No. 13-_____

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

Under FED. R. CIV. P. 23, district courts "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," may alter or amend class-certification orders prior to final judgment, and must ensure that class settlements are "fair, reasonable, and adequate" and review any attorney-fee awards. Non-party class members may object to any settlements that require court approval and have standing to appeal settlements based on those objections. Petitioner – a non-named class member – objected not only to this class-action settlement's terms and the attorney-fee award as contrary to the Class Action Fairness Act and Rule 23 but also to the district judge's standard class-certification order requiring class counsel to reflect the racial make-up of the class, *see* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327 (2011), which the petitioner alleges to violate this Court's holdings against racially conscious judicial proceedings. *See Rose v. Mitchell,* 443 U.S. 545, 556-57 (1979). The district judge ignored many of petitioner's objections, including his objection to the class-certification order's race-based requirements. The Second Circuit affirmed, holding that petitioner lacks standing to challenge the order's race-based requirements.

The question presented is whether an objecting class member – whose antitrust claims have been waived by a settlement negotiated by class counsel appointed by a racially conscious class-certification order as described above – has standing to challenge the class-certification order and, through it, the antitrust settlement?

PARTIES TO THE PROCEEDING

Petitioner is Nicolas Martin, a class-member objector to the proposed settlement who participated at the fairness hearing in district court and timely appealed that order to the court of appeals.

The respondents are the defendant and the named plaintiffs certified as class representatives:

- The defendant is Sirius XM Radio Inc., a publicly traded corporation headquartered in New York City, New York.
- The 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.

A third group of potential respondents – the other objectors* – are not involved here. S.CT. RULE 12.6.

* They 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.

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PETITION FOR WRIT OF *CERTIORARI*

Nicolas Martin petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Second Circuit affirming the U.S. District Court for the Southern District of New York's approval of a class-action settlement between defendant Sirius XM Radio, Inc. and plaintiffs Carl Blessing *et al.* ("Class Representatives").

OPINIONS BELOW

The Second Circuit's decision is reported at 507 Fed. Appx. 1, and reprinted in the Appendix ("App.") at 1a. The district court's decision is reported at 2011-2 Trade Cases P 77,579 and reprinted at 36a.[1]

JURISDICTION

The Second Circuit issued its decision on December 20, 2012, and denied Martin's petition for rehearing *en banc* on March 5, 2013. App. 45a. By Order dated May 23, 2013, Justice Ginsburg acting as Circuit Justice extended until August 2, 2013, the time within which to petition for a writ of *certiorari.* The district court had jurisdiction under 28 U.S.C. §§1331, 1332(d), 1337, and the Second Circuit had jurisdiction under 28 U.S.C. §1291. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Appendix quotes or excerpts the authorities involved, which fall primarily into three areas:

Constitutional Equal Protection. The Due Process Clause of the Fifth Amendment includes an

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[1] The district court decision also appears at 2011 WL 3739024 and 2011 U.S. Dist. Lexis 94723.

Equal-Protection component equivalent to the Equal Protection Clause. U.S. CONST. amend. V, XIV, §1.[2] Equal-protection principles prohibit Judge Baer's ordering class counsel to "fairly reflect the class composition in terms of relevant race and gender metrics." App. at 35a.

Rule 23. The Appendix excerpts the portions of Rule 23 on approval of settlements and appointment of class counsel. FED. R. CIV. P. 23(c), (e), (g).

CAFA's Coupon-Settlement Criteria. The Appendix includes 28 U.S.C. §1712 and the findings from the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, §2, 119 Stat. 4-5. These authorities relate to valuation of the settlement, which in turn relates to the fairness of the $13 million in legal fees that the district court awarded to class counsel. Although the district court found the settlement to be worth $180 million based on face value, Martin cited CAFA to argue that the face value is illusory in this worthless coupon settlement.

STATEMENT OF THE CASE

Petitioner Martin seeks review of the district judge's requiring class counsel to staff the case to reflect the class on the basis of race and sex, App. 35a, which the Second Circuit held objectors to lack standing to challenge. App. 7a. Although the petition primarily addresses constitutional equal-protection principles and case-or-controversy requirements, the Court requires an understanding of the underlying class-action dispute under CAFA and Rule 23 in

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[2] *See Buckley v. Valeo,* 424 U.S. 1, 93 (1976); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). Decisions under the Fifth Amendment apply equally to the states under the Fourteenth Amendment, and vice versa.

order to resolve the constitutional issues presented here and to evaluate the impact of the race-conscious proceedings on Martin's claims.[3]

This litigation consolidates five putative class actions claiming both that the July 28, 2008 merger of Sirius Satellite Radio, Inc. with XM Satellite Holdings, Inc. created a monopoly in the surviving company, respondent Sirius XM Radio Inc. ("Sirius"), and that Sirius, *inter alia,* abused its monopoly power in violation of federal antitrust laws. Court of Appeal Appendix ("CAA"), at 94-96, 102-37.

As the case prepared to go to trial, class counsel and Sirius agreed to a settlement whereby Sirius would freeze its list price for five months and pay class counsel up to $13 million in attorneys' fees without challenging the fee award. Because Sirius widely offered subscriptions well below the stated list price, however, objectors like petitioner Martin argued that the settlement was a worthless "coupon settlement" that enriched class counsel at the expense of class members.

Statutory Background

In CAFA, Congress found that class-action abuse "undermine[s] … the free flow of interstate commerce," *Id.* §2(a)(4), 119 Stat. 5, and that class members "often receive little or no benefit, and are sometimes harmed, where … counsel are awarded

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[3] Although the district judge acted on the basis of both race and sex, this petition focuses on race because courts evaluate it more stringently, and invalidating the challenged order for race discrimination would suffice for the *vacatur* and remand relief that Martin seeks. *See, e.g., MD/DC/DE Broadcasters Ass'n v. FCC,* 236 F.3d 13, 21-23 (D.C. Cir. 2001) (invalidating federal agency's race- and sex-based order by evaluating race only).

large fees, while leaving class members with coupons or other awards of little or no value." *Id.* §2(a)(3)(A), 119 Stat. 4. Congress also found that these manifest abuses "undermine the national judicial system" itself, *id.* §2(a)(4), 119 Stat. 5, as well "public respect for our judicial system." *Id.* §2(a)(2)(C), 119 Stat 4.

Congress enacted CAFA to remedy these negative effects both by ensuring that legitimate class actions go forward to "fair and prompt recoveries for class members" and by "benefit[ting] society by encouraging innovation and lowering consumer prices" through less class-action abuse. *Id.* §2(b)(1), (3), 119 Stat. 5. CAFA's primary remedy was 28 U.S.C. §1712's requirement that courts use coupons' actual redeemed value – not their face value – to assess class counsel's entitlement to fees.

The Market for Satellite Radio and the Merger

Although the Sirius merger partners were the only providers of satellite digital audio radio service, that service competes with a wide range of alternative entertainment: terrestrial radio, portable devices carrying dozens of hours of personalized music playlists and podcasts, and free Internet-based services. CAA at 835, 891-95. Faced with this competition, Sirius regularly discounted its list price substantially. For example, Martin paid only $3.99 per month for his service, notwithstanding the monthly $12.95 list price. *Id.* at 821; *Blessing v. Sirius XM Radio Inc.,* 28 U.S.C. §1653 Decl. of Appellant Nicolas Martin, Nos. 11-3696(L) & 11-3883 (2d Cir.), at 1-2.[4]

[4] After the Class Representatives challenged for the first time on appeal whether Martin had presented sufficient evidence in the district court to demonstrate he was a class

As a condition of approving the merger, the Federal Communications Commission ("FCC") required Sirius to freeze prices for three years, until July 28, 2011. CAA at 834. The FCC considered whether to extend the price freeze, but declined to do so after Sirius successfully argued that it was constrained in the marketplace by existing competition. *Id.* at 834-37, 881-901. The FCC's final decision not to extend the price freeze did not come until July 27, 2011, *Id.* at 881-86, which was the day before the freeze lapsed.

The Lawsuit and the Class Certification

The district court dismissed the plaintiffs' contract and consumer-fraud claims, but certified a class on the antitrust claims, App. 35a, which sought to demonstrate Sirius's allegedly illegal market power with its ability to impose a small but significant and non-transitory increase in price ("SSNIP"). CAA at 129-32. In certifying the class under FED. R. CIV. PROC. 23(g), the district court conditioned appointment of class counsel upon class counsel's staffing the case in proportion with the class' "race and gender metrics." App. 35a (*citing In re JP Morgan Chase Cash Balance Litig.,* 242 F.R.D. 265, 277 (S.D.N.Y. 2007)) (hereinafter, the "Diversity Order"). The Diversity Order is standard for class actions before this judge. *See generally* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity,* 17 CARDOZO J.L. & GENDER 321, 327 (2011). Class counsel did not object to or seek an interlocutory appeal of the Diversity Order.

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member with standing to appeal, Martin submitted a declaration pursuant to 28 U.S.C. §1653 with his reply brief.

The Settlement Agreement

As indicated, the settlement paid no cash to class members and instead consisted of an injunction that Sirius would not raise prices from the lapse of FCC's moratorium on July 28, 2011, through December 31, 2011, and would allow class members to use that time to renew their subscriptions at the current list price. *Id.* at 232-33. Class members who were no longer customers would get an explicit coupon for one free month of service without a reactivation fee. *Id.* at 233. Although the settlement would not pay any cash to class members, it would provide a significant cash payment to class counsel, whom the settlement authorized to request up to $13 million. *Id.* at 235-36. The settlement also included a clear-sailing clause (*i.e.,* Sirius' commitment not to challenge the fee request). In addition, a "kicker" provided that any court-imposed reduction in fees would revert to Sirius, not to the class members. *Id.*

The Martin Objections and Responses

Martin, a Sirius subscriber and class member paying under $5 per month for his satellite radio service, objected. *Id.* at 800-33. He argued, *inter alia,* that the settlement was worthless to class members because they already had the ability (like him) to obtain Sirius service below the list price offer that was the only benefit of the settlement, and available equally to class members and non-class-members. *Id.* at 821. As Martin put it, "if you have a class action against Gray's Papaya and it is resolved by giving every class member a coupon that allows them to buy a hot dog for $16, that's worthless." *Id.* at 1320. Moreover, the requirement that consumers do new business with Sirius to obtain any benefit made the

settlement a coupon settlement, but the settlement terms and fee request did not comply with CAFA's restrictions. *Id.* at 830-31.

