Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

Attorney for Objector Michael Frank Bednarz

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE LITHIUM ION BATTERIES ANTITRUST LITIGATION,

This Document Relates to:

ALL INDIRECT PURCHASER ACTIONS

Case No. 13-md-02420 YGR (DMR)

MDL No. 2420

OBJECTION OF MICHAEL FRANK BEDNARZ TO INDIRECT PURCHASER PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Judge: Hon. Yvonne Gonzalez Rogers
Courtroom: 1, 4th Floor
Date: July 16, 2019
Time: 2:00 P.M.

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INTRODUCTION

Over the course of this litigation, IPP Class Counsel's fee request has slowly crept up from a yet-to-be-disclosed-to-the-class number they initially described as "in the best interests of the proposed class," Dkt. 108-1 ¶ 18, to 25% in their initial fee request, and now to an especially unreasonable 30% of the $113 million "megafund." Contrary to IPP Class Counsel's arguments, this above-benchmark fee request is not justified by the results, the fee award to DPP Class Counsel, or the voluminous case law and empirical data showing that in megafund settlements such as this one, an award below 20%, or based on diminishing marginal rates, is far more appropriate due to economies of scale.

Class member Michael Frank Bednarz objects on behalf of the class to IPP Class Counsel's excessive fee request now before the Court. Bednarz previously filed an objection to the settlements reached with defendants Hitachi-Maxwell, NEC, and LG Chem and the associated attorneys' fee request. Dkt. 1902. The Court approved the settlements over Bednarz's objection and awarded IPP Class Counsel 10% of the then $44 million settlement fund, denying IPPs' request for an award of 25% of the common fund, without prejudice to a further motion for additional fees. The Court explained that it was "not prepared to make a full award of attorneys' fees at this time," given the ongoing nature of the litigation between IPPs and the remaining defendants. Dkt. 2005 at 1. In reaching its decision, the Court did not consider a key reason Bednarz raised for denying Class Counsel the 25% fee award they then sought, and the 30% fee award they now seek: co-lead IPP Class Counsel Hagens Berman previously submitted a redacted fee proposal, which should guide the Court's fee award. It would be unfair to class members for the Court to award more from their recovery fund than the attorneys themselves agreed to work for, based on their *ex ante* assessment of the litigation risks. Anything above that amount is a windfall to the attorneys at the expense of the class.

Independent from Class Counsel's fee proposal, a 30% fee is unwarranted based on either legal precedent or factors specific to this case. In its order denying IPP Class Counsel's earlier 25% attorneys' fee request, the Court observed that "[t]he total settlement amounts to date approach the characteristics of a so-called 'megafund' case, in which a fee amount approaching the 25 percent benchmark may result in a windfall." Dkt. 2005 at 1-2. With the present round of settlements, the settlement fund is now well into megafund territory. Rather than reduce their percentage request, consistent with economies of scale, IPP Class Counsel

have charged ahead and increased their fee request to an excessive 30%—well above the 25% benchmark adopted by this Circuit and the respective 16.9% and 17.9% median and mean fee awards for settlements of this size.

IPPs' reliance on the Court's award of 30% to DPPs cannot save their unreasonable request. First, the Court did not reduce the 30% fee request by the DPPs based on the settlement being a megafund because the resulting hourly rate was "far below the market rate" for the case. *See* Dkt. 2322 at 2. Here, the Court can readily determine the market rate for IPP Class Counsel by reference to the fee proposal co-lead class counsel submitted with their motion seeking appointment as class counsel. That proposal serves as an effective market rate-based cap on the fee award. Second, DPP Class Counsel achieved far better results and still recovered a fractional multiplier of 0.58 of their lodestar. *Id.* at 3. Awarding IPP Class Counsel the same 30% would reward them with a 40% premium on their rates (a 0.82 lodestar multiplier) compared to the DPPs, despite IPP Class Counsel having recovered a far smaller percentage of their clients' alleged damages. The comparably meager results do not warrant such a fee premium for IPP Class Counsel.

Bednarz therefore respectfully asks the Court to reduce IPP Class Counsel's fee award to no more than what would be awarded under Hagen Berman's fee proposal and, at a maximum, no more than 20% of the settlement fund.

