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: May 20, 2020
Time: 2:00 P.M.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

We are here today because IPP Class Counsel had to resubmit their fee request on remand from the Ninth Circuit—a remand made necessary because Class Counsel argued in this Court and in the Ninth Circuit against increased recovery for repealer-state class members, demonstrating the very conflict of interest that Bednarz objected to in 2017. Instead of heeding Bednarz's objection, IPP Class Counsel engaged in *ad hominem* attacks and incorrectly persuaded the Court to come to the wrong decision and approve a settlement class certification and unfair allocation. While appeal was pending, retired Judge Westerfield recommended a split of 100%/0% for repealer-state class members. Dkt. 2459-1 at 226. Instead, IPP Class Counsel chose the alternative 90%/10%, again arguing for reduced recovery for repealer-state class members, and continued to argue for *pro rata* distribution and affirmance in the Ninth Circuit. Yet, despite this breach of fiduciary duty to the repealer-state class members, and despite the Ninth Circuit reversal after IPP Class Counsel deprived repealer-state class members of their fair share of the settlement, IPP Class Counsel has not reduced their above-benchmark fee request a single penny—even seeking to have the class pay the increased notice costs caused by that breach. Ninth Circuit law gives this Court the discretion to zero out the fee request. But at a minimum, some reduction is required.

Even beyond the breach of fiduciary duty, IPP Class Counsel's request is unreasonably high. 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% (35.7% with expenses included) of the $113.45 million "megafund." Contrary to IPP Class Counsel's arguments, this above-benchmark fee request is not justified by the results, the market rate, 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.

Co-lead IPP Class Counsel Hagens Berman previously submitted a redacted fee proposal, which should guide the Court's fee award. Because the Court no longer possesses that proposal, it should order Hagens Berman to submit it into the record. 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 complement 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 deny IPP Class Counsel's fee request. In the alternative, it should reduce IPP Class Counsel's baseline 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; and, from this baseline, the Court should make deductions to account for class counsel's failed Round 2 settlement proposals.

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 LG Chem, Hitachi Maxell, and NEC Defendants, and the approved 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. Bednarz previously objected to the initial settlements with LG Chem, Hitachi Maxell and the NEC Defendants, and his subsequent appeal resulted in the vacation of those settlements' approval. *In re Lithium Ion Batteries Antitrust Litig.*, 777 Fed. Appx. 221 (9th Cir. 2019). Bednarz intends to appear through counsel at the May 20, 2020 fairness hearing (if it is held as scheduled), 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).

Since it was founded in 2009, 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. In this case, Bednarz's prior objection and appeal resulted in an enhanced recovery of just over $10 million for the repealer-state class funds. *See* Notice of Motion of Michael Frank Bednarz, Motion for Attorneys' Fees ("Bednarz Fee Motion"), Dkt. 2587 at 8-9. Class counsel may again attempt to impugn Bednarz, his counsel and his employer through personal attacks in hopes of discrediting his objection. *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 (Dkt. 1902-2) and the more recent Supplemental Declaration of Theodore H. Frank (Dkt. 2591-1).

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. The settlements themselves include no 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 vis-à-vis 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. IPP Class Counsel's request for 35.7% of the $113.45 million combined funds remains unreasonably high.

Class counsel's renewed Rule 23(h) request is unreasonably high, especially after the recent proceedings are taken into consideration. To begin, Bednarz reasserts and incorporates by reference the main objections he raised in connection with the Round 3 IPP Settlements' accompanying fee request. *See* Objection of Michael Frank Bednarz to Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees ("Fee Obj."), Dkt. 2495.

A. No fees and costs should be awarded in excess of IPP Class Counsel's sealed bid.

Bednarz has previously explained at length why the Court should make available to the class the terms of Class Counsel Hagens Berman's sealed fee proposal, and should not award IPP Class Counsel an amount greater than that would be due under the proposed grid. Fee. Obj. 6-10; Dkt. 1902 at 20-24; Dkt. 2535. Because the Court no longer possesses that fee proposal (Dkt. 2560 at 2-3), it should require Hagens Berman to submit the bid onto the record. If the Court declines to so require, Bednarz submits as an offer of proof, the Supplemental Excerpts of Record in *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 17-15065 (9th Cir.), which includes Hagens Berman's fee bid in that antitrust MDL. (Attached as Exhibit A). On information and belief, Hagens Berman's fee bid in this case was substantially similar to that in *Optical Disk Drive*.

