Hillery,* 474 U.S. 254, 262-63 (1986); *Batson v. Kentucky,* 476 U.S. 79, 100 (1986); *Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979) (collecting cases). In any event, even without relying on equal-protection principles, Martin has standing to challenge arbitrary government action, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977), which is enough to vacate the diversity order.

Significantly, there is at least a prospect that this Court will grant *certiorari,* given that the Second Circuit's decision conflicts with decisions of its sister circuits on each of these issues and with decisions of this Court on the latter issue.

Second, the Ninth Circuit's recent decision in *Inkjet* alters Martin's calculations on which issues to address in his petition for a writ of *certiorari,* and Martin and his counsel have not had adequate time to re-assess the relative importance of these issues – and revise the petition for a writ of *certiorari* accordingly – in light of *Inkjet.*

Third, the newly engaged *pro bono* counsel requires additional time to become familiar with the record below, relevant legal precedents, and the issues involved in this matter, given the competing professional commitments.

Fourth and finally, the respondents will not be prejudiced by an extension. Under either the current or the extended filing date, the Court would not consider Martin's petition for a writ of *certiorari* until the beginning of next term.

## REQUESTED RELIEF

Petitioner respectfully requests a 60-day extension of the time within which to petition for *certiorari.*

## CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the time within which to file a petition for a writ of *certiorari* should be extended by 60 days, from June 3, 2013, to and including August 2, 2013.

Dated: May 23, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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 Av NW Suite 200
Washington, DC 20036
Telephone: (202) 355-9452
Facsimile: (202) 318-2254
Email: lj@larryjoseph.com

*Counsel for Petitioner Nicolas Martin*