ARGUMENT

I. Bednarz is a member of the proposed settlement classes and has standing to object.

Objector Michael Frank Bednarz is a member of the proposed IPP settlement classes with SDI, TOKIN, Toshiba, and Panasonic, through his purchase of a laptop in 2006 and a replacement lithium ion battery for his laptop in 2010, as well as another laptop purchase in 2002. Declaration of M. Frank Bednarz ("Bednarz Decl."), Dkt. 1902-1 ¶¶ 5-6; *see also* Supplemental Declaration of M. Frank Bednarz, Dkt. 1907 ¶ 4. Bednarz' address is 1145 E. Hyde Park Blvd. Apt 3A, Chicago, IL 60615, and his phone number is 801-706-2690. Bednarz Decl. ¶ 2. His email is frank.bednarz@hlli.org. Bednarz is an attorney with the non-profit Hamilton Lincoln Law Institute ("HLLI"), which also represents him *pro bono* in this matter. (Prior to the formation of HLLI, Bednarz was an attorney with, and represented *pro bono* by, the Center for Class Action Fairness ("CCAF"), which merged into HLLI. *See* Bednarz Decl. ¶¶ 3-4.) Bednarz intends to appear through

counsel at the July 16, 2019, fairness hearing, where he wishes to discuss matters raised in this Objection. Bednarz does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party, objector, or *amicus*. Bednarz also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval, including any who testify by declaration. Bednarz objects to the extent Class Counsel use expert witnesses in a reply brief to support their fee application after the objection deadline. Such a procedure is unfair under Rule 23(h) and inconsistent with the rule of *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010). Any such new evidentiary submissions should be stricken. He joins by reference any substantive objections made by other class members not inconsistent with those made here.

HLLI's Center for Class Action Fairness represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12 (calling founder Theodore H. Frank "[t]he leading critic of abusive class-action settlements").

Since it was founded in 2009,[1] CCAF has recouped more than $200 million for class members by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016) ("more than $100 million"); *see, e.g., McDonough v. Toys "R" Us,* 80 F. Supp. 3d 626, 661 (E.D. Pa 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members." (cleaned up)). Because it has been CCAF's experience

[1] In February 2019, CCAF moved to the then-newly-formed non-profit public interest law firm HLLI. At the time of Bednarz's previous objection, CCAF was a sub-unit of the non-profit Competitive Enterprise Institute.

that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are often styled "professional objectors." A "professional objector" is a specific term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF's *modus operandi*. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. *See generally* Declaration of Theodore H. Frank, Dkt. 1902-2 ¶¶ 4-21. CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank filed as docket number 1902-2.

To avoid doubt about his motives, Bednarz is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of his objection. Bednarz Decl. ¶10; *see generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Bednarz brings this objection through CCAF in good faith to protect the interests of the class. His objection applies to the entire class.

II. The district court has a fiduciary duty to the class as a whole.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *Mercury Interactive Corp.*, 618 F.3d at 994 (internal quotation marks omitted). This fiduciary role is necessary because, unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. *Pampers*, 724 F.3d at 715. "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* "The concern is not necessarily in isolating instances of major abuse, but rather is for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the

attorney's interests." *In re "Agent Orange" Prod. Liab. Litig.,* 818 F.2d 216, 224 (2d Cir. 1987) (internal quotation omitted).

Encompassed within this fiduciary duty is "the Court's responsibility to avoid awarding plaintiffs' counsel a 'windfall' at the expense of the class—a special concern where 'the recovered fund runs into the multi-millions.'" *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) (quoting *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 52 (2d Cir. 2000)). "Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Thus, "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23. To prevent the erosion of public confidence in the class action device, "it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey,* 757 F.2d 1112, 1144 (11th Cir. 1985); *see also In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (differentiating "reasonable" and "windfall" fees in megafund cases).

The court's active involvement and fiduciary role are necessary because "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage," when counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Mercury Interactive Corp.*, 618 F.3d at 994 (internal quotation omitted). Compounding the problem, "[i]n most common-fund cases, defendants have little interest in challenging class counsel's timesheets." *Gutierrez v. Wells Fargo, NA*, No. 07-cv-05923 WHA, 2015 U.S. Dist. LEXIS 67298, at *16 (N.D. Cal. May 21, 2015). As the settlements here illustrate, while class counsel and the defendant have an incentive to bargain over the size of the settlement, similar incentives do not govern their critical decisions about how to divvy it up—including allocation to counsel's own fees. *Pampers*, 724 F.3d at 718. Just as in the first round of settlements, the settlements do not include any limits on the amounts IPP Class Counsel may seek from the common fund; defendants pay a set amount regardless of how much is paid to the class versus the attorneys. Similarly, no individual class member has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In*

re Continental Ill. Sec. Litig., 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded objectors) serve as the last line of defense against overreaching fee requests.