Martin further challenged the Diversity Order as a constitutional violation that precluded settlement by class counsel who were inappropriately appointed, and thus could not represent the class under Rule 23(g). *Id.*at 828-30. Martin also argued that the settlement would only have a non-zero value to consumers if Sirius had the market power to end its discounting and raise prices, which would mean that the antitrust suit was meritorious and should not be settled on these terms. *Id.* at 816-25.

The Fairness Hearing and Rulings

The court held a fairness hearing on August 8, 2011, *id.* at 1285-1338, and subsequently approved the settlement and attorneys' fees. App. 37-44a. The court held that the settlement was not a coupon settlement because it did not "require class members to purchase something they might not otherwise purchase." *Id.* 40a. It endorsed the settling parties' $180 million calculation of class benefit without any explanation why it was rejecting Martin's arguments that a freeze on list prices was worthless to class members who could obtain the same service for substantially less than list price without the settlement. *Id.* 37a-44a. The district court did not address or acknowledge Martin's challenge to the Diversity Order. Martin and several other objectors appealed.

The Appeal in the Second Circuit

The Second Circuit affirmed the district court's approval of the settlement and fee award, but via a slightly different analysis. It found that the district

court had a sufficient evidentiary basis to support its valuation of the settlement, *id.* 2a-4a, but rejected the objectors' claim that the relief was sufficiently coupon-like to trigger the §1712(a)'s actual-value requirements as irrelevant. The Second Circuit held that because the parties had bifurcated negotiations about class relief from the attorney-fee negotiations (*i.e.,* none of the awarded fees were attributable to class relief), §1712(a) was inapplicable. *Id.* 5a-6a. The Second Circuit neither mentioned nor addressed the objection that class members who accepted the settlement benefit would be about $100 worse off than if they, like Martin, negotiated the widely-available discounted price.

On the Diversity Order, the Second Circuit held that objectors lacked standing because they did not suffer an "injury in fact" – *i.e.,* a particularized injury to a legally protected interest – without suffering "actually inferior" legal service. *Id.* 7a. As such, the Second Circuit held that the objectors lacked standing to challenge the Diversity Order and did not reach its merits. *Id.*

REASONS TO GRANT THE WRIT

While race discrimination should have had nothing to do with this antitrust litigation, the district judge gratuitously introduced his standard class-action diversity requirements in the class-certification order. App. 35a.[5] In ruling that objecting

[5] *Compare id. with Cash Balance Litig.,* 242 F.R.D. at 277; *Spagnola v. Chubb Corp.,* 264 F.R.D. 76, 95 n.23 (S.D.N.Y. 2010); *In re Gildan Activewear Sec. Litig.,* 2010 U.S. Dist. LEXIS 140619, at *3 (S.D.N.Y. Sept. 20, 2010); *In re Dynex Capital, Inc. Sec. Litig.,* 2011 WL 781215, at *9 (S.D.N.Y. Mar. 7, 2011); *Pub. Employees' Retirement Sys. of Mississippi v. Goldman Sachs Group, Inc.,* 280 F.R.D. 130, 142 n.6 (S.D.N.Y.

class members like Martin lack standing to challenge racial discrimination in court proceedings, the Second Circuit conflicts not only with the principle 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, 307-08 (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), but also with several other facets of the doctrine of standing. The petition for a writ of *certiorari* should be granted for four reasons:

1. The most compelling reason to grant the writ is that the Diversity Order plainly discriminates based on race with no possible justification for that discrimination, *see* Section I, *infra,* and this Court has directed the appellate courts – and committed itself as the backstop if ever needed – to vacate all instances of race-based discrimination in judicial proceedings. *Rose*, 443 U.S. at 556-57 ("where discrimination … is proved, … the error will be corrected in a superior court, and ultimately in this court upon review"). Under the circumstances, *vacatur* and remand are the only possible ways to cure the taint of racial discrimination from these proceedings. *See* Section II.C, *infra.*

2. The Second Circuit's ruling conflicts with decisions of this Court and the District of Columbia and Ninth Circuits that involuntary participants like Martin in discriminatory schemes have standing to

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2012); *N.J. Carpenters Health Fund v. Residential Capital, LLC,* 2012 WL 4865174, at *4 n.5 (S.D.N.Y. Oct. 15, 2012).

challenge the discrimination, even though they do not themselves suffer discrimination. *Barrows v. Jackson,* 346 U.S. 249, 259 (1953); *Lutheran Church-Missouri Synod v. F.C.C.,* 141 F.3d 344, 350 (D.C. Cir. 1998); *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 707 (9th Cir. 1997). This Court should recognize that Martin has standing to challenge discrimination visited *on anyone* in the service of Martin's class.

3. In rejecting Martin's *first-party* injuries from the Diversity Order, the Second Circuit declined to address Martin's argument that he could rely on *third-party* standing to raise the equal-protection rights of counsel against whom the Diversity Order discriminates on the basis of race. As Chief Justice Marshall famously put it, "[courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976). Insofar as Martin plainly can challenge the Diversity Order as discriminatory via third-party standing, *see* Section II.B, *infra,* the Second Circuit's refusal to review the issue requires this Court's supervising review.

4. In limiting Martin to the need to have suffered "actually inferior" legal services, the Second Circuit neglected to consider that any trifling burden is enough to establish a case or controversy. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 689 n.14 (1973). Thus, even if this Court were to hold that Martin cannot assert the equal-protection interests of counsel whom the Diversity Order excludes from working as class

counsel, Martin still could assert the class' interest in being free from the more petty but nonetheless *ultra vires* micromanagement of the class-counsel relationship (*e.g.,* using this lawyer rather than that lawyer, taking time to weigh any staffing decision vis-à-vis the Diversity Order). *See* Section II.A.1, *infra.* That "trifle" is enough for standing under the precedents of this Court and of every circuit.

In addition to the foregoing four reasons why this Court should grant the writ, Martin also establishes that his injuries fall within the relevant zones of interest and that his injuries remain redressable here, notwithstanding that the parties want their settlement approved. *See* Sections II.D-II.E, *infra.* For all the foregoing reasons, petitioner Martin respectfully submits that the Court should grant the writ to review the judicially mandated, race-based discrimination in Judge Baer's Diversity Order. Given the absence of any proffered justification for the discrimination and this Court's commitment in *Rose,* petitioner Martin respectfully submits that summary disposition would be appropriate here.

I. THE DIVERSITY ORDER DISCRIMINATES BASED ON RACE AND IS *ULTRA VIRES*

Although federal courts typically review their jurisdiction before the merits, here the merits arguments against the Diversity Order support Martin's standing to contest that order, which justifies reviewing the merits here. *Land v. Dollar,* 330 U.S. 731, 735 (1947) (review of merits permissible "where the question of jurisdiction is dependent on decision of the merits"). As explained in this section, the Diversity Order is unlawful *on the merits.*

First, the Diversity Order violates the Due Process Clause's Equal Protection component by requiring race-based treatment without the narrow tailoring that strict scrutiny requires. *Grutter v. Bollinger,* 539 U.S. 306, 334 (2003). "Narrow tailoring … requires that the reviewing court verify that it is *'necessary'* … to use race to achieve the educational benefits of diversity" *Fisher v. Univ. of Tex. at Austin,* 133 S.Ct. 2411, 2420 n.9 (2013). To be sure, *Grutter* allowed classroom diversity to qualify for a time as a governmental interest sufficient to justify race-conscious admissions in higher education. *Grutter,* 539 U.S. at 334. Moreover, *Grutter* and *Fisher* focus on the benefit that diversity confers to *students' education,* not to combatting societal discrimination generally. Judge Baer provided no evidence of the need for racially proportional legal representation.

For Judge Baer's Diversity Order to withstand strict scrutiny, therefore, this Court would need evidence that the Diversity Order benefits class counsel's representation of the class. Nothing in Judge Baer's unsupported Diversity Order qualifies as evidence at all, App. 35a (*citing Cash Balance Litig.,* 242 F.R.D. at 277), much less as the type of evidence on which *Grutter* relied and that *Fisher* required:

> Appointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members' control over the attorney-client relationship and thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected. Judge Jack Weinstein of the

> Eastern District has aptly compared the role of class counsel to that of "a judicially appointed fiduciary, not that of a privately retained counsel." The proposed class includes thousands of Plan participants, both male and female, arguably from diverse racial and ethnic backgrounds. Therefore, I believe it is important to all concerned that there is evidence of diversity, in terms of race and gender, of any class counsel I appoint. A review of the firm biographies provides some information on this score. Here, it appears that gender and racial diversity exists, to a limited extent, with respect to the principal attorneys involved in the case. Co-lead counsel has met this Court's diversity requirement--i.e., that at least one minority lawyer and one woman lawyer with requisite experience at the firm be assigned to this matter.

Cash Balance Litig., 242 F.R.D. at 277 (citations omitted). With such preferences, however, "the burden of justification is … demanding and it rests entirely on the [government]." *U.S. v. Virginia,* 518 U.S. 515, 532-33 (1996). While Martin doubts that Judge Baer *could justify* his discriminatory order, Judge Baer clearly did not do so.

In *Castaneda v. Partida,* 430 U.S. 482 (1977), Justice Marshall cautioned against believing that "all members of all minority groups, have an inclination to assure fairness to other members of their group." *Id.* at 503-04 (Marshall J., concurring). He concluded that the Court "has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups" and that

"[i]f history has taught us anything, it is the danger of relying on such stereotypes." *Id.* In ordering race-based counsel, Judge Baer did exactly what Justice Marshall said may not be done; he assumed that sharing the same race would somehow make class lawyers more responsive to class members of that race.

Indeed, in the context of racially gerrymandered voting districts, this Court has held that "[r]ace-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution." *Miller v. Johnson,* 515 U.S. 900, 912 (1995); *cf. Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (purported benefit to black students of having black teachers as role models does not justify race-based discrimination against teachers). Our history and Constitution equally bar racially gerrymandered appointments of class counsel.

