No. 20-2055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS' PENSION TRUST FUND, *et al.*,
Plaintiffs-Appellees,

v.

STERICYCLE, INC, *et al.*
Defendants.

APPEAL OF: MARK PETRI,
Objector -Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-07145,
Judge Andrea Wood

Opening Brief and Required Short Appendix of Appellant Mark Petri

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Attorney's Signature: /s/ Theodore H. Frank Date: 19 June 2020

Attorney's Printed Name: Theodore H. Frank

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Statutes, Regulations, and Rules

Federal Rule of Civil Procedure 23. Class Actions.

(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:

…

(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

…

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Jurisdictional Statement

The district court had jurisdiction under 28 U.S.C. § 1331 and § 1337 because the underlying claims arise under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. § 78j(b) and § 78t(a), Rule 10b-5 (17 C.F.R. § 240.10b-5), and Sections 11, 12(a)(2), and 15 of the Securities Act, 15 U.S.C. § 77k, § 77*l*, and § 77o. *See* Complaint, Dkt. 1, ¶ 1.[1]

The district court granted in part class counsel's motion for attorneys' fees from the settlement common fund in orders filed May 19, 2020. Dkts. 149, 150. (The district court previously issued final judgment on August 12, 2019. Dkt. 142. This appeal does not challenge the settlement approval.) Mark Petri filed a notice of appeal on June 17, 2020. Dkt. 151. This appeal is timely under Fed. R. App. Proc. 4(a)(1)(A). The United States Court of Appeals for the Seventh Circuit has jurisdiction under 28 U.S.C. § 1291, which provides jurisdiction over appeals from all final decisions of district courts. The post-approval fee decision is an independently appealable collateral order. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

Mark Petri is a trustee for the Julia Winkler Petri 2014 Trust, created under Article III, Section (D) of the Margaret Gregory Reiter 1988 Trust, created by Agreement dated June 9, 1988, as amended July 22, 1992. Dkt. 120-1. The 2014 Trust purchased Stericycle shares during the class period and therefore a class member, and authorized trustee Petri to object. *Id*. Petri timely objected to the fee request, filed a claim, and appeared at the fairness hearing through counsel. Dkts. 120, 120-1. As such, Petri is a "party" entitled to appeal adverse rulings without the need to formally intervene, and

[1] "Axyz" refers to page xyz of Petri's Appendix. "Dkt." refers to docket entries in Case No. 16-cv-07145 (N.D. Ill.) below.

has standing to appeal the fee award and related orders. *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Birchmeier v. Caribbean Cruise Line*, 896 F.3d 792 (7th Cir. 2018).

Statement of the Issues

1. The Seventh Circuit requires a "market-mimicking approach": when setting attorneys' fees in a common-fund class-action settlement "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market" that would have been negotiated at the outset of the litigation. *E.g.*, *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001) ("*Synthroid I*"). Thus, district courts should, where available, consider the provisions of analogous retention agreements reached by sophisticated clients for analogous services and the risk borne by class counsel. *Id.* at 720-21. Did the district court err as a matter of law or abuse its discretion when it ignored retention agreements by plaintiffs in other securities class actions that showed much smaller percentage fee awards should be granted when a settlement is reached prior to discovery and prior to resolution of the motion to dismiss, and instead relied on *ex post* percentage awards made in much smaller and more fully-litigated settlements, and awarded the 25% award requested?

2. Objector Petri presented credible evidence that lead plaintiffs MissPERS and ATRS had previously diverted work to politically-connected attorneys in questionable circumstances and that such pay-to-play schemes resulted in larger fee requests than in cases with less-conflicted lead plaintiffs; Petri requested in July 2019 that the court permit modest discovery to see whether this had happened in this case. Moreover, *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014), holds that Rule 23(h) requires class-member access to "details of class counsel's hours and expenses."

(a) Did the district court abuse its discretion when in May 2020 it refused to permit Petri to conduct any discovery on the grounds that (i) "further discovery" would delay resolution and (ii) Petri had not yet proved the existence of the kickback scheme for which he sought discovery to prove?

(b) Did the district court commit legal error in refusing to require class counsel to produce details of its hours and expenses?

3. The Court holds that lodestar billing is useful in calculating an appropriate hypothetical *ex ante* fee award because the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). Here, Petri argued a lodestar cross-check was unusually important because a rational client would not agree *ex ante* to divert work to lawyers for political reasons, and because the case settled before any discovery had taken place, but the fee request was for over $11 million. Did the district court abuse its discretion in failing to perform a lodestar cross-check and failing to articulate any reason a cross-check should not be performed?