III. No fee should be awarded in excess of IPP Class Counsel's sealed bid.

Bednarz renews his objection to any fee award that is in excess of what counsel would be paid under the proposal submitted by IPP Class Counsel Hagens Berman in support of its motion to be appointed class counsel. Hagens Berman provided a confidential fee proposal that Mr. Berman—who filed the attorneys' fee motion now before the Court—described as "very competitive, if not compelling and in the best interests of the proposed class." Declaration of Steve W. Berman in Support of Application to Appoint Hagens Berman as Interim Class Counsel, Dkt. 108-1 ¶¶ 17-18 ("Berman Decl."). By definition, then, any fee above what would be awarded under the proposal is not in the best interests of the class. Despite this earlier commitment, and Class Counsel's ongoing fiduciary duty to represent the interests of the class, Class Counsel appear to have changed their tune about what's best for the class and now seek 30% of the common fund without any reference to that fee proposal.

Due to the need for confidentiality in a sealed bidding process, the terms of Hagen Berman's fee proposal were redacted in Mr. Berman's declaration. *Id.* ¶ 17. The bid should be unsealed and made accessible to class members and the general public to ensure transparency and confidence in the judicial process. *See In re Cendant Corp.*, 260 F.3d 183, 193-96 (3d Cir. 2001). There is a strong presumption of public access to judicial records, and keeping the proposal secret at this stage of the case serves no purpose. Providing access to class counsel's bid "comports with the spirit of the Model Rules of Professional Conduct" and allows class members to better monitor the faithfulness of their counsel. *Id.* at 195.

At a minimum, the Court should award fees in an amount no greater than that due under Hagen Berman's bid. Awarding fees greater than that amount would deprive the class of the benefits of Hagens Berman's offer. A judge selecting class counsel for a putative class is acting as a fiduciary of that putative class. *See In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 468 (N.D. Cal. 1995) ("[T]he court's fiduciary obligation to the plaintiff class compels it to secure the best representation possible."). As fiduciary, the court is effectively negotiating on behalf of the class, and trying to get the best deal possible for class members. *See id.* ("To do so, … the court must strive to emulate the arrangements and decisions that the class itself would make were it able to negotiate."); *Continental Ill. Sec. Litig.*, 962 F.2d at 572 (discussing how "the judge has so step in and play

surrogate client" when selecting class counsel). Hagens Berman's bid is a benefit that this Court was able to extract for the class and reflects the market rate determined by the attorneys in this case. The class should not now be deprived of the benefit of this bargain.

"[I]t is inherently illogical for lawyers to undertake litigation on the basis of the risks and rewards they perceive at the beginning, yet be compensated on the basis of the risks and rewards the court perceives at the end of the litigation." *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990) (Walker, J.). Yet this is exactly what Class Counsel are attempting to do here. *See* Fee Motion, Dkt. 2487 at 14-16 (touting the risks looking backward at the litigation). It's one thing to adopt of necessity an *ex post* perspective when there is no record evidence of how the lawyers initially perceived the risks of litigation. But it would be another entirely to do so when Hagens Berman's bid is a matter of record in the litigation. "Determining attorney fees after resolution of the litigation … disserves both the class and class counsel." *Oracle*, 131 F.R.D. at 692.

