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
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER'S MOTION TO SUPPLEMENT THE QUESTIONS PRESENTED

PAUL F. NOVAK
MILBERG LLP
One Penn Plaza
New York, NY 10119
212-594-5300

JAY W. EISENHOFER
Counsel of Record
JAMES J. SABELLA
SHELLY L. FRIEDLAND
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
646-722-8500
jeisenhofer@gelaw.com

CHRISTOPHER B. HALL
P. ANDREW LAMPROS
COOK, HALL & LAMPROS, LLP
Promenade Two, Suite 3700
1230 Peachtree Street, N.E.
Atlanta, GA 30309
404-876-8100

Counsel for Respondents Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, 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

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INTRODUCTION

In an extraordinary sign of weakness, Petitioner makes a belated motion to add a new question presented to his petition for certiorari. While the decision allegedly prompting the motion, *In re Dry Max Pampers Litigation*, No. 11-4156, 2013 U.S. App. LEXIS 15930 (6th Cir. Aug. 2, 2013), was rendered on August 2, 2013, Petitioner did not promptly move to supplement the questions presented but rather waited until almost a month after receiving Respondents' brief in opposition to the petition. Now, more than 45 days after the Sixth Circuit issued this decision, after seeing Respondents' brief, which thoroughly refuted Petitioner's application for certiorari, and after the petition and the brief in opposition were scheduled to be distributed within the Court, Petitioner has moved to add a new question presented, based on a purported conflict between the decision below and the Sixth Circuit's August 2 decision. The motion should be denied, and it only further underscores that the petition should be denied.

As a threshold matter, the motion should be denied as untimely. Petitioner presents no good reason why he waited so long to make this motion, especially considering that Petitioner's counsel was on the appellate brief in the *Pampers* case (and managed to find the time to blog about that decision only three days after the Sixth Circuit issued it). Petitioner also failed below to preserve the question he now asks to be added to his questions presented. He did not contend in either his appeal briefs to the Second Circuit or in his petition for rehearing that the courts below purportedly mislaid the burden of proof.

On the merits, the purported "conflict" that Petitioner tries to force into his proposed new question presented is non-existent. Petitioner asserts that while *Pampers* held that the burden of proof to show the fairness of a settlement is on the proponent of the settlement, the decisions below purportedly placed the burden of proof on objectors to show that the settlement was unfair. This is simply not so. Neither the District Court nor the Second Circuit held that the burden of proof was on the objectors. Rather, the proponents of the settlement – Plaintiffs and Defendant Sirius XM Radio Inc. ("SXM") – carried their burden by presenting voluminous and overwhelming evidence demonstrating that the settlement was fair to class members—including extensive evidence going to the valuation of the settlement and, unlike in the *Pampers* case, in the context of a protracted and hard-fought litigation. Objectors failed to submit any credible evidence to counter this detailed showing, and both the District Court and the Second Circuit found that the evidence proved that the settlement was fair and reasonable. The rulings below do not conflict with *Pampers* or any other court of appeals decision concerning the burden of showing the reasonableness of a settlement.

I. PETITIONER'S MOTION IS UNTIMELY

Pampers was decided by the Sixth Circuit on August 2, 2013 – the same day that Petitioner filed his petition for certiorari. If Petitioner truly believed that the decision below conflicted with *Pampers*, he could have and should have promptly moved to supplement his question presented. Instead, he waited weeks after Respondents' brief in opposition was filed on August 20, 2013 and only after the

petition was scheduled to have been circulated within the Court (on or about September 3, 2013).

Petitioner's counsel cannot claim that they were not aware of the *Pampers* decision at the time it was rendered back on August 2. Theodore H. Frank and the Center for Class Action Fairness, who are among the counsel representing Petitioner on this petition, also represented the objector in *Pampers*. Indeed, Mr. Frank wrote a blog about the *Pampers* opinion on August 5, 2013,[1] but nevertheless waited until September 19, 2013 to ask this Court to supplement the question presented for a petition scheduled to go to conference on September 30, 2013.