Finally, Judge Baer had no authority to impose his preference for diversity either on the class or on prospective class counsel. Rule 23(g)'s enumerated criteria say nothing of diversity, and the residual authority in Rule 23(g)(1)(B) to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class" is far too slender a reed on which to impose a disparate-impact standard on counsel's ability to represent a diverse class:

> [D]eference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. Here, neither the language, purpose,

> nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if [the agency] has attempted to create such an obligation itself, it lacks the authority to do so.

Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 411-12 (1979) (internal quotations and citations omitted). Indeed, insofar as no one has the right to counsel of one's own race, *U.S. v. Burton,* 584 F.2d 485, 489, (D.C. Cir. 1978), even in a criminal prosecution where the clients' rights are stronger, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99 (1982), counsel's race is simply not "pertinent to counsel's ability to fairly and adequately represent the interests of the class," and Judge Baer exceeded his authority under FED. R. CIV. P. 23(g)(1)(B).[6]

II. THE SECOND CIRCUIT'S DENIAL OF STANDING CONFLICTS WITH THIS COURT'S HOLDINGS AND SPLITS WITH THE CIRCUITS

The Second Circuit held that Martin lacked standing to challenge the Diversity Order. App. 7a. The doctrine of standing, of course, derives from Article III's confining federal courts to cases or

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[6] Under the canon of constitutional avoidance, this Court should interpret Rule 23 to avoid calling into question its constitutionality. *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2559 (2011); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 103-04 (1981) (holding district court's order forbidding communication between counsel and absent class members violated Rule 23, and thus declining to decide whether such a ban violated First Amendment).

controversies. U.S. CONST. art. III, §2. At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III: (a) legally cognizable injury, (b) caused by the challenged action, and (c) redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). In addition to the constitutional limits on standing, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria.

As relevant here, these prudential limits include the requirement that the "complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (interior quotations omitted), and that a plaintiff "generally must assert his own legal rights … and cannot rest his claim to relief on the legal rights … of third parties." *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (interior quotations omitted). Unlike the constitutional minima, however, these prudential limits are more flexible.

A. The Second Circuit Splits With Its Sister Circuits and Conflicts With This Court on Martin's First-Party Injuries

As explained in this section, Martin easily meets the constitutional minima for standing. At the outset, there is no question whether Martin has standing to appeal the settlement itself. *Devlin v.*

Scardelletti, 536 U.S. 1, 6-7 (2002).[7] Whatever relief that Martin's appeal secures for the class provides sufficient relief for Article III purposes. *See generally SCRAP,* 412 U.S. at 689 n.14. Instead, the question implicitly raised by the Second Circuit was whether Martin had standing to challenge the Diversity Order as an issue separate from the settlement. The following two subsections identify *first-party* injuries that to Diversity Order inflicts on Martin.

By way of background, the Second Circuit held that Martin failed to state an "injury-in-fact" because he did not allege that class counsel's representation was "actually inferior" due to the Diversity Order:

> Although objectors allege that staffing a case with an eye to diversity "may interfere with [counsel's] ability to provide the best representation for the class," 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

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[7] *See also Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 & n.1 (10th Cir. 2002) (objectors who have objected to entire settlement are entitled to raise all issues relating to settlement fairness with respect to entire class); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 727-32 (3d Cir. 2001); *cf. also Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632 (5th Cir. 2012) (class member has standing to appeal settlement approval even though it had not filed a claim); *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011) (ruling on objector-appellant's argument that *cy pres* unfairly directed); *In re Bluetooth Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011) (ruling on objector-appellants' argument that $0 settlement directed too much money to attorneys and not enough to *cy pres*).

> diversity request in its class certification order.

App. 7a (alterations in original, citations omitted). Martin respectfully submits that the court erred on the issue of whether class members generally or Martin particularly have suffered *first-party* injury. In any event, as indicated in Sections II.B and II.C, *infra,* Martin also alleges that the circumstances here enable him to assert third-party injuries suffered by class counsel or prospective class counsel affected by the Diversity Order.

1. The Diversity Order Impairs the Class-Counsel Relationship, Wholly Apart from Discrimination

Even if Martin could not challenge the Diversity Order as discriminatory against certain lawyers (*e.g.,* on the basis of third parties' equal-protection rights), Martin still could challenge the Diversity Order as an arbitrary and irrational interference with the class' rights to counsel, which necessarily is impacted by the addition of an arbitrary government overlay:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational [government] actions.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977). Simply by challenging the Diversity Order's arbitrary and irrational effects on the class, Martin can prevail without the need to assert either third-party or equal-protection rights.

Specifically, the Diversity Order restricts the terms on which the class and class counsel may

interact. Thus, notwithstanding any equal-protection injuries that the Diversity Order inflicts on counsel, the injury qualifies as a first-party injury to the class by *directly* impairing its freedom to interact with others. Henry P. Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 299 (1984) ("a litigant asserts his own rights (not those of a third person) when he seeks to void restrictions that directly impair his freedom to interact with a third person who himself could not be legally prevented from engaging in the interaction"); *FAIC Securities, Inc. v. U.S.,* 768 F.2d 352, 360 n.5 (D.C. Cir. 1985) (*citing* Monaghan, *supra*) (Scalia, J.); *Columbia Broadcasting System, Inc. v. U.S.,* 316 U.S. 407, 422-23 (1942) (broadcasters had standing to challenge regulations that altered the terms on which third-party station owners could interact with broadcasters); *Law Offices of Seymour M. Chase, P.C. v. F.C.C.,* 843 F.2d 517, 524 (D.C. Cir. 1988) (discussing cases) (R.B. Ginsburg, J.). Insofar as even minor burdens qualify to establish standing, *see, e.g., Pub. Citizen v. FTC,* 869 F.2d 1541, 1547-48 (D.C. Cir. 1989); *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.,* 901 F.2d 673, 676-77 (8th Cir. 1990), that is enough for Article III.

2. Racial Discrimination Done In the Name of His Class Injures Martin

When the law makes one an involuntary participant in a discriminatory scheme, prudential concerns pose no barrier to attacking that scheme by raising a third party's equal-protection rights. *Barrows,* 346 U.S. at 259 (Caucasian homeowners could challenge a racially restrictive covenant by asserting rights of minorities to whom they might

sell); *Lutheran Church-Missouri Synod,* 141 F.3d at 350 (employer could challenge affirmative-action requirement by asserting its employees' rights); *accord Monterey Mech. Co.,* 125 F.3d at 707 ("[a] person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex"). Thus, although Martin is not himself a class-action lawyer denied employment under the Diversity Order, Martin nonetheless can assert the equal-protection rights of those discriminated against on behalf of Martin's class and, in essence, in Martin's name.

B. The Second Circuit Improperly Ignored Martin's Claim to Third-Party Standing to Assert Injuries to Counsel

Martin understands that the respondents take the position that the only people with standing to challenge the Diversity Order are attorneys excluded by the Order. If that is their position, respondents are incorrect.

At the outset, permitting objectors to raise appellate issues with respect to the broader interests of other litigation participants in the hopes of reversing a class action judgment is not unique to Rule 23(e): for example, in *Phillips Petroleum Co. v. Shutts*, this Court permitted a defendant to raise the issue of the due process rights of absent class members despite the fact it "d[id] not possess standing *jus tertii*," and was "assert[ing] the rights of its adversary, the plaintiff class." 472 U.S. 797, 803-06 (1985). Similarly, in *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917-19 (7th Cir. 2011), a *defendant* had

standing to raise a *hypothetical* Rule 23(g) appointment issue. Having class members assert the rights of attorneys deprived of a race-neutral Rule 23(g) process would not be unprecedented, even without Martin's having third-party standing

In any event, third-party or *jus tertii* standing allows plaintiffs to assert the rights of absent third parties under a three-part test: (1) the person attempting to assert a third party's rights suffers a constitutional injury in fact, (2) that person has a close relationship with the third party, and (3) some hindrance prevents the third party's asserting its own rights. *Powers v. Ohio,* 499 U.S. 400, 411 (1991). Martin readily meets each prong of this test.

First, as explained in Section II.A, *supra,* Martin has his own standing. That suffices for meeting the first *Powers* prong. Significantly, when a party with first-party standing invokes third-party standing to other injuries or claims, the first party then has access to additional interests with which to satisfy the zone-of-interests test. *FAIC Securities,* 768 F.2d at 357-61; *Carey v. Population Serv., Int'l,* 431 U.S. 678, 682-86 (1977).

Second, with the fiduciary relationship between class counsel and the class, *Cash Balance Litig.,* 242 F.R.D. at 277, Martin and class counsel clearly have a close relationship. Certainly, that class-counsel relationship is closer than the relationship between a rejected venireperson and defendants in *Powers* or in *Edmonson.*

The third prong is not strictly necessary (*i.e.,* the absence of a hindrance does not preclude third-party standing). *Caplin & Drysdale v. U.S.,* 491 U.S. 617, 624 n.3 (1989). In any event, the third prong is

readily met where the rights holder has "little incentive" to bring suit because "of the small financial stake involved and the economic burdens of litigation." *Powers,* 499 U.S. at 415. Martin easily meets this test through lawyers employed by the class-counsel firms. There is an obvious hindrance "to the third party's ability to protect his or her own interests": any member of class counsel's firm adversely affected by the race-conscious order would risk the ire of his employer and the district court by challenging the order; any prospective injunction achieved years later would be a Pyrrhic victory given the internal consequences at his employer for interfering with a multi-million case.

For these three reasons, Martin has third-party standing to raise the equal-protection rights of class counsel against whom the Diversity Order discriminates on the basis of race.[8]

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[8] The Second Circuit's requirement that class counsel must have provided "actually inferior" legal services for Martin to have standing (App. 7a) is wholly unprecedented. For "unequal footing" cases like this, the question is never the actual receipt of the benefit, but rather the ability to compete for it on an equal footing, free of unlawful discrimination. *Adarand Constructors, Inc., v. Pena,* 515 U.S. 200, 211 (1995). In other words, the injury "is the denial of equal treatment resulting *from the imposition of the barrier,* not the ultimate inability to obtain the benefit." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville,* 508 U.S. 656, 666 (1993) (emphasis added).