Judge Alsup confronted a similar situation to this one in *Dugan v. Lloyds TSB Bank, PLC*, No. 12-2549, 2014 U.S. Dist. LEXIS 60852 (N.D. Cal. April 24, 2014). There, in their retainer agreement with the class representatives, class counsel promised that they would not seek more than 35% of the common fund. *Id.* at *4. But in their fee request, class counsel sought well over that amount. *Id.* As here, *Dugan* class counsel "failed to even mention their written promise in their opening motion for fees and expenses." *Id.* at *5. Noting the "foreseeable risk[s]" of litigation, Judge Alsup held that counsel should be held to their earlier representation: "[w]hen an attorney makes a promise like this one to cap fees, it is meant for the benefit of the class and is a factor in why the class representatives have chosen that particular counsel. . . . In turn, judges may approve the selection based in part on such a fee cap." *Id.* at *7-*8. "When attorneys promise to restrict the fees to be sought in a fee petition, that *ex ante* promise should be honored, absent special circumstances." *Id.* at *8.[2]

[2] In another antitrust case, Judge Seeborg refused to hold Hagens Berman to its initial fee bid based upon various "imponderables" that affected the litigation. *In re Optical Disk Drive Prods. Antitrust Litig*, No. 3:10-md-02143-RS, 2016 U.S. Dist. LEXIS 175515, at *67 (N.D. Cal. Dec. 19, 2016). Respectfully though, the need for multiple class certification motions and appeals to the Ninth Circuit during a six-year litigation is not an imponderable result for a massive MDL. While a case may be "time-consuming and involved, … plaintiffs' original counsel knew or should have known what this case would require at its inception." *Wright v. Ford Motor Co.*, 982 F. Supp. 2d 1292, 1297 (M.D. Fla. 2013) (refusing to allow an upward modification to a contingency percentage agreed upon at the outset).

Just so here. In their motion to be appointed class counsel, Hagens Berman may have offered to take a smaller percentage of the common fund than the percentage they are now requesting. If they did so, it was doubtlessly intended to persuade the Court to select them as lead counsel. Such a promise serves to benefit the putative class, and should be honored. Indeed, Mr. Berman averred that his firm's sealed bid "provide[d] for fair compensation while minimizing the impact on the proposed class." Berman Decl. ¶ 18. That precise representation demonstrates why this Court need not award a higher fee.[3]

Also, holding Hagens Berman to their promise would preserve the integrity of the class-counsel appointment process. Conversely, allowing counsel to later renege comes "at the expense of future settlements, inasmuch as [courts] will be unable to trust assurances made by plaintiffs' counsel." *Evans v. Jeff D.*, 475 U.S. 717, 737 n.29 (1986). Competitive bidding in class counsel selection is a laudable practice that benefits class members in all class actions where it is used. Ordinarily, in a competitive market, a firm proposing to a sophisticated client a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until all above-market rents were bid away. In the class-action context, however, the client is a diffuse body of individual claimants, typically with less at stake and thus little incentive and even less ability to negotiate down the rates offered by competing counsel. *See Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D. Cal. 1999) (lack of sophisticated lead plaintiff, "together with the inherent conflicts and agency problems in class actions and the limited ability of the court to address such problems through case management" led court to determine that competitive bidding "is necessary to protect the interests of the putative class members"); *accord Redman v. RadioShack Corp.* 768 F.3d 622, 629 (7th Cir. 2014) ("individual members of the class have such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant"). So it is best when, just as in a competitive market, prospective class counsel themselves look at the expected opportunity cost, the expected chance that investment in the case would produce no return, and the expected size of a settlement in the litigation. They would then, as co-lead counsel did here, propose a contingency-fee percentage that compensates them for that expected risk and opportunity cost. *See FTC*

[3] That the other two firms appointed interim co-lead class counsel did not sign on to the fee proposal does not change the fact that Hagen Berman's bid represented the market rate for the case, based on the firm's experienced *ex ante* risk analysis. If the appointed firms operated less efficiently than Hagen Berman's proposal anticipated, the class members should not be the ones charged above the market rate for such wastefulness.

Workshop—Protecting Consumer Interests in Class Actions, 18 GEO. J. LEGAL ETHICS 1243, 1261 (2005) ("If you're going to award lawyers for the risk that they undertake in litigation, the best time to measure that risk, and in fact the only time that you can do so effectively, is at the outset of the case."). "Empirical evidence suggests that ex ante fee negotiation is a key mechanism for reducing agency costs between counsel and the class they represent." *Laffitte*, 376 P.3d at 690 (Liu, J., concurring).