Bednarz will not repeat his earlier objections on this score, but would like to address the reasons this Court has given for refusing to consider the fee proposal. The Court has reasoned that the fee bid is irrelevant for two reasons. First, the Court did not accept the bid, rather it appointed a team of co-lead class counsel, including the bidder Hagens Berman, without considering the bid. Dkt. 2516 at 5; Dkt. 2560 at 3. Second, the Court thought that "given the procedural history of this case and the myriad of factors the Court considered" in awarding fees, the fee bid did not have "any apparent bearing." Dkt. 2560 at 3.

These rationales fail in light of the Ninth Circuit's instruction to consider the "market rate" as a relevant factor in assessing the reasonableness of the fee request. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002). Although *Vizcaino* declined to adopt the Seventh Circuit's across-the-board market-mimicking approach, it specifically announced that, in contrast to a garden-variety employment action, "where lawyers compete for lead counsel status" an "ascertainable 'market'" does exist. *Id.* Hagens Berman's bid when competing for lead counsel status reflects the market rate in this case regardless of whether the bid was considered or accepted. Accordingly, *Vizcaino* instructs that this bid is probative evidence of the market rate,

and so this Court should order Hagens Berman to submit their bid onto the record.

Despite the fact that multiple objectors have raised the issue, to date Hagens Berman has declined to enter their bid onto the record. It is appropriate to infer from this failure that the bid does not support their request for 35.7% of the aggregate common fund. *Cf. Estrada v. Speno & Cohen*, 244 F.3d 1050, 1058 (9th Cir. 2001) (a party's "refusal to produce evidence material [to the issue in controversy] was but an admission of the want of merit in the asserted defense") (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S 322, 351 (1909)). Bednarz infers from class counsel's silence that their payment proposal in this case is substantially similar to their proposal in another large-scale electronic products antitrust MDL *In re Optical Disk Drive Prods. Antitrust Litig*, No. 3:10-md-02143-RS (N.D. Cal.) (attached as Exhibit A). Applying the rubric of their *Optical Disk Drive* bid to the facts of this case yields the following calculations:

	Percentage award after summary judgment	Award
First $5,000,000	0	$0
$5,000,001-$25,000,000	14%	$2,800,000
$25,000,001-$50,000,000	13.25%	$3,312,500
$50,000,001-$75,000,000	13%	$3,250,000
$75,000,001-$100,000,000	12.5%	$3,125,000
$100,000,001-$113,450,000	11%	$1,479,500
Total award	12.3%	$13,967,000

In accordance with Hagens Berman's fee proposal, the market rate for fees and costs[1] in this case would be 12.3% of the combined common funds. Though IPP class counsel only defeated summary judgment from one defendant (Toshiba), the calculation table above generously applies the higher rates for post summary

[1] Hagens Berman's fee proposal was quite clear that the proposed rates accounted for both fees and costs.

judgment adjudication to all settlement funds.[2] Even so, it indicates just how unreasonable class counsel's 35.7% request is. Conversely, adhering to the *ex ante* proposed fee structure would "provide[] for fair compensation while minimizing the impact on the…class." Declaration of Steve W. Berman in Support of Application to Appoint Hagens Berman as Interim Class Counsel, Dkt. 108-1 ¶18.

At the fairness hearing in *Edwards v. National Milk Producers Federation*, Mr. Berman provided another indication that the 35.7% request here exceeds the market rate. Responding to a question from Judge White regarding why he should deviate upward from the Ninth Circuit's 25% benchmark, Mr. Berman responded by contrasting the 33% request in *Edwards* with the lower (at the time) request in this case: "In Judge Rogers' courthouse, in the *Batteries* case, we're asking for 25 percent. Why? Precertification. The settlement amount is not as high as this one is, 30 percent versus 15 to 20 in the *Batteries* case. So we didn't think an upward adjustment was appropriate." Transcript, *Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-4766-JSW, Dkt. 478 at 62:24-63:3. (N.D. Cal. Dec. 30, 2016). Although settlements here are still precertification, and they in fact now total only 11.7% of the classes' nationwide damages (Dkt. 2487-2 at 16), counsel's fee request is now well above benchmark. In *Edwards*, the court declined to award class counsel an upward deviation from the 25% benchmark. *Edwards*, 2017 WL 3616638, 2017 U.S. Dist. LEXIS 145214, at *35 (N.D. Cal. Jun. 26, 2017) (finding "that a benchmark fee award of 25% is the most reasonable in this case, amply rewarding class counsel for their substantial efforts, providing an incentive for counsel to take this type of cases, and yet not serving as a windfall given the large settlement fund.").