C. The Second Circuit's Refusal to Cure the Taint of Racially Biased Proceedings With *Vacatur* and Remand Conflicts With This Court's Precedents

As indicated in note 8, *supra,* the Second Circuit cannot support its requirement for "actually inferior" legal services under equal-protection analysis, but the Diversity Order presented an even more serious flaw in the lower-court proceedings: the unresolved taint of racial prejudice – inserted by an officer of the federal government – into a federal court proceeding.

When *private attorneys* insert discrimination in judicial proceedings, this Court has found not only that that was *per se* actionable, but also that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." *Edmonson*, 500 U.S. at 628. Far from something that the courts can excuse if it is not too bothersome, such discrimination requires elimination under this Court's precedents:

> Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, [t]he court will correct the wrong, will quash the indictment[,] or the panel[;] or, if not, the error will be corrected in a superior court, and ultimately in this court upon review, and all without regard to prejudice notwithstanding the undeniable costs associated with this approach.

Rose, 443 U.S. at 556-57 (internal quotations and citations omitted). Under *Rose* and related cases, this Court should vacate the discriminatory class-

certification order and remand the case for further proceedings.[9]

Significantly, the harms identified in these cases "are not limited to the criminal sphere," and "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson,* 500 U.S. at 630. Nor is there any reason to restrict the *Batson/Powers* principle to just petit and grand jurors, rather than all aspects of judicial proceedings. Indeed, *Powers* warned of the danger if "race is implicated" in "the standing or due regard of an attorney who appears in the cause." 499 U.S. at 412. While the right to a criminal or civil jury trial is by itself of constitutional significance, so is the question of the adequacy of representation in a class action. *Phillips Petroleum Co.,* 472 U.S. at 812; *Hansberry v. Lee,* 311 U.S. 32, 44-45 (1940). For that reason, this Court should include race-based

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[9] In *Batson*, a criminal defendant was permitted to allege race-based peremptory challenges. If the defendant could prove "prima facie, purposeful discrimination" without a "neutral explanation" for peremptory challenges, the "conviction must be reversed" (*i.e.,* injury would be assumed). 476 U.S. at 100 (citing cases). In *Vasquez*, 474 U.S. at 262-63, a defendant was found guilty beyond reasonable doubt by an unbiased jury, but the Supreme Court set aside the conviction because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. In *Powers,* this Court rejected the argument that a defendant must show that "the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant." *Powers,* 499 U.S. at 411. Rather, racial discrimination "casts doubt on the integrity of the judicial process" and alone creates injury, *id.* (*quoting Rose,* 443 U.S. at 556), an injury even more severe when it "occurs at the behest of not just the parties but of the court itself." *U.S. v. Nelson,* 277 F.3d 164, 207 (2d Cir. 2002).

discrimination in counsel assignments within the scope of the *Batson/Powers* principle.

Even if this Court were inclined not to extend the *Batson/Powers* principle to racial discrimination in counsel-appointment cases, that principle still should apply to this case. The district judge has a history and interest in ordering conduct that is plainly beyond the power of the federal government to order. Reverse-discrimination complainants are skunks at the diversity picnic in the normal case, but here Martin had it much worse. His sole factfinder was personally invested in the very discrimination that Martin opposed. While his opposition to the Diversity Order was substantively distinct from his very principled objections under CAFA and congressional policies against class-action abuse and appellate class-action decisions that counsel against approving the settlement, the fact remains that Judge Baer – the sole factfinder (*i.e.,* Martin's *entire* jury) – simply ignored several of Martin's meritorious arguments.[10]

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[10] *See, e.g., In re Bluetooth,* 654 F.3d at 947-49 ("clear sailing" and "kicker" clauses are signs "that class counsel have allowed pursuit of their own self interests … to infect the negotiations"); *In re GMC Pick-Up Trucks,* 55 F.3d 768, 821 (3d Cir. 1995) ("private agreements to structure artificially separate fee and settlement arrangements cannot transform what is in economic reality a common fund situation into a statutory fee shifting case"); *In re HP Inkjet Printer Litig.,* 716 F.3d 1173 (9th Cir. 2013) (CAFA's requirement to base attorney-fee awards on coupon's actual value applies regardless of what method a court uses to set a fee award); *In re Literary Works in Electronic Databases Copyright Litig.,* 654 F.3d 242, 249-58 (2d Cir. N.Y. 2011) (the existence of distinct, homogeneous subclasses with competing interests – such as those presented by Martin and the subclass of Sirius subscribers with discounts below the list price – requires reopening the class certification to create subclasses); *Synfuel Technologies v. DHL Express (USA),* 463

Under the circumstances, this case would suffer sufficient taint for *vacatur,* even if the typical counsel-appointment case would not.

While no one knows what an individual juror, lawyer, or judge might do, based on his or her race, *Castaneda,* 430 U.S. at 503-04 (Marshall J., concurring), that cannot excuse discriminating on the basis of race in judicial proceedings. To the contrary, in *Rose*, 443 U.S. at 556-57, this Court committed itself to "correct the wrong" where the lower courts would not. This Diversity Order is a recurring issue in this district court, at least,[11] and potentially now in the Second Circuit, and the issue has national importance because it represents race discrimination sponsored – indeed, *mandated* – by the federal government.

As important as this Court's rule against racially tainted judicial proceedings is, a more trivial or petty example perhaps would clarify the availability for relief here. If Judge Baer only appointed class counsel who were born in leap years, clearly the impacted class could seek review of the anti-meritocratic appointment. *See, e.g., Culver v. City of Milwaukee,* 277 F.3d 908, 912-13 (7th Cir. 2002) (describing the indelible relationship between class counsel and adequate representation); *cf. Smyth ex rel. Smyth v. Rivero,* 282 F.3d 268, 280 (4th Cir. 2002) (appellate courts have the general

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F.3d 646, 654 (7th Cir. 2006) (even if settlement relief for a free service is not "identical to a coupon," it should be treated like a coupon when it is "in-kind compensation" that "shares characteristics" with coupons); *In re Mexico Money Transfer Litig.,* 267 F.3d 743, 748 (7th Cir. 2001) ("compensation in kind is worth less than cash of the same nominal value").

[11] See cases collected at note 5, *supra.*

responsibility when reviewing a settlement decree to "examine its terms to ensure they are fair and not unlawful"). That relief is all the more necessary when a district court deviates from its powers under Rule 23 to impose racial discrimination that the Constitution prohibits.

Under the circumstances, Martin respectfully submits that review of the Diversity Order falls under appellate review as plainly unlawful. The entire lower-court proceedings – particularly Judge Baer's findings – are tainted by the entry of the Diversity Order and the refusal to consider or even recognize challenges to it. On the facts of this case, the taint is even worse because Judge Baer similarly ignored other meritorious claims by the same objector. *Vacatur* and remand is the only possible relief that would remedy the taint from this case.

D. Martin's Injuries Fall Well Within the Relevant Zones of Interests

Because Rule 23(e)(5) permits any class member to object to a settlement, and Rule 23(c)(1)(C) allows amending a class-certification order at any time prior to final judgment, the respondents cannot (and the lower courts did not) argue that Martin's injuries fail to satisfy the zone-of-interests test, which requires only that an injury be "*arguably* within the zone of interests to be protected … by the statute.". *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.,* 522 U.S. 479, 492 (1998) (Court's emphasis and alteration, *quoting Ass'n of Data Processing Service Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970)). Martin easily meets that test.

But even if the Martin's injuries from the Diversity Order somehow were not even arguably

within Rule 23's zone of interests, he still would satisfy the zone-of-interest test here for the unconstitutional, *ultra vires* Diversity Order. *Haitian Refugee Ctr. v. Gracey,* 809 F.2d 794, 812 (D.C. Cir. 1987). In essence, Martin would only fall outside Rule 23's zone because *Judge Baer acted outside Rule 23's zone.* Under the circumstances, the zone-of-interest test either does not apply or implicates the zone of interests of the overriding constitutional issues raised by lawless government action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.

Gracey, 809 F.2d at 812 n.14; *accord Chiles v. Thornburgh,* 865 F.2d 1197, 1210-11 (11th Cir. 1989). By acting outside its authority, the district court implicates the larger zone of interests of our Constitution, which would not limit standing here, even if the Martin's objections fall outside Rule 23's zone of interests.

E. The Requested Relief Would Redress Martin's Injuries and Is Not Moot

In essence, Martin seeks to wind this case back to the class certification to ensure fairness to the class generally and, if needed, to his uncertified

subclass specifically.[12] Such a "do over" would not only provide the opportunity to cure the serious procedural and substantive flaws of this class settlement under Rule 23 and CAFA but also would cure the Diversity Order's racial taint on the proceedings to date. *See* Section II.C, *supra.* No one can dispute that Martin and the class have *standing* to demand more than the settlement provides through Rule 23(e)(5) objections (*i.e.,* to demand a different and better settlement). Martin's and the class' injuries are thus readily redressable: if the class-certification order is vacated as unconstitutional, the settlement he challenges will similarly fall, and his antitrust claims will not be waived for nothing.[13]

Insofar as Rule 23 allows amending class-certification orders prior to final judgment, FED. R. CIV. P. 23(c)(1)(C), this case is not over in any sense. Indeed, assuming *arguendo* new class counsel, a new judge, or even the same class counsel and same judge return the same settlement and attorney-fee award, that would not make the current case moot because Martin's requested *vacatur* would put the parties into the position they should have been in all along, which provides enough redress, "even though the agency (like a new jury after a mistrial) might later,

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[12] Martin's subclass would be those Sirius subscribers who paid less than the list price and thus would receive nothing – indeed, less than nothing – from Sirius' freezing the list price.

[13] The ability to opt out under Rule 23(b)(3) does not adequately protect Martin's rights because class action settlements preclude future class litigation, and in the case of a small-dollar antitrust claim, "[e]conomic reality dictates" that the case "proceed as a class action or not at all." *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 161 (1974).

in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins,* 524 U.S. 11, 25 (1998). That a losing party (*i.e.,* an appellant or a petitioner here) may hypothetically lose again on a remand does not deprive them of the right to seek *vacatur* and remand. Under the circumstances, nothing precludes granting the relief that Martin requests.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

August 2, 2013

Respectfully submitted,

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United States Court of Appeals
for the Second Circuit

CARL BLESSING, *ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,*

PLAINTIFFS-APPELLEES,

v.