The results from cases that have employed competitive bidding bear this out. "[A] series of antitrust class action auctions demonstrated that qualified counsel would generally offer to represent the class for fee awards in the 10-15% range." John C. Coffee, *The PSLRA and Auctions*, N.Y.L.J., May 17, 2001, at 5. A Federal Judicial Center study found that attorneys' fees in cases that selected lead counsel through competitive bidding resulted in bids for "lower percentage fee awards than the firms might have been expected to obtain under a percentage-of-the-fund method." Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Federal Judicial Center (Aug. 29, 2001) at 7-8 (finding that attorneys' fee awards ranged from 5% to 22.5%, with the majority of fee awards less than 9%); *see also In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1458 (N.D. Cal. 1994) ("*ex ante* competitive bidding was effective in this case in producing 'reasonable' fees from an *ex post* perspective as well"); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 n.6 (3d Cir. 2000) (competitive bidding "appears to have worked well, and we commend it to district judges").

By contrast, *ex post* fee evaluation is "likely to be distorted by hindsight bias." *Laffitte*, 376 P.3d at 690 (Liu, J., concurring). *Ex post* awards overshoot the market in part because they are usually awarded without a serious adversarial presentation. *See Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014) ("By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that 'caselaw' is so generous to plaintiffs' attorneys."). The major force that exerts downward pressure *ex ante*—the threat of losing the litigation to another firm—dissipates by the time of settlement.

If Hagens Berman's fee request exceeds their sealed bid, then this very case would demonstrate why competitive bidding is such a salutary practice. The sealed bid was made under competitive pressure; at that time, it was not guaranteed that they would be lead counsel. Their current fee request is made under non-competitive conditions; there is no risk that they would lose out to another firm. The difference between the two bids reflects a precise estimate of the value of competitive bidding to this class. But, if courts do not hold

law firms to their bids, firms will cease to take their representations seriously, and that value will be lost not only to the present class but also to future classes.

IV. A declining percentage-based fee should be awarded in this megafund case.

Independent from Class Counsel's fee proposal, there are additional reasons that the Court should significantly reduce the requested fee award. Despite this Court's concern that their previous 25% fee request may result in a windfall given the size of the settlement fund, IPP Class Counsel now seek an award of 30% of the $113.54 million megafund settlement. Their current request is for $29.54 million; once one includes the $4.495 million the Court already awarded, the total fee requested is $34.035 million. IPP Class Counsel also seek nearly $6 million in costs, on top of the costs previously reimbursed by order of the Court. Once those costs are subtracted from the gross settlement fund, class counsel's fee request is closer to an even more excessive 32% of the net settlement fund available to the class.

This is not a reasonable percentage. A reasonable percentage should be a sliding scale to prevent a windfall for plaintiffs' attorneys at the expense of the class. That's because "[i]t is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998). Instead, high-dollar recoveries tend to be the result of class size rather than attorney skill, and, thus, "the percentage awarded ordinarily should decrease as the amount of the recovery rises, particularly in 'mega-fund' cases where the recovery is above $100 million." *In re Royal Ahold NV Secs. & ERISA Litig.*, 461 F. Supp. 2d 383, 385 (D. Md. 2006) (reducing award to 12%). "'[T]here is considerable merit to reducing the percentage as the size of the fund increases. In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel.'" *NASDAQ Market-Makers*, 187 F.R.D. at 486 (quoting *In re First Fidelity Sec. Litig.*, 750 F. Supp. 160, 164 n.1 (D.N.J. 1990)). Thus, "[i]n cases with exceptionally large common funds, courts often 'account[] for these economies of scale by awarding fees in the lower range.'" *Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d at 374 (quoting *Goldberger*, 209 F.3d at 52).

In accord with these principles and litigation realities, percentage awards in megafund cases tend to be "substantially less than the 25% benchmark applicable to typical class settlements in this Circuit." *Alexander v. FedEx Ground Package Sys.*, No. 05-cv-00038, 2016 U.S. Dist. LEXIS 78087, *5 (N.D. Cal. June 15, 2016) (awarding 16.4% of common fund). Courts in this Circuit and others consistently reject fee requests in the