With *Edwards* resolved, class counsel no longer has use for the contrast of a more modest fee request in this case. But the market rate hasn't changed. That rate is best revealed in Hagens Berman's competitive fee proposal. A reasonable fee does not exceed the terms of that proposed structure, whether it is the 12.3% dictated by the bid in *Optical Disk Drive*, or another number that Hagens Berman could evidence by submitting the bid in this case into the record.

[2] Bednarz also reads the chart under the assumption that the percentages apply only to the marginal monies in that bracket (just how, for example, the federal income tax rates works). It is possible to read the chart as applying the 11% rate to the entire $113.45 million combined fund. However, such a reading would create mal incentives such as class counsel preferring a $100 million class recovery to a $101 million class recovery.

B. 35.7% of a combined $113.45m megafund exceeds the range of reasonable awards.

Bednarz reasserts his objection that the Rule 23(h) request is especially unreasonable given the combined $113.45 megafund size of the settlements. Fee. Obj. 10-12. Previously the Court recognized that in a "so called 'megafund' case" "a fee amount approaching the 25 percent benchmark may result in a windfall." Dkt. 2005 at 1-2 (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)). In its subsequent fee order, however, it did not appear to consider the aggregate size of the settlements, nor Bednarz's argument that a declining percentage should be used when awarding megafund settlement fees. Dkt. 2516 at 13-14.

"[T]he empirical literature and case surveys strongly support the conclusion that class actions ranging from $100 million to $150 million tend to have an average award of less than 25% of the common fund." *Good v. W. Virginia-American Water Co.*, 2017 WL 2884535, at *25 (S.D. W. Va. July 6, 2017). One survey found that when settlement size fell between $100 and $250 million, the median fee award was 16.9% and the mean was 17.9%. Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811, 839 (2010). Another found that when settlement size fell between $69.6 million and $175.5 million, the median fee award was 19.9% and the mean was 19.4%. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements*, 7 J. EMPIRICAL L. STUD. 248, 265 tbl.7 (2010).

Class counsel rely on a study they claim shows that 19 antitrust settlements between 2009 and 2013 (with 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. 2588 at 22 (citing Eisenberg, Miller, & Germano, *Attorneys Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 952 (2017)). This data point—involving such a broad range of recoveries—distorts the actual findings of the study. *See Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2020 WL 949885, 2020 U.S. Dist. LEXIS 33552, at *169 (D. Mass. Feb. 27, 2020) (concluding that class counsel, including Lieff Cabraser, "provid[ed] a misleading description" of a similar empirical study by failing to disclose other findings adverse to their fee motion). The Eisenberg 2017 study concludes that it remains true that "fees as a percentage of the recovery tend to decrease as the size of the recovery increases." 92 N.Y.U. L. REV. at 940, 947. 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.