SIRIUS XM RADIO INC.,

DEFENDANT-APPELLEE,

v.

MARVIN UNION, *ET AL.,*

OBJECTORS-APPELLANTS,

LINDA MROSKO, *ET AL.,*

OBJECTORS

Nos. 11-3696-cv (Lead), 11-3729-cv (Con), 11-3834-cv (Con), 11-3883-cv (Con), 11-3908-cv (Con), 11-3910-cv (Con), 11-3916-cv (Con), 11-3965-cv (Con), 11-3970-cv (Con), 11-3972-cv (Con)

Decided Dec. 20, 2012

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

SUMMARY ORDER

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, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (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.

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[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, 2011 U.S. Dist. LEXIS 32791 (S.D.N.Y. Mar. 29, 2011), ECF No. 85.

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 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.

United States District Court,
S.D. New York.

CARL BLESSING, *ET AL.*,

PLAINTIFFS,

v.

SIRIUS XM RADIO INC.,

DEFENDANT.

No. No. 09 CV 10035(HB)
March 29, 2011

Before: HAROLD BAER, JR., District Judge.

OPINION & ORDER

This case involves a proposed class action based on the plaintiffs' purchase of satellite digital audio radio services ("SDARS")—commonly known as "satellite radio"—from the defendant in various locations throughout the United States. Plaintiffs claim that the July 28, 2008 merger of Sirius Satellite Radio, Inc. with XM Satellite Holdings, Inc. created a monopoly in the surviving company, Defendant Sirius XM Radio Inc. ("Defendant" or "Sirius XM"), and that Defendant has abused its monopoly power in violation of federal anti-trust laws. Plaintiffs also claim that Defendant deceived its customers in violation of state consumer protection laws. The plaintiffs now move to certify four classes under Rule 23(b)(2) and Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiffs also move to be appointed as Class Representative, and to have Grant & Eisenhofer P.A., Milberg LLP, and Cook, Hall & Lampros, LLP as Class Counsel.

For the following reasons, the plaintiffs' motion for class certification is GRANTED in part and DENIED in part.

FACTUAL AND PROCEDURAL BACKGROUND

On July 28, 2008, the only two providers of SDARS in the U.S., Sirius Satellite Radio, Inc. and XM Satellite Holdings, Inc. merged to form Defendant. The result of the merger has effectively eliminated Defendant's competition within the U.S. SDARS market. After the merger Defendant made upward adjustments to its pricing with respect to various services including: (i) increase in the monthly charge per additional radio for multi-radio subscribers from $6.99 per month to $8.99; (ii) initiating a $2.99 monthly fee for internet streaming; (iii) charging a "U.S. Music Royalty Fee" (the "Royalty Fee") between 10% and 28%; and (iv) increases in various administrative fees. Plaintiffs allege that these price increases are the result of Defendant's abuse of monopoly power, whereas Defendant alleges that the price increases simply reflect increases in the Defendant's costs and the higher quality of service provided.

Plaintiffs filed several class action lawsuits against Sirius XM, which were joined in a consolidated amended complaint filed March 22, 2010. On May 3, 2010, Plaintiffs filed the Second Consolidated Amended Class Action Complaint ("SCAC"), which added eleven new plaintiffs. Plaintiffs allege four counts: (1) unlawful acquisition of monopoly power in violation of Clayton Act § 7; (2) unlawful acquisition of monopoly power in violation of Sherman Act § 2; (3) breach of contract and breach

of implied covenant of good faith and fair dealing; and (4) breach of state consumer protection statutes.

On July 30, 2010, Plaintiffs moved to certify the following four classes[1]:

> INJUNCTIVE RELIEF CLASS. All persons or entities who reside in the United States and who contracted with Sirius Satellite Radio, Inc., XM Satellite Radio Holdings, Inc., Sirius XM Radio Inc. or their affiliated entities for the provision of satellite digital audio radio services during the relevant period of July 28, 2008 through the present.[2]
>
> FEDERAL ANTITRUST DAMAGE CLASS. All persons or entities who reside in the United States and who contracted with Sirius Satellite Radio, Inc., XM Satellite Radio Holdings, Inc., Sirius XM Radio Inc. or their affiliated entities for the provision of satellite digital audio radio services who, during the relevant period of July 29, 2008 through the present: (1) paid the U.S. Music Royalty Fee; (2) own and activated additional radios ("multi-radio subscribers") and paid the increased monthly charge of $8.99 per additional radio; or (3) did not pay to access the content available on the 32 bkps or 64 bkps connections on the Internet but are now paying

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[1] Excluded from each Rule 23(b) class are: (1) all persons or entities that make a timely election to be excluded from the proposed Class; (2) Sirius XM and its legal representatives, officers, directors, assignees and successors; (3) governmental entities; and (4) the judges to whom this case is assigned and any immediate family members thereof.

[2] Plaintiffs move to certify the Injunctive Relief Class under Fed. R Civ. P. 23(b)(2).

the Internet access monthly charge of $2.99.[3]

BREACH OF CONTRACT CLASS. All persons or entities who reside in the United States and who contracted with Sirius Satellite Radio, Inc., XM Satellite Radio Holdings, Inc., Sirius XM Radio Inc. or their affiliated entities for the provision of satellite digital audio radio services who paid the U.S. Music Royalty Fee, during the relevant period of July 29, 2009 through the present.[4]

CONSUMER PROTECTION CLASS. All persons or entities who reside in Arizona, California, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and Washington and who contracted with Sirius Satellite Radio, Inc., XM Satellite Radio Holdings, Inc., Sirius XM Radio Inc. or their affiliated entities for the provision of satellite digital audio radio services who paid the U.S. Music Royalty Fee, during the relevant period of July 29, 2009 through the present.[5]

(Pl. Notice of Motion for Class Cert. at 1–3.) On November 17, 2010, this Court dismissed Count 3 of the SCAC, rendering the motion to certify the Breach of Contract Class moot. The motion to certify the

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[3] Plaintiffs move to certify the Federal Antitrust Damage Class under Fed. R Civ. P. 23(b)(3) for federal antitrust violations of Section 7 of the Clayton Act and Section 2 of the Sherman Act.

[4] Plaintiffs move to certify the Breach of Contract Class under Fed.R.Civ.P. 23(b)(3).

[5] Plaintiffs move to certify the Consumer Protection Class under Fed.R.Civ.P. 23(b)(3).

remaining three classes remains before this Court.

DISCUSSION

A. Legal Standard for Class Certification

To qualify for class certification, plaintiffs must prove by a preponderance of the evidence that the putative class meets the four threshold requirements of Rule 23(a) and must also establish that the class is maintainable under at least one of the subsections of Rule 23(b). *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,* 546 F.3d 196, 202 (2d Cir.2008). Courts must engage in a "rigorous analysis" to determine whether the Rule 23 requirements have been met. *In re Initial Public Offerings Sec. Litig.,* 472 F.3d 24, 33 (2d Cir.2006). District courts may rely on affidavits, documents, and testimony to determine whether the Rule 23 requirements have been met. *Spagnola v. Chubb Corp.,* 264 F.R.D. 76, 93 (S.D.N.Y.2010) (citing *Bombardier,* 546 F.3d at 204). During this determination, the resolution of any factual dispute is made only for the purposes of the class certification phase, and is not binding on the court with respect to the merits of the case. *Id.* at n. 17 (citing *In re IPO,* 471 F.3d at 41).

B. Rule 23(a) Requirements

To qualify for class certification, plaintiffs must first prove four elements by a preponderance of the evidence: (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation. Fed.R.Civ.P. 23(a). Rule 23 also contains an "implicit requirement that the proposed class be precise, objective and presently ascertainable." *Bakalar v. Vavra,* 237 F.R.D. 59, 64 (S.D.N.Y.2006). I will address these elements in turn.

1. Numerosity

Rule 23(a)(1) requires that the "class [be] so numerous that joinder of all members is impracticable," (Fed.R.Civ.P. 23(a) (1)) or would be "inconvenient or difficult." J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 272 (S.D.N.Y.2007). In the Second Circuit a proposed class of 40 members presumptively satisfies numerosity. See, e.g., Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir.1995). Here, plaintiffs have demonstrated that as of March 31, 2010, Sirius XM had 18,944,199 subscribers, and that substantially all subscribers are members of the putative classes. It would be highly inconvenient and nearly impossible to join this many individuals; hence, plaintiffs have established numerosity.

2. Commonality

Rule 23(a)(2) requires that there must be "questions of law or fact common to the class." Fed R. Civ. P. 23(a)(2). "[T]he critical inquiry is whether the common questions are at the core of the cause of action alleged." *Vengurlekar v. Silverline Techs., Ltd.,* 220 F.R.D. 222, 227 (S.D.N.Y.2003). Even one common question may be sufficient to satisfy Rule 23(a)(2). *Spagnola,* 264 F.R.D. at 93.

Plaintiffs raise several common questions of law and fact with respect to the Federal Antitrust Damage Class and Injunctive Relief Class, meeting the Rule 23(a) requirement. The list includes defining the relevant product market and determining the impact of the merger on competition. (Pl. Mem. at 6.) These issues turn on an analysis of Defendant's actions without regard to an impact on any individual plaintiff, and as such are

common questions among the putative classes.

Plaintiffs have also met the commonality requirement for the Consumer Protection Class. Plaintiffs raise two relevant questions in their brief: (1) "[w]hether, by providing false and deceptive information concerning the Royalty Fee, Sirius XM ... violated various state consumer protection laws;" and (2) "[w]hether class members are entitled to damages as a result of ... consumer protection statutory violations." (Pl. Mem. at 6.) The issue of whether Defendant's actions constitute false and deceptive information is a common question, not particular to any individual plaintiff. Although the issue of whether Defendant's actions were in violation of various state statutes depends on the language of the individual statutes, there are common questions of law among the statutes, sufficient to meet the commonality requirement.