range sought by class counsel in cases involving recovery of over $100 million. *See In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015) (reducing fees from the requested 13% of $346 million fund to 8.2%); *Precision Assocs. v. Panalpina World Transp., Ltd.*, No. 08-cv-42, 2013 U.S. Dist. LEXIS 121795 (E.D.N.Y. Aug. 27, 2013) (rejecting request for 33% of $87 million); *In re Wachovia Preferred Securities & Bond/Notes Litig.*, No. 09 Civ. 6351, 2011 U.S. Dist. LEXIS 155622 (S.D.N.Y. Jan. 3, 2012) (awarding 12% of fund); *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) (awarding 3% in fees for $1.512 billion of direct pecuniary relief and $1.9 billion for indirect relief); *AT&T Mobility Wireless Data Serv. Sales Litig.*, 792 F. Supp. 2d 1028 (N.D. Ill. 2011) (fee of 25% was "unreasonable" and well above the mean and median fees awarded where recovery was likely to exceed $100 million); *In re Charles Schwab Corp. Secs. Litig.*, No. C 08-01510, 2011 U.S. Dist. LEXIS 44547 (N.D. Cal. Apr. 19, 2011) (awarding attorneys' fees of 9.24% where fund equaled $235 million); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (awarding fees of 12%); *Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d at 373 (requested fee of 20% was "too high given the significant size of the fund"); *Royal Ahold*, 461 F. Supp. 2d at 387-88 (awarding 12% of net settlement fund); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 122-23 (2d Cir. 2005) (upholding fee award of 6.5% of compensatory relief in "especially large and complicated" case); *see also Merkner v. AK Steel Corp.*, No. 1:09-CV-423-TSB, 2011 U.S. Dist. LEXIS 157375 (S.D. Ohio Jan. 10, 2011) (awarding 10%, inclusive of costs, of $91 million). Similar examples are numerous.

While class counsel cited a handful of cherry-picked examples where courts have awarded fees equal to or greater than the percentage they seek here, empirical research shows that such cases are outliers because "the median attorney's fees award in a sample of 68 'megafund' class action settlements over a 16-year period was 10.2%." *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 U.S. Dist. LEXIS 118052, at *50 (N.D. Cal. Sept. 2, 2015) (awarding "reasonable" fees of 9.8%). The data show that in class actions "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 838 (2010). In class actions in which the settlement equaled $100 to $250 million, the median fee award was 16.9% and the mean was 17.9%. *Id.* at 839. Other surveys support this analysis. *E.g.,* Logan, Stuart, *et al.*, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports (March-April 2003) (empirical survey showed average recovery of 15.1% where recovery exceeded $100 million).

Class counsel also rely on a study they claim shows that 19 antitrust settlements between 2009 and 2013 had a mean recovery of $501.09 million and a median recovery of $37.3 million had mean and median fee awards of 27% and 30%, respectively. Dkt. 2487 at 12. This data point—involving such a broad range of recoveries—distorts the actual findings of the study. The study concluded that it remains true that "fees as a percentage of the recovery tend to decrease as the size of the recovery increases." Eisenberg, *et al.*, *Attorneys Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 940, 947 (2017). For settlements greater than $67.5 million, the study found that fee percentages fell to 22.3% of the recovery, with significant variation between the years of the study due to the small number of very large settlements. *Id.* at 947-48.

In addition to the empirical data, the relevant legal factors also support a fee award below 20%. The result in this case—which is the most critical factor in granting a fee award—does not justify IPPs' requested fee award. By IPPs' own estimate, Class Counsel recovered less than 12% of the total damages estimated for the class. Dkt. 2487 at 1 ("The resulting $113.45 million common fund represents 11.7 percent of the total single damages estimated for the Class nationwide." (emphasis omitted)). Even using IPP Class Counsel's doctored assertion that the settlement equals 20% of the estimated damages for the 30 repealer jurisdictions, the result still falls short of that achieved in other antitrust class actions, including ones on which IPP Class Counsel rely to justify their requested fee. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, 2013 U.S. Dist. LEXIS 49885, at *69 (N.D. Cal. Apr. 3, 2013) (IPPs recovered 50% of damages and were awarded fees of 28.5%) (Fee Mot. 12 n.57); *In re Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2007) (counsel recovered "triple the average recovery" for that kind of case and was awarded fees of 28%) (Fee Mot. 12 n.61).