Further demonstrating the unreasonableness of Petitioner's delay is the fact that *Pampers* did not break any new ground when it held that the burden is on the proponents of a class settlement to show that it is reasonable. Indeed, the *Pampers* opinion cites decisions from two other circuits that previously had held that the burden is on the proponents. *See* Motion App. 8a (citing *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012), and *In re Katrina Canal Breaches Litigation*, 628 F.3d 185, 196 (5th Cir. 2010)). If Petitioner thought that the courts below improperly placed the burden on objectors, he did not have to wait for the Sixth Circuit to issue its decision in *Pampers* before urging that the decision below conflicted with the rule in other circuits. He could have argued in his petition that there was a conflict between the decision below and these other court of appeals

[1] *See* http://www.pointoflaw.com/archives/2013/08/ccaf-sixth-circuit-victory-in-pampers-dry-max.php.

cases from 2010 and 2012. In fact, Petitioner ***acknowledges*** this point in his Supplemental Brief on *In re Dry Max Pampers Litigation*, dated Sept. 19, 2013 ("Pet. Supp. Br."),[2] where he cites both *Ault* and *Katrina* and then states that in the decision below "the Second Circuit also split with the Eleventh and Fifth Circuits." *Id*. at 7. These facts belie Petitioner's assertion that he could not have included in his petition a question concerning the alleged misallocation of the burden of proof.

If Petitioner had acted in a timely manner, Respondent could have addressed the proposed new question presented in Respondents' brief in opposition, and the Justices of this Court would have had everything relating to this issue before them when the petition and opposition were circulated pursuant to SUP. CT. R. 15.5. Instead, Petitioner's tactics have necessitated an additional round of papers, driving up the burden and expense of these proceedings in connection with a settlement that was approved more than ***two years ago***.

In these circumstances, Petitioner's undue delay in filing this motion provides sufficient basis for denying the motion.

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[2] Notwithstanding that SUP CT. R. 21.1 provides that "[n]o separate brief may be filed" in support of a motion, Petitioner has filed a lengthy supplemental brief addressing *Pampers*. Petitioner purports to justify this rules violation by relying on SUP. CT. R. 15.8 (*see* Pet. Supp. Br. at 1), but that Rule only applies when the new matter to be addressed was "not available at the time of the party's last filing." SUP. CT. R. 15.8. Petitioner's last filing in support of the petition for certiorari was his reply brief, which was filed on September 19, 2013. *Pampers* was available as of August 2, 2013 – long before that last filing – and hence could have been discussed in that reply brief. Petitioner's supplemental brief thus falls outside of SUP. CT. R. 15.8 and hence is precluded by SUP. CT. R. 21.1. It should, therefore, be ignored.

II. PETITIONER DID NOT PRESERVE BELOW THE NEW QUESTION PRESENTED

This Court ordinarily refuses to review on certiorari issues not preserved below. *See Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987) (dismissing writ of certiorari as improvidently granted); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973) (dismissing writ of certiorari as improvidently granted and noting: "We cannot decide issues raised for the first time here"). Petitioner's motion to supplement the question presented should be denied because Petitioner failed to preserve below the issue of whether the burden of proof regarding the fairness of the settlement was improperly placed on objectors.

In his brief in the Second Circuit, Petitioner set forth a lengthy and detailed "Statement of the Issues Presented." But that Statement—with no fewer than six issues in it—nowhere mentioned a purported misallocation of the burden of proof concerning the fairness of the settlement. Indeed, the only issue that even touched on the valuation of the settlement—the second in the complete list below of Petitioner's "Issues" in the Court of Appeals—acknowledges the fact-bound nature of Petitioner's challenge to the valuation evidence proffered by Respondents, as it concerned only "findings of fact" that are reviewed for "clear error":

Statement of the Issues Presented

> 1. The district court held that the settlement was not subject to the restrictions on coupon settlements under the Class Action Fairness Act because the relief, only available to class members who purchased future services from the defendant at list price, did not "require class members to purchase something they might not otherwise purchase." There is no language in the Class Action Fairness Act creating an exception for coupons that do not "require class members to purchase something they might not otherwise

purchase." Did the district court commit an error of law in failing to apply 28 U.S.C. § 1712 to the settlement approval and attorney-fee request?

Standard of Review: Questions of law are reviewed *de novo*. *E.g., United States v. Mejia*, 545 F.3d 179, 198-99 (2d Cir. 2008).

2. Was it clearly erroneous for the district court to find that a settlement 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?

Standard of Review: Findings of fact are reviewed for clear error. *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001).