3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). The thrust of the rule is that the class representative must have the "incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions." *In re Oxford Health Plans, Inc.,* 191 F.R.D. 369, 375 (S.D.N.Y.2000) (internal quotation marks and citation omitted); *see also Spagnola,* 264 F.R.D. at 93 (Typicality requires that plaintiffs "prove that each member's claims arise from the same course of events and that each class member makes similar legal arguments to prove liability.") (citing *Steinberg,*

224 F.R.D. at 72); *Robinson v. Metro–North Commuter R.R.,* 267 F.3d 147, 155 (2d Cir.2001). The typicality requirement helps ensure that "the class representative is not subject to a unique defense which could potentially become the focus of the litigation." *Steinberg,* 224 F.R.D. at 72.

Plaintiffs have shown that the claims of the Federal Antitrust Damage Class and Injunctive Relief Class will be typical among all plaintiffs, namely violations of the antitrust statutes as a result of the merger. Defendant argues that the claims are not typical, largely because of differences between the circumstances of individual plaintiffs. Defendant points to the fact that some individuals have benefited from the merger because they prefer the new subscription packages offered post-merger. (Def. Mem. at 21.) However, individual subjective preferences with regard to post merger services is not an element of the cause of action that plaintiffs must prove. The plaintiffs will need to prove the same elements to establish a cause of action regardless of which plaintiff serves as class representative.

Plaintiffs have also shown that the claims urged by the Consumer Protection Class will be typical because the claims arise from the Defendant's allegedly deceptive calculation of Royalty Fees and all result in an ascertainable economic injury. Defendant argues that plaintiffs will be subject to individualized defenses because they will need to show reliance pursuant to some of the consumer protection statutes. (Def. Mem. at 23.) While the demonstration of reliance may in some instances pose a problem under Rule 23(b)(3), the underlying course of events and legal theories involved are

sufficiently typical between all members of the class for purposes of Rule 23(a)(3).

4. Adequacy of Representation

To show that absent class members are adequately represented, plaintiffs must prove that "the representative parties will fairly and adequately protect the interests of the class." *Bd. of Trs. of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.,* 269 F.R.D. 340, 345 (S.D.N.Y.2010); Fed.R.Civ.P. 23(a)(4). A district court must inquire whether "1) plaintiff's interests are antagonistic to the interest[s] of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."[6] *In re Flag Telecomm. Holdings, Ltd. Secs. Litig.,* 574 F.3d 29, 35 (2d Cir.2009). The purpose of the adequacy requirement is "to ferret out potential conflicts between representatives and other class members." *Freeland v. AT & T Corp.,* 238 F.R.D. 130, 141 (S.D.N.Y.2006) (emphasis and citation omitted). "To defeat a motion for class certification, the conflict must be fundamental. *See in re Visa Check/Mastermoney Antitrust Litig.,* 280 F.3d 124, 145 (2d Cir.2001), *abrogated on other grounds by, In re IPO,* 471 F.3d 24 (2d Cir.2006).

Mem. at 21.) This argument is unpersuasive because the subjective value of services purchased does not sufficiently raise a fundamental conflict with respect to whether the plaintiffs have an interest in reducing their costs. Next, Defendant argues that "customers of a given subscription

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[6] Defendant's make no challenge to the qualification, experience and ability of the attorneys here.

package will benefit from proving that the price of *their* post-merger subscription package increased more than for other subscribers." (Def. Mem. at 21.) This argument is also unpersuasive because for plaintiffs to prevail, it may not be necessary that some class members experienced more significant price increases than others, but rather that any price increases were the result of post-merger abuses of monopoly power. Defendant also argues that subscribers in urban areas and rural areas will pose conflicting arguments with respect to market power. While of concern because plaintiffs from different geographic regions may depend on different litigation strategies, it is in the interest of all plaintiffs to seek to define the relative market narrowly and regardless of any individual's origin. Therefore, none of the potential conflicts are so fundamental that the class representatives will be unable to fairly and adequately represent the class.

5. Ascertainability

In addition to the explicit requirements of Rule 23(a), courts have identified an implicit criteria in class certification motions that the "[c]lass membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without having to engage in numerous fact-intensive inquiries. *Spagnola,* 264 F.R.D. at 97 (citation omitted). A court need not ascertain the class members prior to certification, but the class members must be ascertainable at some stage of the proceeding. *Noble v. 93 Univ. Place Corp.,* 224 F.R.D. 330, 338 (S.D.N.Y.2004). Here, plaintiffs have identified the class members as those who paid for specific services within a certain geographic region and after a certain date. This Court expects that

such criteria will be sufficient to identify class members without numerous fact-intensive inquiries.

C. Rule 23(b)(2) Requirements

Plaintiffs seek to certify the Injunctive Relief Class under Rule 23(b)(2). Under Rule 23(b), a class action may be maintained if in addition to meeting the requirements of 23(a), "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed R. Civ. P. 23(b)(2). The Second Circuit has held that 23(b)(2) certification may be allowed if (1) "the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," and (2) "class treatment would be efficient and manageable." *Robinson v. Metro–North Commuter R .R. Co.,* 267 F.3d 147, 164 (2d Cir.2001) (internal quotation marks and citation omitted). In order to determine whether injunctive or declaratory relief is predominate, a district court should be comfortable with a finding that "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both *reasonably necessary and appropriate* were the plaintiffs to succeed on the merits." *Id* (emphasis added). Injunctive relief is reasonably necessary when the plaintiff succeeds on the merits but legal remedies are inadequate. *See Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506–07 (1959).

Plaintiffs have not met their burden to show that

the value of injunctive relief sought predominates over that of damages for purposes of class certification. Plaintiffs seek restitution, compensatory damages, treble damages, punitive damages and interest, as well as injunctive relief. (SCAC at 91–92.) It is reasonable to assume that all plaintiffs value damages as a remedy. It is less clear whether all plaintiffs value injunctive relief. Despite plaintiffs' assertion that a prohibition of future price increases or divestiture of the merged entity would be a meaningful remedy (Pl. Mem. at 19.), plaintiffs have not demonstrated that the value of an injunction is the predominant relief sought. At least one plaintiff has stated that he does not wish to seek divestiture if he is paid all damages to which he is entitled. (Nathan Dep. Aug. 5, 2010, at 116:10–16.) 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. Furthermore, certifying this class for injunctive relief is not reasonably necessary because an injunction asserted by an individual plaintiff for a prohibition of future price increases or divestiture of the merged entity would have essentially the same impact on Defendant as an injunction asserted by a certified class, a concept more or less agreed to in oral argument. *See Hawaii v. Standard Oil Co.,* 405 U.S. 251, 261 (1972) ("the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one"). Therefore, plaintiffs have failed to meet their burden to show that the value of injunctive relief sought predominates, and the motion to certify the Injunctive Relief Class is denied.

D. Rule 23(b)(3) Requirements

Plaintiffs seek to certify the Federal Antitrust Damage Class and Consumer Protection Class under Rule 23(b)(3). A class action is maintainable under Rule 23(b)(3) when "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3). Thus, to be certified as a Rule 23(b)(3) class, Plaintiffs bear the burden to prove two elements: predominance and superiority.

1. Predominance

The predominance inquiry serves to assess whether a class is "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor,* 521 U.S. 591, 623 (1997). Common questions of law and fact predominate when issues applicable to the class as a whole are subject to generalized proof and predominate over issues that are subject to individualized proof. *See Cordes & Co. Fin. Servs. Inc. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 107–08 (2d Cir.2007); *In re Visa Check/Mastermoney Antitrust Litig.,* 280 F.3d 124, 136 (2d Cir.2001), *abrogated on other grounds by, In re IPO,* 471 F.3d 24 (2d Cir.2006). "This requirement is more demanding than the commonality requirement under Rule 23(a); thus a court must deny certification where individual issues of fact abound." *In re Currency Conversion Fee Antitrust Litig.,* 230 F.R.D. 100, 309 (S.D.N.Y.2010); *see also In re MTBE,* 209 F.R.D. at 349.

a. Federal Antitrust Damage Class

With respect to the Federal Antitrust Damages Class, the primary issues involved are (1) whether there is a violation of federal antitrust law; (2) injury and causation; and (3) damages. *See Cordes & Co. Fin. Servs. Inc. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 105 (2d Cir.2007). Pursuant to Rule 23(b)(3), plaintiffs must demonstrate that they will prove each of these three elements by relying predominantly on class-wide proof. *See In re Visa Check/MasterMoney,* 192 F.R.D. 68, 87 & n. 20 (E.D.N.Y.), *aff'd,* 280 F.3d 124 (2d Cir.2001).

i. Antitrust Violation

A violation of Clayton § 7 occurs when the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly." *United States v. E.I. Du Pont de Nemours & Co.,* 353 U.S. 586, 595 (1957) (citation omitted). Similarly, a violation of Sherman § 2 occurs when a person monopolizes or attempts to monopolize through "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Heerwagen v. Clear Channel Communications,* 435 F.3d 219, 226 (S.D.N.Y.2006) (citation omitted). Determining whether a plaintiff has violated either Clayton § 7 or Sherman § 2 turns, in part, on the definition of the relevant market and whether the defendant's conduct with respect to that market was anticompetitive. *See, e.g., Heerwagen,* 435 F.3d at 227–30. The relevant market includes a relevant product market and a relevant geographic market. *See Heerwagen,* 435 F.3d at 227.

Courts have held that defining the relevant

product market in an antitrust lawsuit may be susceptible to class-wide proof because the definition affects all members of the putative class. *See, e.g., In re Visa Check/MasterMoney,* 192 F.R.D. 68, 87 & n. 20 (E.D.N.Y.2000), *aff'd,* 280 F.3d 124 (2d Cir.2001); *Jennings Oil Co. v. Mobil Oil Corp.,* 80 F.R.D. 124, 130 (S.D.N.Y.1978). These determinations often involve fact intensive inquiries into the commercial realities faced by consumers to determine market definition, but such proof is not necessarily specific to each individual. *See, e.g., Brown Shoe Co. v. U.S.,* 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *In re Live Concert Antitrust Litigation,* 247 F.R.D. 98, 127 (C.D.Cal.2007) ("when calculating the cross-elasticity of demand, economists examine the aggregate demand of consumers as represented by a demand curve rather than the purchasing decisions of an individual consumer").