The results achieved by IPP class counsel also fall far short of those achieved by DPPs, whose fee award IPP Class Counsel ask this Court to replicate for themselves. As described in DPPs' fee request, the DPP settlement represents a 39% recovery of the single damages the DPP class could recover at trial—in other words, more than three times the sub-12% recovery that IPPs achieved. *Compare* Dkt. 2171 at 2 *with* Dkt. 2487 at 1. Awarding IPPs the same 30% that DPPs were awarded is even more unjustified when one examines the lodestar multiplier. *See* Section V. Despite recovering less than a third of the percentage of damages that DPPs recovered, IPPs ask the Court to award them a 40% premium on their lodestar multiplier compared to DPPs' multiplier.

Finally, regardless of what percentage the Court settles on, the award should be calculated on the net fund, after expenses have been deducted. While the Ninth Circuit gives courts the discretion to calculate the percentage-of-the-recovery on the gross or net fund, *In re Online DVD*, 779 F.3d 934 (9th Cir. 2015), courts have recognized that the better approach is to calculate the percentage *after* expenses have been deducted from the settlement. In *Redman v. RadioShack*, the Seventh Circuit explained, "costs are part of the settlement but not part of the value received from the settlement by the members of the class." 768 F.3d 622, 630 (7th Cir. 2014). Attorneys' fees should be calculated based on the class benefit, and "fees paid to the settlement administrator—do[] not constitute a benefit to the class members." *Myles v. AlliedBarton Security Services, LLC*, No. 12-5761 JD, 2014 U.S. Dist. LEXIS 159790, at *16 (N.D. Cal. Nov. 12, 2014). If costs are included when calculating attorneys' fees, then counsel is being awarded a commission on those costs, creating "perverse incentives" for class counsel to overspend on third parties. *Redman*, 768 F.3d at 630. "Put another way, incentives to minimize expenses and to allocate resources properly go much farther toward cost efficiency than can post hoc judicial review." *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994).

V. Class Counsel's lodestar provides no basis for the Court to award more than Hagen Berman's fee proposal or, at most, 20% of the net settlement fund.

That IPP Class Counsel's purported lodestar is fractional does not justify an otherwise excessive fee award; it is simply the "nature of the beast" that is contingency fee litigation. *Keirsey v. Ebay, Inc.*, No. 12-cv-01200, 2014 U.S. Dist. LEXIS 21371, at *7 (N.D. Cal. Feb. 18, 2014). Class Counsel rely on the Court's award of 30% to DPP Class Counsel; however, the factors the Court cited to support the DPP fee award are not applicable here. In particular, the Court noted that the 0.58 fractional multiplier for DPP counsel "results in an effective hourly rate far below the market rate" so as to mitigate the usual "megafund concern" that class counsel may recover excess profits. Dkt. 2322 at 2. Here, in contrast, the Court can rely on the market rate presented in Hagen Berman's fee proposal to ensure IPP Class Counsel recover a fair and reasonable fee.

The market rate, by definition, is the rate an attorney would charge in a competitive market. It is widely accepted that *ex ante* fee bidding replicates the free market for legal services better than the lodestar approach. *See In re Bank One Shareholders Class Actions*, 96 F. Supp. 2d 780, 785 (N.D. Ill. 2000). The Court thus has the market rate for IPP class counsel because Hagens Berman provided a fee proposal in connection with its application for lead counsel. In formulating their bid, Hagens Berman almost certainly examined the expected

opportunity cost, the expected chance that investment in the case would produce no return, and the expected size of a settlement in the litigation. The resulting fee proposal would compensate them for that expected risk and opportunity cost, while excluding any windfall that might otherwise be included but for the competitive market. *See FTC Workshop—Protecting Consumer Interests in Class Actions*, 18 Geo. J. Legal Ethics at 1261; *In re Oracle Sec. Litig.*, 131 F.R.D. at 692.

Separately, the 0.82 lodestar multiplier that results from a 30% fee award here overcompensates IPP Class Counsel, particularly when compared to the attorneys' fee award to DPP Class Counsel. The 0.82 multiplier asserted by IPP Class Counsel is 40% more than DPP Class Counsel's awarded multiplier. Even if the Court were to award IPP Class Counsel 25% of the gross settlement fund, or $28.4 million (including the first $4.495 million fee award), IPPs would recover a lodestar multiplier of over 0.68—still substantially greater than that recovered by DPP Class Counsel. A total fee award of $22.7 million, equal to approximately 20% of the fund, would bring IPP class counsel's lodestar multiplier to approximately 0.55, very close to DPP class counsel's 0.58 multiplier yet slightly lower in recognition of IPPs' more limited success.