Standard of Review

This Court reviews fee awards for abuse of discretion. *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 973 (7th Cir. 1991). "Abuse of discretion occurs when the district court commits a serious error of judgment, such as the failure to consider an essential factor." *United States v. Lowe*, 632 F.3d 996, 997 (7th Cir. 2011). This Court will "review de novo the district court's methodology to determine whether it reflects procedure approved for calculating" Rule 23(h) awards. *Harman*, 945 F.2d at 973; *Americana Art China v. Foxfire Printing*, 743 F.3d 243, 246 (7th Cir. 2014). Whether the district court's methodology conforms to Circuit law is a question of law. *Pennington v. Doherty*, 110 F.3d 502, 506 (7th Cir. 1997).

Statement of the Case

This case is one of many securities class actions with lead plaintiff Public Employees' Retirement System of Mississippi ("MissPERS"), a public retirement fund. Objecting class member Petri appeals the $11 million fee award—awarded before there was any merits discovery, without any district-court investigation into the lodestar of the class counsel, without any investigation into the credible allegations of pay-to-play and possible kickbacks to politically-connected law firms, and disregarding Petri's evidence that market rates for pension funds settling similar securities litigation in similar procedural postures were substantially below 25% of the net settlement fund awarded here.

A. Stericycle's dubious billing practices are publicized, litigated, and successfully settled years before plaintiffs file the underlying suit.

In January 2013, the state of New York announced its settlement of claims with Stericycle, a medical waste disposal company, that allegedly increased the rates charged to customers automatically without notice, and in violation of customer contracts. New York Attorney General's Office, *A.G. Schneiderman Announces $2.4 Million Settlement With Stericycle For Overcharging NY State And Local Entities* (Jan. 8, 2013).[2] In a previously-sealed *qui tam* action filed in 2008, the relator's complaint alleged that thirteen states and the federal government were defrauded. *Id.* The New York settlement provided $2.4 million based on actual damages of $820,000, *id.*, nearly the full measure of treble damages New York could have been entitled to under the False Claims Act.

[2] Available at: https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-24-million-settlement-stericycle-overcharging-ny-state.

The remaining states and the federal government settled the *qui tam* action in 2015 for $28.5 million—over double the actual damages of $13.57 million. *United States ex rel. Perez v. Stericycle, Inc.*, No. 08 C 2390, 2016 WL 369192, 2016 U.S. Dist. LEXIS 11277, at *5 (N.D. Ill. Feb. 1, 2016).

Following the unsealing of the *qui tam* complaint, a land rush of consumer complaints were filed against Stericycle and shortly thereafter consolidated to the Northern District of Illinois. *In re Stericycle, Inc.*, 959 F. Supp. 2d 1356 (J.P.M.L. 2013). Nevertheless, Stericycle's business continued to grow briskly and its share price increased to about $149—until October 23, 2015, when the first of several bad earnings reports caused a one-day loss of $28.73. Dkt. 84 ¶ 149. Securities litigation followed.

B. Shareholders sue Stericycle, the court appoints Bernstein Litowitz lead plaintiff, and the case settles during a pending motion to dismiss.

On July 11, 2016, two Florida municipal pension funds filed a putative class action against Stericycle and its directors based on the revelations of the settled *qui tam* action and pending consumer actions, alleging that the disappointing financial results of Stericycle and resulting stock drops were caused by customer attrition due to Stericycle's "fraudulent billing practices" in automatically increasing its rates. Dkt. 1 at 5.

Plaintiffs acknowledge, and even rely on in their amended complaint, that "multiple court proceedings that have been brought against Stericycle on behalf of both its governmental customers and its private customers" relating to the automatic price increases at the center of this case. Dkt. 84 ¶ 7. Plaintiffs cite both the *qui tam* settlement, and also the later settlement of the consumer MDL in March 2018 for $259 million on behalf of non-governmental customers arising from the same practices. *Id.*; Dkt. 118 at 13. These settlements "confirmed" "[t]he contours of the fraud" at issue. Dkt. 84 ¶ 8.

Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") are the only attorneys on the face of this complaint. Dkt. 1. On September 12, 2016, the St. Paul Teachers' Retirement Fund Association ("St. Paul") moved for appointment as lead plaintiff though its lead counsel, Pomerantz LLP. Dkt. 25. MissPERS and Arkansas Teacher Retirement System ("ATRS") jointly moved for appointment through Bernstein Litowitz the same day. Dkt. 28. Before the court decided the competing motions for appointment, St. Paul voluntarily withdrew its motion in deference to the greater losses of MissPERS and ATRS. Dkt. 36. The court granted the unopposed appointment on October 31. Dkt. 42. Although two firms had initially sought appointment, the district court did not inquire into any retention agreements these potential plaintiffs may have had regarding fees.