3. The settlement contained both a "clear sailing" clause and a "kicker" clause protecting attorneys' fees from reduction, without any offsetting benefit to the class. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011), holds that such clauses are signs "that class counsel have allowed pursuit of their own self-interests … to infect the negotiations," making the settlement potentially unfair. Did the district court err as a matter of law in not only failing to consider that these self-serving clauses suggested settlement unfairness, but holding that the kicker clause meant that it had a "reduced" obligation to scrutinize the settlement?

Standard of Review: Questions of law are reviewed *de novo*. *E.g., Mejia*, 545 F.3d at 198-99.

4. Fed. R. Civ. Proc. 23(h) requires notice of the request for attorneys' fees to be directed to the class in a reasonable manner. Did the notice in this case violate Rule 23(h) when objections were due Tuesday, July 19, but the motion and supporting papers for attorneys' fees were filed only late in the day Friday, July 15, and not posted on the settlement website until Monday, July 18?

Standard of Review: Questions of law are reviewed *de novo*. *E.g., Mejia*, 545 F.3d at 198-99.

5. Multiple courts and the American Law Institute hold that, given the lack of incentive for objecting, a court should not construe a small number of objectors to be support for the settlement. Should the Second Circuit reverse its holding, followed by the district court, that the presence of 85 objectors is "a fact that favors approval"?

Standard of Review: Questions of law are reviewed *de novo*. *E.g., Mejia*, 545 F.3d at 198-99.

> 6. Did the district court err, violating the Constitution's ban on racial classifications imposed by federal entities, when it imposed an explicit racial quota on class counsel as a condition of class certification?
>
> **Standard of Review**: Questions of law are reviewed *de novo*. *E.g., Mejia*, 545 F.3d at 198-99.

Blessing v. Sirius XM Radio Inc., No. 11-3696 (2d Cir.), Doc. No. 338, at 2-4.

Moreover, neither in his initial brief in the Court of Appeals (Doc. No. 338) nor in his reply brief (Doc. No. 493) did Petitioner set forth any argument that the District Court had improperly placed the burden of proof on the objectors with respect to the fairness of the settlement. And, in his petition for rehearing in the Second Circuit (Doc. No. 599), with respect to the Second Circuit's statement that he had failed to request an evidentiary hearing or for more time to present witnesses (including experts) to respond to the proof of fairness that Respondents proffered, Petitioner's only points were that, at oral argument in the District Court, he purportedly had requested such a hearing and that he did not have enough time to propound rebuttal proof.[3] There was never any mention of the Second Circuit purportedly mislaying the burden of proof on Petitioner.

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[3] In fact, Petitioner did ***not*** request an evidentiary hearing, as the Second Circuit correctly noted. He made only rhetorical points that, if the District Court had answers to the questions Petitioner raised, it could better evaluate the proof that Respondents offered in support of the settlement. Petitioner did not request a hearing or more time to identify experts or other witnesses to challenge Respondents' showing. Petitioner was, instead, content to complain that the schedule for presenting objections did not give him enough time and that if he had more time "he might also have chosen to retain an economic expert," without ever saying that he actually wanted to retain such an expert or asking the District Court for more time to marshal rebuttal proof in support of his objections. Doc. No. 599 at 13.

This new question was, in short, not preserved below. On this separate ground, Petitioner's motion to add this issue to the questions presented should be denied.

III. THE DECISION BELOW DID NOT CREATE ANY SPLIT IN THE CIRCUITS

The law in the Second Circuit regarding the burden of proof concerning the fairness of a class settlement is completely consistent with the law in the Sixth Circuit. Thus, the Second Circuit has long held that "the parties reaching the settlement have the obligation to support their conclusion to the satisfaction of the District Court…." *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982) (internal quotation marks omitted). The proceedings below were consistent with this teaching.

Petitioner's motion and his supplemental brief attempt to create the impression that in connection with the settlement approval proceedings in the District Court, Respondents presented no evidence as to the reasonableness of the settlement, and the District Court and Court of Appeals upheld the settlement simply because the objectors did not present evidence showing the settlement was unreasonable. This is a complete mischaracterization of the proceedings. In the District Court, Respondents presented extensive evidence, including several sworn statements and expert declarations, demonstrating that the settlement was fair and reasonable.