Economies of scale apply equally in antitrust cases. *Edwards*, where the $52 million settlement size fell "somewhere between a typical fund and a megafund," declined class counsel's request to depart upward from the 25% benchmark. 2017 WL 3616638. Previously, plaintiffs cited a table of several other comparable antitrust settlements. Further Submission in Support of Pending Motions for Final Approval and for Attorneys' Fees and Expenses, Dkt. 1988 (N.D. Cal. Oct. 16, 2017). None of the four megafund settlements from this table awarded fees and costs in excess of even 30% of the common fund. *Id.* at 14. Plaintiffs now cite several out-of-circuit outlying fee awards of greater than 30% in megafund settlements. Dkt. 2588 at 21-22 n.18. But "isolated string cites to cases in which class counsel received a higher percentage of the settlement are not particularly meaningful." *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-cv-7126, 2018 U.S. Dist. LEXIS 202526, at *14 (S.D.N.Y. Nov. 29, 2018). It is as easy to cite an similarly lengthy list of cases on the other side, counseling a much lower award, and Bednarz need not go out of district to do so.[3] None of three purportedly "comparable large antitrust class actions" in district are comparable and one of the three is not even large. *Contra* Dkt. 2588 at 22 n.20. The settlement fund in *In re Static Random Access Memory (SRAM) Antitrust Litigation* amounted to only $41.322 million; equal to 15% of potential damages. Motion for Award of Attorney's Fees, No. 07-md-1819-CW, Dkt. 1375 (N.D. Cal. Jul. 27, 2011). Contrary to plaintiffs' characterization, the Court in *In re Cathode Ray Tube (CRT) Antitrust Litigation* did not *award* 30% in fees, it denied both class counsel's original request for 33.3% fee award and the special master's recommended 30%, and instead awarded only 27.5% of the megafund. 2016 WL 4126533 (N.D. Cal. Aug. 3, 2016). Further, the recovery of 20% of estimated damages in *CRT* dwarfs the 11.7% recovered here. Finally, in *In re TFT-LCD (Flat Panel) Antitrust Litigation* the

[3] *In re Wells Fargo & Co. Shareholder Derivative Litigation*, No. 16-cv-05541-JST, Dkt. 312 (N.D. Cal. Apr. 7, 2020) (rejecting a 28.33% fee request and instead awarding 22% of the $240 million fund); *In re High-Tech Employee Antitrust Litigation*, No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015) (rejecting a 19.5% fee request and instead awarding 9.8% of a $415 million settlement); *Nitsch v. DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *12 (N.D. Cal. June 5, 2017) (rejecting a 21.4% fee request and instead awarding 11% of $150 million settlement in order to avoid "windfall profits" to class counsel where class counsel "achieved economies of scale"); *Gutierrez v. Wells Fargo, NA*, No. C 07–05923 WHA, 2015 WL 2438274, at *5 (N.D. Cal. May 21, 2015) (rejecting 25% of $203 million; awarding only 9% in action alleging unfair banking practices); *Alexander v. FedEx Ground Package Sys.,* No. 05-cv-00038, 2016 WL 3351017, at *2-*3 (N.D. Cal. Jun. 15, 2016) (rejecting 22% of a $226 million megafund settlement over wage-and-hour claims as "well above the typical range"; awarding instead 16.4%, "consistent with the higher end of awards in megafund cases"); *In re Charles Schwab Corp. Secs. Litig.*, No. C 08–01510 WHA, 2011 WL 1481424, at *8 (N.D. Cal. Apr. 19, 2011) (awarding attorneys' fees of 9.25% where fund equaled $235 million).

Court granted in full a fee award of 28.6% of the megafund, but only where the settlement recovered 50% of potential untrebled damages. No. 07-md-1827 SI, 2013 U.S. Dist. LEXIS 49885, 2013 WL 1365900, at *7 (N.D. Cal. Apr. 3, 2013).

Plaintiffs argue that any concern about a megafund windfall is obviated because they seek less than their lodestar (a proclaimed .82 multiplier). Dkt. 2588 at 12, 29. IPP co-lead counsel was charged by this Court with "promot[ing] the orderly and efficient conduct of this litigation and to avoid unnecessary duplication and unproductive efforts." Dkt. 194 at 3. Their notion of discharging this responsibility was employing 43 firms to work the litigation to a tune of $41.45 million. Dkt. 2487-2 at 28-29. And now they use this overstaffing to justify their, excessive by all other empirical measures, fee.

While the Court accepted (Dkt. 2322 at 3) DPP class counsel's 0.58 multiplier as a reason to approve a 30% fee award, the 0.82 multiplier asserted by IPP Class Counsel is 40% more than DPP Class Counsel's multiplier. This despite the fact that DPPs recovered 39% of the single damages available at trial, a vast gulf from the 11.7% IPPs recovered. Even if the Court were to award IPP Class Counsel 25% of the gross settlement fund, or $28.4 million, IPPs would recover a lodestar multiplier of over 0.68—still substantially greater than that multiplier 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 appropriately lower given IPPs' more limited success.