Bernstein Litowitz filed an amended complaint on behalf of MissPERS and ATRS. In March 2018, before the court decided an April 2017 motion to dismiss, plaintiffs moved, unopposed, to file an amended complaint. Defendants again moved to dismiss in May 2018. The district court did not act on the new motion by November 2018, when the parties advised they were "engaged in settlement discussions." Dkts. 41, 81, 84, 91, 99.

In February 2019, the parties jointly moved for preliminary approval of their settlement, which provides a $45 million common fund. A33. The settlement and motion for preliminary approval was co-signed by attorneys from the Mississippi-based firm of Gadow Tyler, PLLC ("Gadow"), the first time their name appeared in the litigation. A72; Dkt. 108. The district court granted preliminary approval using the parties' proposed order, which included a stay of all case activity not pertaining to settlement approval. A12.

Plaintiffs moved for a fee award of 25% of the gross settlement fund. Dkt. 116. Plaintiffs also disclosed the involvement of Klausner, Kaufman, Jensen & Levinson P.A.

("Klausner") for the first time—deep within a declaration accompanying the motion. Dkt. 119 at 39 n.8. The fee motion and accompanying papers suggested the Gadow and Klausner firms would receive undisclosed fee awards for their role as "Plaintiffs' Counsel." *Id.* Plaintiffs did not disclose then what portion of the fee award would go to Gadow and Klausner. Lodestar information for Bernstein Litowitz and Gadow was limited to a summary table of the number of hours billed by each attorney and their purported hourly rates, Dkt. 119-6, Ex. 1. The papers provided a general summary of Gadow's work on the case: "consulting with Lead Counsel regarding litigation strategy, legal research, reviewing substantive pleadings throughout the litigation, attending the April 2018 mediation in Chicago, Illinois, and consulting on settlement negotiations and strategy." Dkt. 119-7 ¶ 2. (Klausner later provided a similar declaration, along with claimed hours, in response to Petri's objection. Dkt. 133-4.)

C. Mark Petri objects and moves for limited discovery.

On July 1, 2019, Mark Petri objected to the fee request as the trustee of a trust shareholder class member. Dkt. 120. In particular, Petri noted that the attorneys were seeking $11.25 million though no discovery had taken place and the court had not ruled on any substantive motions. *Id.* at 7. Petri also objected that the fee request did not disclose how the fee would be allocated among the plaintiffs' firms, and that plaintiffs had failed to provide information necessary to analyze the lodestar. *Id.* at 14.

Petri on the same day moved to lift the stay so that he could seek discovery from named plaintiffs. A149. The proposed discovery requests, later filed on July 8, sought hourly billing, which plaintiffs have never provided in this case, and the fee-sharing and distribution between the firms. A175.

Petri also sought discovery of political donations and volunteer work given by plaintiffs' attorneys to Mississippi's Attorney General Jim Hood. A176. Petri presented evidence that Bernstein Litowitz and MissPERS may divert fees to politically-connected

firms that do no useful work in the underlying case, and Petri sought to establish whether this had occurred here. A156-63. Petri argued that ATRS's involvement could not correct any political corruption by MissPERS, citing investigation of class litigation in the District of Massachusetts where ATRS was class representative and a court-ordered investigation discovered that class counsel diverted $4.1 million to a politically-connected firm that did no work in the case. A163-66 (discussing *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, 404 F. Supp. 3d 486, 509 (D. Mass. 2018) ("*State Street I*")). ATRS's director testified that he did not review billing arrangements with outside counsel whatsoever and he "had no responsibility to learn of it." *State Street I*, 404 F. Supp. 3d at 509.

Petri contended that the pay-to-play history of MissPERS, and ATRS's history of failing to provide oversight, likely disadvantaged the class, who were paying an excessive amount of attorneys' fees for a settlement of this size and early resolution prior to discovery. Dkt. 120 at 7. Petri observed that other sophisticated clients would insist on a smaller percentage of attorneys' fees, that firms unencumbered by pay-to-play appear to charge smaller percentages, and that the risks of this litigation were relatively modest given the procedural posture of the case and the fact that it was based on previously-successful *qui tam* litigation. *Id.* at 8. Petri argued that a lodestar cross-check should be performed in this case for the same reasons. *Id.* at 13.