The settlement provided, *inter alia*, that for a period of five months after expiration of the price freeze that the FCC had imposed as a condition for approval

of the merger of Sirius and XM, SXM could not raise its prices for basic subscriptions, multi-radio subscriptions, Internet streaming, and other services, or increase the royalty fee that SXM charged subscribers. The settlement further allowed former subscribers to either (a) reconnect their satellite radio without paying a reactivation fee and receive one month of basic satellite radio service at no cost, or (b) receive SXM Internet streaming service for one month at no cost.[4]

To demonstrate that the settlement was fair and reasonable, Respondents presented evidence that in the ten years since coming into existence, Sirius had ***never*** raised its base subscription price and XM had done so only once, in 2005. *Blessing v. Sirius XM Radio Inc.*, No. 11-3696 (2d Cir.), Doc. No. 339 at A116. A price increase was due, and Respondents submitted contemporaneous documents showing that SXM had in fact contemplated and made plans for a large price increase after the FCC-imposed price freeze expired on July 28, 2011. Doc. No. 341 at A569-71, A579-626. To estimate the value of the settlement, Respondents submitted a declaration by an economic expert, Dr. James Langenfeld, analyzing the settlement and concluding that the value of the settlement was at least $180 million. Doc No. 340 at A529-49. Respondents also submitted a declaration by a Vice President of Finance for SXM, Catherine Brooker, showing that the SXM had contemplated raising its prices after the expiration of the FCC's three-year price freeze and that the impact on SXM of such a price increase would be approximately

[4] In addition, the settlement required SXM to pay all of the costs of providing notice to class members, and to pay in addition a fee to plaintiffs' counsel in an amount to be approved by the Court.

$185.6 million. Doc No. 340 at A359-61. The benefit of the settlement to the class was confirmed when SXM thereafter implemented a substantial increase in its base subscription price as of January 1, 2012, when the price freeze imposed by the settlement expired. Doc. No. 344 at A1383. Thus, Respondents produced abundant evidence to satisfy the burden of showing that the settlement was fair and reasonable.

Both the District Court and the Court of Appeals acknowledged that Respondents had carried the burden of demonstrating the fairness of the settlement. For example, the District Court noted that while the objectors contended that "Sirius XM would not have raised prices even without the Settlement," Petition for Certiorari App. at 40a, the evidence produced by Respondents proved the contrary: "[Objectors'] 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." *Id.* Similarly, with respect to the value of the price freeze, the District Court found that the expert declarations submitted by Respondents proved that "the Settlement Agreement requires Sirius XM to forego some $180 million in fees." *Id.* Thus, the District Court's finding that the settlement was fair and reasonable was based on the evidence that Respondents submitted, not on any failure of the objectors to carry a purported burden of showing the settlement was unreasonable. In the Court of Appeals, the same was true. The Second Circuit held that "[t]he record also supports a finding of substantive fairness" of the settlement, *id.* at 3a, and that "the

district court did not abuse its discretion when it concluded that the proposed settlement was substantively fair." *Id.* at 4a.

Petitioner's contention that the courts below placed the burden on the objectors is based on a statement by the Court of Appeals that the objectors did not request an evidentiary hearing or more time to identify expert witnesses or the opportunity to present any witnesses. Motion at 3. It is important to place this statement in context. In his brief in the Second Circuit, Petitioner had to grapple with the fact that Respondents had submitted in the District Court substantial evidence, including expert declarations, supporting the fairness of the settlement, whereas the objectors had submitted nothing to rebut Respondents' showing, other than speculation, hearsay, and assertions by objectors' counsel.[5] Attempting to address this deficiency, Petitioner asserted that he did not have sufficient time between his receipt of Respondents' papers supporting the settlement and the fairness hearing. He argued that "[h]ad Martin had a reasonable time to respond, he might have chosen to retain an economic expert to more fully demonstrate why the James Langenfeld expert report was unreasonable…." *Blessing v. Sirius XM Radio Inc.*, No. 11-3696 (2d Cir.), Doc. No. 338 at 39. It was in light of this assertion by Petitioner that he "might" have proffered a rebuttal expert witness if he had had more time that the Second Circuit noted, correctly, that Martin had never actually requested more time to obtain an expert or to present testimony.

[5] *See Blessing v. Sirius XM Radio Inc.*, No. 11-3696 (2d Cir.), Doc. No. 480 at 21-24, explaining the deficiencies in the objectors' presentation.