Finally, the cases that IPP Class Counsel cite to show that a fractional multiplier is evidence of a fair and reasonable fee are inapposite. *See* Fee Mot. at 19 n.89. In *TFT-LCD*, 2013 U.S. Dist. LEXIS 49885, at *70, class counsel achieved far better results than IPP class counsel here, thus supporting a higher fee award. In two of the other cited cases, fees were awarded using the lodestar method as the exclusive methodology rather than as a cross-check of a percentage-based award. *E.g.*, *Gong-Chun v. Aetna Inc.*, No. 1:09-cv-1995, 2012 U.S. Dist. LEXIS 96828, at *52, *64 (E.D. Cal. July 12, 2012) (awarding fees under fee-shifting statute using lodestar method); *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 854 (N.D. Cal. 2010) (awarding fees exclusively by lodestar method). In another case, the court awarded 17.44% of a $3.25 million settlement and relied on a fractional multiplier to confirm the reasonableness of the result, thus showing that a reasonable percentage is a more relevant consideration than the fractional nature of the lodestar. *See In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138, 2007 U.S. Dist. LEXIS 88886, *42 (N.D. Cal. Nov. 26, 2007). The case thus readily supports this Court awarding a lower percentage than IPP Class Counsel request here, and to confirm the reasonableness of that award through the resulting fractional multiplier.

VI. Statement regarding settlement structure, subclassing, and Rule 23(a)(4).

In the initial round of settlements, Bednarz objected to the single settlement-class structure with identical recovery for class members from "repealer" states and "non-repealer" states as a violation of Fed. R. Civ. Proc. 23(a)(4) and (b)(3). Dkt. 1902. The Court overruled the objection, and Bednarz appealed. That appeal, No. 17-17367, is fully briefed, and is likely to be scheduled for oral argument in a few months. The parties have partially rectified this problem in the latest tranche with a distribution plan that reserves 90% of the settlement fund for class members from "repealer" states. Bednarz is skeptical about the process by which Class Counsel chose the 90%/10% split. That split is likely within a range of Rule 23(e) and Rule 23(e)(2)(D) reasonableness because of the possibility that the Supreme Court might overturn *Illinois Brick* if the case were fully litigated, permitting a federal cause of action of indirect purchases, but settlement fairness under Rule 23(e) does not cure a flaw precluding certification under Rule 23(a)(4). For example, *In re Literary Works in Electronic Databases Copyright Litigation* struck a class certification where a single class counsel negotiated separate levels of payments for three sets of subclasses whose interests conflicted because they were dividing a settlement pie; the Second Circuit reversed without any finding that the compensation negotiated for any category was unfair or inadequate. 654 F.3d 242 (2d Cir. 2011). *See generally* Bednarz Opening Brief, No. 17-17367 at 20-22 (9th Cir.).

Because the Court has already ruled on this question in a context where the violation was much more unfair to class members, because that matter is already on appeal in No. 17-17367 two years ahead of this settlement tranche, and because litigating that issue in this settlement tranche is not likely to make a material difference to the class worthy of the several-year delay that such litigation would cause, Bednarz will not pursue the Rule 23(a)(4) issue with this settlement tranche. For similar reasons, Bednarz will not pursue the Rule 23(b)(3) issue here. The decision not to object to class certification here is without prejudice to Bednarz's earlier objection and appeal No. 17-17367, where the failure to subclass repealer and non-repealer states cost class members from repealer states between $16 million and $20 million. Indeed, that the mediator suggested that non-repealer states should be limited to 0% to 10% of the settlement fund (and the parties agreed) demonstrates the unfairness of the first tranche of settlements and validity of Bednarz's objections there.

CONCLUSION

For the foregoing reasons, Bednarz respectfully asks the Court to award fees no greater than those proposed by IPP Class Counsel Hagens Berman in the fee proposal submitted with its application for appointment as Interim Class Counsel (Dkt. 108-1).

Dated: May 28, 2019

Respectfully submitted,

/s/ Theodore H. Frank
Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Email: ted.frank@hlli.org
Cell: 703-203-3848

Attorney for Objector M. Frank Bednarz

PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 28th day of May 2019.

/s/ Theodore H. Frank
Theodore H. Frank