IV. Historical considerations of settlement negotiations, case proceedings, and the now defunct Round 2 settlements counsel a further reduction.

In light of Section III above, an appropriate baseline for class counsel's fee award in this case is 12.3% to a maximum of 20% given the market rate revealed through the fee proposal, the size of the case, and the modesty of the damages obtained. Additionally, though, because the circumstances of the case have shifted, Bednarz supplements his earlier objections with the following ones, which require reductions from the baseline.

- By negotiating a set of settlements with an unfair *pro rata* plan of allocation, class counsel betrayed the interests of repealer-state class members. This conflicted representation constitutes an ethical violation under California state law and warrants a fee reduction.
- Even if class counsel's conflicted representation does not rise to the level of an ethical violation,

their fee should be nevertheless reduced to reflect their inadequate first effort in advancing an untenable set of settlements.

- Class counsel are no longer solely responsible for the class benefit and thus is not entitled to the full attorneys' fee as if they were lone movers. Their award must be reduced to fund Bednarz's fee award.
- Class counsel are directly responsible for the necessity of renoticing the class after their initial Round 2 settlements were vacated. Their award must be reduced to absorb the cost of that renotification.

A. Class counsel's breach of fiduciary duty to the repealer-state class members warrants a reduction.

"The representation of clients with conflicting interests and without informed consent is a particularly egregious ethical violation that may be a proper basis for complete denial of fees." *Rodriguez v. Disner*, 688 F.3d 645, 655 (9th Cir. 2012) ("*Rodriguez II*"). "A court has broad equitable power to deny attorneys' fees (or to require an attorney to disgorge fees already received) when an attorney represents clients with conflicting interests." *Id.* at 653 (internal citation omitted). "[A] reasonable fee for an attorney who represents clients with conflicting interests is zero at least when the violation is one that pervades the whole relationship." *Id.* at 654 (internal quotations omitted). "In making such a ruling, the district court may consider the extent of the misconduct, including its gravity, timing, willfulness, and effect on the various services performed by the lawyer, and other threatened or actual harm to the client." *Id.* at 655. "[I]t compounds injustice to allow the attorney to recover fees from the very party injured by the ethical violation." *Id.* at 654 (internal quotation omitted).

In common fund class action cases "these equitable principles" apply "even more assiduously" "because the district court has a special duty to protect the interests of the class, and must act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is." *Id.* at 655 (internal quotations omitted). Indeed, in class actions "[t]he responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009) ("*Rodriguez I*") (internal quotation omitted).

Thus, after *Rodriguez I* pinpointed a conflict of interest stemming from *ex ante* incentive award agreements between class counsel and the named representatives that decoupled the financial interests of those representatives and the absent class members, the district court eliminated class counsel's fee award ***entirely***. *Rodriguez II*, 688 F.3d at 652. And the Ninth Circuit affirmed, notwithstanding the fact that the conflict "did not lead to actual injury" to the class. *Id.* at 658; *accord id.* at 657 (noting argument that the "class suffered no hardship as a result of the conflict of interest."). A "knowing and willful creation of a conflict of interest" itself was a breach of loyalty sufficiently egregious to justify fee forfeiture. *Id.* at 657.

As in *Rodriguez*, class counsel here labored under a conflict of interest, through their attempt to represent a unitary nationwide class, thereby tying the fate of class members with colorable state law claims to those with no colorable claims.[4] Worse than *Rodriguez*, however, here class counsel's divided loyalties inflicted actual harm on class members. Had Bednarz not objected and appealed, class counsel's conflicted loyalties would have lost the repealer-state subclass more than $10 million. And, just with respect to the $44.95 second tranche of settlements fund, those conflicted loyalties may still cost repealer-state class members $4.5 million through counsel's decision to decline retired Judge Westerfield's primary recommendation of allotting 100% of the settlement funds to repealer-state class members. *See* Dkt. 2459-1 at 207-26.

The other *Rodriguez II* factors also weigh in favor of imposing a fee reduction. The conflict of interest was not only gravely detrimental to the disfavored repealer-state class members, it was continuous and ongoing. Class counsel attempted to (and, for a time, did) cram down upon this conflicted class an unfair Procrustean settlement even after this Court had strongly implied that such a nationwide class could not be certified under Rule 23. *See* Dkt. 1735. Class counsel then fiercely defended their conflicted agreement for two years on appeal. Even after a retained netural issued a recommendation that the repealer-state class members be allocated 100% of the settlement funds, class counsel continued to betray repealer-state interests by instead opting for a 90/10 split that was offered only as an "alternative" proposal. *See* Dkt. 2459-1 at 218 n.2.