Plaintiffs allege that in proving that the relevant market is SDARS, they will rely on documentary evidence concerning Defendant's product characteristics, consumer purchase data and Defendant's ability to sustain profits through price increases, none of which varies by individual class member. (Pl. Mem. at 10.) Plaintiffs also allege that in proving Defendant's anticompetitive conduct they will rely on the increase in market concentration, Defendant's post-merger price increases, and Defendant's plans to further increase prices in the future, none of which requires individualize proof. (Pl. Mem. at 11–12.) Defendant's have offered no proof to counter plaintiffs' use of class-wide proof in

determining the relevant product market, and plaintiffs' assertions appear sufficient to meet their burden that issues involving class-wide proof predominate. Defendant's primary dispute lies with the proof required to establish the relevant geographic market.

Courts generally determine the relevant geographic market based on the "area of effective competition," that is "how far consumers will go to obtain the product or its substitute in response to a given price increase and how likely it is that a price increase for the product in a particular location will induce outside suppliers to enter that market and increase supply-side competition in that location." *Heerwagen,* 435 F.3d at 227. "In other words, the geographic market encompasses the geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition." *Id.* at 228 (internal quotation marks and citation omitted).

Defendant's contend that to determine the relevant market the Court will require individualized proof and that here the alternatives available to plaintiffs will vary depending on the geographic location of each individual consumer. Defendant argues that subscribers in rural areas may have fewer terrestrial radio stations available to them as a competitive alternative to satellite radio.[7]

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[7] Although this argument may be deemed moot if the relevant product market is limited to SDARS because Defendant is the only provider of SDARS in any U.S. location, the definition of the relevant product market remains in debate at the present time and the "district court is not permitted to conduct a preliminary inquiry into the merits of plaintiff's case at the class certification stage." *Heerwagen,* 435 F.3d at 231.

(Def. Mem. at 10–12.)

However, as plaintiffs point out, one would expect that if there were a meaningful difference in market power between regions, then prices for satellite radio would vary in different regions. In this case, the prices did not vary between urban and rural areas, either before or after the merger. (Pl. Reply at 3.) Although there may be a number of reasons why the providers of satellite radio deliberately maintained consistent prices despite varying degrees of competition in different geographical regions, Defendant has not presented those reasons to the Court. Even assuming *arguendo* that the presumed greater number of alternatives to satellite radio available to consumers in urban areas causes shifts in Defendant's market power depending on the region, Defendant has not provided any evidence to show that these shifts are significant or complex enough such that this issue will predominate over the issues that plaintiffs contend will be subject to generalized proof. Therefore, plaintiffs have met their burden to demonstrate that they can establish market power predominantly through class-wide proof.

ii. Injury, Causation and Damages

In antitrust cases, a plaintiff must prove that it suffered an injury resulting from the alleged violation and that it was the type of injury that the antitrust laws were designed to prevent, i.e., an injury caused by the defendant's anticompetitive

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Thus, this Court must still determine at this stage whether issues of class-wide proof with respect to the relevant geographic market are likely to predominate.

conduct. *See Cordes,* 502 F.3d at 106 (citation omitted); *In re Currency Conversion Fee Antitrust Litig.,* 264 F.R.D. at 115. At the class certification stage a plaintiff must also prove that it suffered some damage as a result from the injury; however, "that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *In re Currency Conversion Fee Antitrust Litig.,* 264 F.R.D. at 115–16 (citing *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 222 (2d Cir.2008) (partially abrogated on other grounds by *Bridge v. Phoenix Bond & Indem. Co.,* 553 U.S. 639 (2008))); *see also Spencer v. Hartford Financial Services Group, Inc.,* 256 F.R.D. 284, 305 (D.Conn.2009) (citations omitted) ("The court's inquiry at the class certification stage is limited to determining whether, if individual damages will vary, there is nevertheless a possible and reasonable means of computing damages on a class-wide basis, for example by using a formula or statistical analysis.").

Plaintiffs allege that they will prove injury and causation using evidence of Defendant's uniform price increases including the multi-radio price increase, Royalty Fee, and Internet access charge. (Pl. Mem at 13.) Plaintiffs also allege they will prove damages through the use of expert testimony that will demonstrate a common formula to reasonably calculate damages for any class member. (Pl. Mem. at 16–17.)

Defendant makes three arguments, none of which this Court finds convincing. First, Defendant argues that although its pricing changes may have been uniform, they affect members of the putative class differently because not all members subscribed

to the same services, and thus individual proof would be required to show actual injury. (Def. Mem. at 5.) This Court finds no reason why this issue cannot be easily resolved by a simple formula, which plaintiffs opine will be presented through their expert. Second, Defendant argues that proving the price increases would not have occurred but for the merger discounts other causes of price increases. (Def. Mem. at 6–7.) This argument has nothing to do with class-wide proof. Third, Defendant argues that proving that the increases do not reflect enhanced levels of services requires individualized proof of the increased benefits to individual consumers. (Def. Mem. at 7–9.) Although the Defendant may assert a defense that the price increases reflected service enhancements, Defendant fails to persuade this Court why such a defense should turn on the subjective value of individual users. Therefore, plaintiffs have met their burden that proving injury, causation and damages can be accomplished through class-wide proof.

b. Consumer Protection Class

Plaintiffs seek to certify a single consumer protection class comprised of consumers in 16 states under 20 consumer protection statutes.[8] Courts have certified classes involving statutes from multiple states. *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.,* 252 F.R.D. 83, 96, 108 (D.Mass.2008) (certifying one Medigap class under the laws of 24 different consumer protection statutes); *but see Lewis Tree Service, Inc. v. Lucent Techs. Inc.,* 211 F.R.D. 228, 237 (S.D.N.Y.2002)

[8] Plaintiffs move in the alternative to certify subclasses for each of the 16 states for which plaintiffs assert a consumer protection claim.

(denying class certification where plaintiff's common law fraud claims would require analysis of the substantive law of every state). Courts routinely deny class certification where "individual questions concerning the substantive laws of other states would overwhelm any potential common issues." *In re Currency Conversion Fee Antitrust Litig.,* 230 F.R.D. 303, 311 (S.D.N.Y.2004) (collecting cases).

While all the statutes relied on by the plaintiffs require a deceptive act, the statutes vary with respect to whether they require intent to deceive and reliance on the deception. For example, Arizona and New Jersey require that the deceptive act comes "... with intent that others rely upon such concealment, suppression or omission ..." A.R.S. § 44–1522 (2010); N.J. Stat. § 56:8–2 (2010). Similarly, Kansas requires that defendants have a requisite level of knowledge or willfulness with respect to various elements in the rule. K.S.A. § 50–626 (2009). Contrariwise, Florida, Maine, and Massachusetts simply prohibit, *inter alia,* unfair methods of competition, and the statutes make no mention of intent. Fla. Stat. § 501.204 (2010); 5 M.R.S. § 207 (2009); ALM GL ch. 93A, § 2 (2010). Pennsylvania requires a showing of "justifiable reliance by the party defrauded upon the misrepresentation," *Piper v. Am. Nat'l Life Ins. Co.,* 228 F.Supp.2d 553, 560 (M.D.Pa.2002), whereas New York and Illinois do not. *See Hershey Foods Corp. v. Voortman Cookies Ltd.,* 367 F.Supp.2d 596, 600 n. 2 (S.D.N.Y.2005) ("a showing of reliance is not necessary to maintain a § 349 claim"); *Randels v. Best Real Estate, Inc.,* 243 Ill.App.3d 801, 805 (2d Dist.1993) ("[a] plaintiff alleging Consumer Fraud Act violations does not have to show actual reliance

on the deceptive acts").[9]

Without cataloguing the differences in the laws of each statute, suffice it to say Defendant argues persuasively that the varying legal standards between these statutes should preclude certification. Put another way, there are enough uncommon issues of law among the state statutes that individual issues would predominate such that certifying one class under all state laws is improper.[10]

Defendant also argues that those statutes that require reliance necessarily require evidence subject to individualized proof that each member of the putative class relied on the website explanation in order to prove liability. Plaintiffs argue that the requirement of reliance under various state statutes does not defeat predominance for the proposed class because reliance is either irrelevant or presumed.

Courts have often held that reliance on a misrepresentation requires individualized proof. *See, e.g., McLaughlin v. American Tobacco Co.,* 522 F.3d 215, 223 (2d Cir.2008) ("Individualized proof is needed to overcome the possibility that a member of the purported class purchased [light cigarettes] for some reason other than the belief that [light cigarettes] were a healthier alternative – for

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[9] In addition, although many states require "that the deceptive act relate[ ] to a material fact," *Randels v. Best Real Estate, Inc.,* 243 Ill.App.3d 801, 805 (2d Dist.1993), the standards of materiality are not entirely consistent among the states.

[10] Plaintiff's alternative request to certify classes based on individual laws would likely alleviate this particular concern as each statute raises the same issues of law for all claims brought under that statute.

example, if a [light cigarette] smoker was unaware of that representation, preferred the taste of [light cigarettes], or chose [light cigarettes] as an expression of personal style."); *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1253 (2d Cir.2002) ("a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed").

Plaintiffs argue that reliance is irrelevant here because subscribers were contractually bound to rely on Defendant's implementation of the Royalty Fees. (Pl. Mem. at 22.) Plaintiffs rely heavily on *In re Pharmaceutical Industry Average Wholesale Price Litigation,* where the U.S. District Court for the District of Massachusetts certified a class under the laws of 24 different consumer protection statutes. 252 F.R.D. 83, 108 (D.Mass.2008) (*"A WP"*). In *AWP,* the plaintiffs alleged that pharmaceutical manufacturers grossly inflated the prices of branded physician-administered drugs by misstating the Average Wholesale Prices of these drugs in industry publications. *Id.* at 85–86. The court explained that the requirement that a plaintiff prove reliance did not preclude certification because third party payors were required by contract to pay all or part of a Medicare beneficiary's co-payment, which is statutorily based on the Average Wholesale Prices published in industry publications. *Id.* at 96–97. In the instant case, the Royalty Fees that Defendant charges to its customers are not governed by statute. Unlike in AWP, where third party payors were "required, by contract, to rely on the [Average Wholesale Prices] in reimbursing for the co-

payments made by Medicare beneficiaries" (*id.* at 97), here satellite radio subscribers are not required by contract to rely on the website explanation of how the Royalty Fees are calculated. Satellite radio subscribers may choose whether to renew or in some cases cancel their subscriptions if they do not wish to pay the Royalty Fee, but third party payors may not elect to stop covering their beneficiaries. Therefore, the issue of whether subscribers relied on the website explanation of Royalty Fees when determining whether to continue their subscriptions is necessary to the issue of whether to certify the class.