The record here stands in stark contrast to that in *Pampers*. There, the parties submitted no proof as to the value of the relief provided by the settlement in that case. *See* Motion App. 6a (where Sixth Circuit in *Pampers* notes that the proponents of the settlement "did not carry that burden [to prove that the refund program had actual value]—which again (to his credit) P&G's counsel conceded at oral argument on appeal"). Here, in contrast, Respondents submitted two declarations explaining in detail how the settlement was valued, supported by contemporaneous documents that SXM had contemplated and made plans for raising prices after the FCC lifted its three-year price freeze. Indeed, in *Pampers* there was no discovery record and the Court had no basis for determining whether the settlement was reasonable. At bar, discovery, including expert discovery, was complete, and the Court had a substantial basis to evaluate not only the value of the settlement, but also the strengths and weaknesses of Plaintiffs' claims and the likelihood that the Plaintiffs would prevail at trial. *See* Petition for Certiorari App. at 4a, where the Second Circuit observed that the reasonableness of the settlement was supported by the fact that the evidence showed that "were the case to go to trial, plaintiffs' likelihood of success was slim."

Lastly, it may be noted that Petitioner acknowledges that absent this supposed legal issue concerning allocation of the burden of proof, there are "fact-bound arguments that would be required" to address the issue of the value of the settlement. Motion at 3, 5. Such argument necessarily implies that the record contains facts concerning the value of the settlement. If Respondents had not

provided any proof, as the Sixth Circuit said was the case in *Pampers*, then there would be no "fact-bound arguments" but simply an argument that Respondents had not put forth anything to carry their burden.

The decision below creates no split in the circuits as to the legal issue of the burden of proof concerning the reasonableness of a class settlement. The issue is simply the "fact-bound" issue of whether the evidence demonstrated that the settlement was fair – an issue that Petitioner concedes does not justify a grant of certiorari. Motion at 3-4.

CONCLUSION

For the foregoing reasons, Petitioner's motion to supplement the questions presented should be denied.

Dated: September 23, 2013

Respectfully submitted,

PAUL F. NOVAK
MILBERG LLP
One Penn Plaza
New York, NY 10119
212-594-5300

JAY W. EISENHOFER
Counsel of Record
JAMES J. SABELLA
SHELLY L. FRIEDLAND
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
646-722-8500
jeisenhofer@gelaw.com

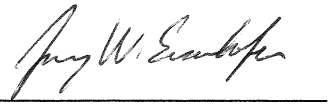
CHRISTOPHER B. HALL
P. ANDREW LAMPROS
COOK, HALL & LAMPROS, LLP
Promenade Two, Suite 3700
1230 Peachtree Street, N.E.
Atlanta, GA 30309
404-876-8100

Counsel for Respondents Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, 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

CERTIFICATION

Pursuant to Sup. Ct. Rules 21 and 33, I certify that the attached Brief in Opposition to Petitioner's Motion to Supplement the Questions Presented is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contains 14 pages, excluding this Certification, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Respectfully submitted,



JAY W. EISENHOFER
Counsel of Record
JAMES J. SABELLA
SHELLY L. FRIEDLAND
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
646-722-8500
jeisenhofer@gelaw.com

Counsel for Respondents Carl Blessing, Edward A. Scerbo, John Cronin, Charles Bonsignore, 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

CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of September, 2013, a true and correct copy of the foregoing Brief in Opposition to Petitioner's Motion to Supplement the Questions Presented was served by overnight mail on:

Lawrence J. Joseph
1250 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
Counsel for Petitioner Nicolas Martin

Theodore H. Frank
Center for Class Action Fairness
1718 M Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner Nicolas Martin

Todd R. Geremia
Jones Day
222 East 41st Street
New York, NY 10017
Counsel for Respondent Sirius XM Radio Inc.

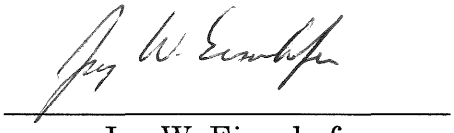
Joshua P. Thompson
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Counsel for Amicus Pacific Legal Foundation

Michael E. Rosman
Center for Individual Rights
1233 20th Street, N.W.
Washington, D.C. 20036
Counsel for Amicus Center for Individual Rights

(In addition to the foregoing service by mail, the undersigned also certifies that a pdf copy of the foregoing document was sent via electronic mail to each parties' counsel of record.)

The undersigned further certifies that on this 23rd day of September, 2013, an original and ten true and correct copies of the foregoing document was sent to the Court by Federal Express, next-day delivery.

Dated: September 23, 2013



Jay W. Eisenhofer