As in *Rodriguez* "the conflict of interest…did not just happen, nor was it a conflict that developed

[4] Also as in *Rodriguez*, the California Rules of Professional Conduct apply to litigation in this district through this Court's local rules. *See* N.D. Cal. Civ. L. R. 11-4(a)(1). In turn, Rule 1.7(b) of the California Rules of Professional Conduct, prohibits, absent informed written consent from each client, representations of clients "if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client…"

beyond the control or perception of class counsel." *Rodriguez I,* 563 F.3d at 968. *Illinois Brick* has been black letter antitrust law for more than 40 years, and class counsel have hundreds of years in combined antitrust law experience. Class counsel willfully deviated from the overwhelming majority of state-law antitrust settlements in this district that routinely and correctly distinguish between class members who purchased in repealer states and those who purchased in non-repealer states, and thus avoid providing the same remedy to differently-situated class members. *E.g., In re Optical Disk Drive Prods. Antitrust Litig.*, 2016 WL 7364803, at *1-2 (N.D. Cal. Dec. 19, 2016) (excluding residents of non-repealer states from settlement class definition); *In re Cathode Ray Tube Antitrust Litig.*, 2016 WL 721680 (N.D. Cal. Jan. 28, 2016) (excluding indirect purchasers in non-repealer states from distribution under plan of allocation); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900 (N.D. Cal. Apr. 1, 2013) (same).

Repealer-state class members had a "legitimate expectation of loyalty" from their counsel but the expectation went unmet. *Rodriguez II*, 688 F.3d at 656 (cleaned up). As a consequence of counsel's conflict, no fees should be awarded from the repealer-state class members' $40.5 million share of the LG Chem, Hitachi Maxell, and NEC settlements. Or, as an alternate remedy for class counsel's breach of duty to the repealer-state class members, their fee should be reduced by an amount equal to the non-repealer state class members' $4.5 million share of the LG Chem, Hitachi Maxell, and NEC settlements. This amount should then be used as restitution to augment the repealer-state class members' share of the funds to the 100% that retired Judge Westerfield recommended as most equitable. *See* Dkt. 2459-1 at 226.

B. Class counsel's inefficient and deficient representation relating to the vacated Round 2 settlement package warrants a reduction.

Even if the Court declines to find a breach of professional duty, the Court should nonetheless reduce fees below the default baseline award to recognize class counsel's inefficient performance in first seeking to consummate an unfair package of settlements.

When evaluating a motion for fees, district courts should consider not just the result obtained but *how* that result was obtained. Both the skill and the efficiency of class counsel are relevant considerations in adjusting counsel's fee award. *E.g. Cunningham v. County of Los Angeles,* 879 F.2d 481, 485 (9th Cir. 1988) (denoting "skill and efficiency" as a "factor[] that may justify a gap between the hours actually spent and the number of hours deemed reasonable."); *In re Anthem, Inc. Data Breach Litig.*, 2018 WL. 3960068, 2018 U.S. Dist.

LEXIS 140137, at *110-*12 (N.D. Ca. Aug. 17, 2018) (considering the skill and quality of class counsel's work as a relevant *Vizcaino* factor). For example, as part of this inquiry, the course of proceedings and "settlement negotiations may be considered by the district court as a factor in determining a fee award." *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011) (collecting cases).