Plaintiffs also argue that reliance may be presumed on a class-wide basis because the misrepresentation is material or "the material nondisclosure is part of a common course of conduct." (Pl. Rely Mem. at 4.) (citing *Markocki v. Old Republic Nat. Title Ins. Co.,* 254 F.R.D. 242, 251 (E.D.Pa.2008). In *Markocki v. Old Republic Nat. Title Ins. Co.,* the Eastern District of Pennsylvania certified a class action lawsuit where a plaintiff, a homeowner, sought relief from predatory lending practices against her title insurance company, which she alleged, among other counts, violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law. 254 F.R.D. 242, 245–46 (E.D.Pa.2008). The court explained that " '[t]he presence of individual questions as to the reliance of each investor does not mean that the common questions of law and fact do not predominate over questions affecting individual members.' " *Id.* at 251 (quoting *Eisenberg v. Gagnon,* 766 F.2d 770, 786 (3d Cir.1985). Reliance may be presumed class-wide "when the material nondisclosure is part of a

common course of conduct." *Id.* (citing *Hoxworth,* 980 F.2d at 924).[11] The court held that allegations that the defendant "provided no training or oversight to its title agents to assure that borrowers were charged the proper rates" supports allegations of an industry-wide practice, and "every consumer reasonably, and justifiably, expects the title insurer, the party with expertise and knowledge of the applicable rates, to charge the rate required by the Rate Manual and Pennsylvania law." *Id.* Despite plaintiff's argument, reliance in the instant case may not be presumed. It does not seem to be a reasonable assumption that subscribers of satellite radio place the same degree of reliance on the reasoning behind a price increase listed on the provider's website as do homeowners on their broker charging them the correct fee. Although it may be the case that the explanation of the Royalty Fee was material to decision of whether to continue the satellite radio subscription for *some* subscribers, this Court cannot find that the website explanation was necessarily material to a reasonable subscriber such as to hold that reliance shall be presumed.[12] Therefore, for at

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[11] In stating this proposition, *Hoxworth* cited to *Affiliated Ute Citizens of Utah v. U.S.,* 406 U.S. 128, (1972). In that case the U.S. Supreme Court states, "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 153–54 (citation omitted).

[12] Stated another way, following the chain of cases that gave rise to the rule relied on in *Markocki,* this Court cannot say that a reasonable subscriber of satellite radio might consider Defendant's explanation for its price increases listed

least the statutes that require reliance or other elements that are necessarily predicated on issues requiring individualized proof, such issues would predominate. *See McLaughlin,* 522 F.3d at 223; *Moore,* 306 F.3d at 1253.

Superiority

To determine whether class treatment is the superior form of adjudication, a court may consider (1) the interest of the class members in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation already commenced by or against class members; (3) the desirability of concentrating the litigation in a particular forum; and (4) difficulties likely to be encountered in the management of a class action. *See* Fed.R.Civ.P. 23(b)(3). Class treatment is particularly appropriate where it allows large groups of claimants to bundle together common claims that would be too small to pursue individually. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 615, 617 (1997); *Noble v. 93 Univ. Place Corp.,* 224 F.R.D. 330, 346 (S.D.N.Y.2004) (noting that class treatment is appropriate in "negative value cases," where the individual interest of each class member's interest in the litigation is less than the cost to maintain an individual action). When proving individual circumstances are relevant to success on the merits, class treatment is less likely to be superior to individual adjudication.

a. Federal Antitrust Damage Class

Proceeding as a class action lawsuit in the

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on its website to be important in the decision of whether or not to maintain a subscription.

antitrust portion of the dispute is the superior method of adjudication. Individuals have little interest in maintaining separate actions given that individual damages are relatively small compared to the costs of prosecuting an antitrust case. Concentrating antitrust litigation in this forum is desirable because Sirius XM is headquartered in New York, and it would be inefficient for many courts to hear, and for the Defendant to be subject to litigating, the same issues arising under the same facts and circumstances. The class action should be manageable because the issues to be litigated predominantly concern the Defendant's actions without regard to the subjective value of any individual plaintiff.

b. Consumer Protection Class

Proceeding as a class action lawsuit for the consumer protection portion of the dispute is not the superior method of adjudication. Unlike the antitrust claims brought under federal law, there is less desirability to concentrate the state law claims in one forum. Additionally, managing the class action would pose problems where jurors would be required to analyze individual factors under several statutes with significant differences in each statute. Certifying distinct classes for each state under which plaintiffs have brought a claim would not alleviate the difficulties that the Court and jurors would face in managing the lawsuit.

The laws that require a showing of individual reliance present additional problems. Individuals have an interest in controlling the litigation where some may have terminated their subscriptions in light of the Royalty Fee and others have not.

Moreover, it would be nearly impossible for jurors to determine whether each class member actually relied on Defendant's website explanation for the Royalty Fee when determining whether to continue the subscription. Therefore, given the relevant individual factors necessary to demonstrate violations of the consumer protection statutes, including those statutes that require a showing of reliance and those that do not, proceeding as a class action is not the superior method of adjudication.

E. Rule 23(g) Requirements

Rule 23(g) provides the test for appointing class counsel, and Defendant does not contest plaintiff's assertion that it is satisfied. In certifying class counsel, a court must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed.R.Civ.P. 23(g). "The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *Id.*

On March 17, 2010, this Court appointed Grant & Eisenhofer P.A., Milberg LLP, and Cook, Hall & Lampros, LLP as Interim Class Counsel. Plaintiffs contend that these firms have extensive relevant and complimentary expertise in antitrust, class action and consumer protection litigation, and that they would coordinate and supervise the prosecution of the consolidated litigation. Defendant does not dispute these contentions. In consideration of other

matter pertinent to counsel's ability to fairly and adequately represent the class, and in accordance with my previous opinions on this score, Grant & Eisenhofer P.A., Milberg LLP, and Cook, Hall & Lampros, LLP should ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics. *See In re J.P. Morgan Chase Cash Balance Litig,* 242 F.R.D. 265, 277 (S.D.N.Y.2007).

CONCLUSION

For the foregoing reasons, the motion for class certification is GRANTED as to the federal antitrust class, and DENIED as to the injunctive relief class and consumer protection class, and DENIED as moot as to the breach of contract class. Plaintiffs are appointed Class Representative, and Grant & Eisenhofer P.A., Milberg LLP, and Cook, Hall & Lampros, LLP is appointed Class Counsel. The Clerk of the Court is instructed to close this motion.

SO ORDERED.

United States District Court,
S.D. New York.

CARL BLESSING, *ET AL.*,

PLAINTIFFS,

v.

SIRIUS XM RADIO INC.,

DEFENDANT.

No. No. 09 CV 10035(HB)
March 29, 2011

Before: HAROLD BAER, JR., District Judge.

ORDER

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, 125 S. Ct. 2277, 161 L. Ed. 2d 1080. 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

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[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 U.S. Dist. LEXIS 22342, 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).

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 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

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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.

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 Antitrust Litig.,* 391 F.3d 516, 538 (3d Cir. 2004) (upholding approval of settlement equal to 33% of estimated damages).

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

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[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 U.S. Dist. LEXIS 112634, 2009 WL 4403185, at *5 n.3 (S.D.N.Y. Dec. 1, 2009) (citing *Grinnell,* 495 F.2d at 459).

"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.

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[5] Indeed, "[b]road class action settlementsare 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.

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.

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 timekeeping 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 *Gierlinger 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
/s/ Harold Baer, Jr.
Hon. Harold Baer, Jr. U.S.D.J.

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,

CARL BLESSING, *ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,*

PLAINTIFFS-APPELLEES,

v.

SIRIUS XM RADIO INC.,

DEFENDANT-APPELLEE,

v.

MARVIN UNION, *ET AL.,*

OBJECTORS-APPELLANTS,

LINDA MROSKO, *ET AL.,*

OBJECTORS

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

ORDER

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

U.S. CONST. art. III, §2 (excerpt)

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. CONST. amend. V (excerpt)

No person shall … be deprived of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, §1 (excerpt)

[N]or shall any state … deny to any person within its jurisdiction the equal protection of the laws.

Class Action Fairness Act §2, Pub. L. No. 109-2, §2, 119 Stat. 4-5 (2005)

(a) Findings.– Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have–

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where–

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constition, in that State and local courts are–

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) Purposes.– The purposes of this Act are to–

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

28 U.S.C. §1712

(a) Contingent Fees in Coupon Settlements. - If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) Other Attorney's Fee Awards in Coupon Settlements.

(1) In general. - If a proposed settlement in a class action provides for a recovery of coupons to class members, and 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.

(2) Court approval. - Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee,

if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) Attorney's Fee Awards Calculated on a Mixed Basis in Coupon Settlements. - If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief -

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

(d) Settlement Valuation Expertise. - In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

(e) Judicial Scrutiny of Coupon Settlements. - In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or

governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section. [Insert.]

FED. R. CIV. P. 23(c), (e), (g)

* * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) **Certification Order.**

(A) **Time to Issue.** At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) **Defining the Class; Appointing Class Counsel.** An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) **Altering or Amending the Order.** An order that grants or denies class certification may be altered or amended before final judgment.

(2) **Notice.**

(A) **For (b)(1) or (b)(2) Classes.** For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) **For (b)(3) Classes.** For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) **Judgment.** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) **Particular Issues.** When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) **Subclasses.** When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

* * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The

following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * *

(g) Class Counsel.

(1) **Appointing Class Counsel.** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) **Standard for Appointing Class Counsel.** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) **Interim Counsel.** The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) **Duty of Class Counsel.** Class counsel must fairly and adequately represent the interests of the class.