Neither consideration, skill, nor efficiency, favors an upward deviation when class counsel precipitated a three-year delay by promoting—and then defending on appeal—an untenable set of settlements. *IL Fornaio (America) Corp. v. Lazzari Fuel Co., LLC*, 2015 U.S. Dist. LEXIS 66145, 2015 WL 2406966 (N.D. Cal. May 20, 2015) (noting submission of two earlier unfair settlements as a reason to depart downward to 20%); *In re Baan Co. Secs. Litig.*, 288 F. Supp. 2d 14, 20 (D.D.C. 2003) ("the Court is disinclined to grant Plaintiffs' Counsel's total request given that there were excessive delays and inefficiencies that plagued this litigation …"). "[C]lass counsel cannot satisfy its duty to the class by ignoring the weaknesses in the settlements it negotiated." *In re Classmates.com Consol. Litig.*, 2012 WL 3854501, 2012 U.S. Dist. LEXIS 83480, at *20 (W.D. Wash. Jun. 15, 2012). Far from deviating upward from the 25% benchmark, an additional downward departure is called for. *Id.* at *23 (reducing fee to less than 20% of the common fund to "reflect[] that counsel should not benefit from its efforts to win approval of an inadequate settlement."); *Thompson v. Costco Wholesale Corp.*, 2017 WL 3840342, at *9-*10 (S.D. Cal. Sept 1, 2017) (awarding 15%, down from the requested 25%, to account for earlier attempts that would have betrayed a subclass and did prolong the litigation).

The reduction contemplated in this section could come in a variety of forms. One option, as in *IL Fornaio*, *Classmates* and *Thompson*, is to reduce the overall fee percentage from baseline percentage for the $44.95 million LG Chem, Hitachi Maxell, and NEC settlements' fund to acknowledge the inefficiency with which class counsel reached the result. Alternatively, the court could decline to award any fees attributable to the $10 million that was initially misallocated to non-repealer state class members and was, only after remand, properly reallocated to the repealer-state fund.

C. Class counsel's award should be reduced to pay the fees of objector Bednarz.

Bednarz, in his fee papers, explains why his fee award as a matter of equity should be drawn from class counsel's fee award rather than the class's funds. Dkt. 2587 at 19-21; Dkt. 2591 at 19. The equities discussed there are at their zenith when class counsel's unsatisfactory settlement requires not merely an objection, but

also a subsequent appeal that delays the class's resolution by several years. *See McDonough v. Toys R Us*, 80 F. Supp. 3d 626, 651 (E.D. Pa. 2015) (deducting objector's fees from class counsel's fee "because class counsel fulfilled their responsibility" only "on the second try"); *cf. also Eubank v. Pella Corp.*, 2019 WL 1227832, 2019 U.S. Dist. LEXIS 43074, at *27 (N.D. Ill. Mar. 15, 2019) (former class counsel "also fails to acknowledge the substantial harm that their ill-begotten settlement has caused to the class in this case. That settlement effort, the subsequent litigation overturning it, and the ultimate replacement of class counsel delayed this case for over four years."). The class is already being charged for the services of 43 law firms (three as co-lead counsel and forty as supporting class counsel)! Dkt. 2487-2 at 28. They ought not be charged for another firm and an appellate clinic on top of that. Bednarz's award should be deducted directly from class counsel's fee award.

D. Class counsel's award should be reduced to pay the cost of renoticing the class.

Likewise, class counsel are "duty-bound to reimburse the class for the waste of settlement funds" occasioned by the need to renotice the class. *Radcliffe v. Experian Info Solutions*, 794 Fed. Appx. 605, 608 (9th Cir. 2019). This is the same principle that applies when any supplemental notice is required to correct an omission or misstatement: "Those who made the misstatements should bear the costs of a notice to correct misstatements." Manual for Complex Litigation (Fourth) § 21.313 (2004).

Here, the cost of the iterative notice is $245,938. Declaration of Cameron R. Azari, Esq., Regarding Proposed Class Notice Program, Dkt. 2566-6 ¶48. Accordingly, this amount should be reduced from class counsel's fee award to avoid double-charging the class.

CONCLUSION

For the foregoing reasons, Bednarz respectfully asks the Court to calculate class counsel's baseline fee using no more than the market rate as revealed through Hagens Berman's fee proposal. To reach a reasonable fee, the Court should descend from that baseline to account for the fact that class counsel only obtained the result after fighting tooth and nail with Bednarz at the Ninth Circuit to prevent repealer-state class members from being fairly paid while arguing for reduced compensation for them—a plain conflict of interest that gives this court discretion to deny fees entirely, but, at a minimum, merits a substantial reduction from a fee that would've been awarded had class counsel proposed a fair allocation to begin with.

Dated: April 13, 2020

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 13th day of April 2020.

/s/ Theodore H. Frank
Theodore H. Frank