D. MissPERS awards pay-for-play business to political supporters of Mississippi Attorney General Jim Hood.

Petri raised two distinct concerns about MissPERS's pay-to-play practices. First, previous litigation against Bernstein Litowitz suggested that MissPERS directs Bernstein Litowitz to divert payments to politically-connected counsel in Mississippi. A154. Second, MissPERS appear to award work *only* to firms that also donate to then-Attorney General Jim Hood, including all of the plaintiffs firms here. A155.

1. Former Bernstein Litowitz partner files whistleblower complaint regarding MissPERS kickback scheme.

Lead plaintiff MissPERS is among the most prolific public retirement funds in securities litigation. *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP* unsealed pleadings by a former Bernstein Litowitz partner alleging MissPERS's practice of undisclosed payoffs to politically-chosen lawyers. 814 F.3d 132, 143 (2d Cir. 2016) ("*BLB&G*"). According to the complaint, after MissPERS reached a settlement in principle in a securities class action, Bernstein Litowitz assigned unnecessary legal projects and handsomely compensated a Mississippi lawyer with close ties to the Mississippi Attorney General's Office. *Id.* at 137. When confronted about the payment in one case, another Bernstein Litowitz partner allegedly asked, "Do you ever want us to work with Mississippi again?" *Id.* Neither this Mississippi attorney nor the fees paid were ever disclosed to the court that approved the underlying securities settlement. *BLB&G*, No. 14-cv-6867, 2016 WL 1071107, 2016 U.S. Dist. LEXIS 35385, at *5 n.4 (S.D.N.Y. Jan. 12, 2015). In fact, fees were allegedly paid to *four* other Mississippi law firms not disclosed to the approving court. *Id*. The former partner alleged that "he developed 'similar concerns' related to other cases in which the firm assigned work to friends or relatives of members of the Mississippi Attorney General's Office." *Id.* at *5. *BLB&G* settled confidentially, 814 F.3d at 136, and the allegations, which Bernstein Litowitz unsuccessfully attempted to keep under seal, were never resolved by any court.

MissPERS's own filings lend support for the idea that the pay-to-play allegations are substantially true. In an effort to keep the whistleblower complaint forever sealed, Bernstein Litowitz sent a letter to the law firm representing the whistleblower from George W. Neville, Special Assistant Attorney General of Mississippi. A88. (Neville logged time in this case. Dkt. 119-2 at 5.) Neville asserts that the Attorney General is "not constrained by the parameters of the traditional attorney-client relationship." A89.

Instead, he "serves not only as counsel to the State, but is the State for the purposes of litigation." *Id*. Moreover, "it is a policy of the State of Mississippi and its agencies to engage local counsel in litigation and, in particular, a policy of this office to provide work to qualified minority attorneys such as the local counsel in the *Satyam* case." A90.

This policy has teeth, as the letter stresses: "no state agency may employ legal counsel without the prior approval of the attorney general and any such special legal counsel appointed performs their duties under the ***supervision and control of the attorney general*** and serves at his pleasure and may be dismissed by him." A91 (emphasis in original). The letter also asserts that the former partner "was aware that a judgment was made by every law firm involved—including lead counsel for Mississippi and its agency MPERS—that it was unnecessary to submit affidavits from, or otherwise disclose, those lawyers who were not named class counsel on the case and were to be paid out of . . . lead counsel's award." A90.

According to Neville, MissPERS decided against disclosing payments to the other firms because a S.D.N.Y. Local Rule that for years "formerly required such disclosure had been rescinded before the fee application . . . was filed." *Id.* Citing *BLB&G*, the Committee re-amended its local rules to again require the disclosure of "any fee sharing agreements with anyone" for settlements under both Rule 23 and 23.1. S.D.N.Y 2016 Committee Note to Local Rule 23.

In sum, Petri argued, in prior litigation Mississippi's Attorney General asserted he has boundless authority to divert work to local firms and indeed MissPERS policy *requires* outside firms to retain undisclosed "local counsel." A90. In response to Petri's motion, Bernstein Litowitz argued the *BLB&G* complaint was "withdrawn," but the firm did not deny any of the particulars above. Dkt. 134 at 11.

2. All plaintiffs' firms representing MissPERS donate directly and sometimes indirectly to former Mississippi Attorney General Jim Hood.

Petri argued below that when Jim Hood was first elected Mississippi Attorney General in 2003, he received no campaign contributions from any out-of-state securities firms. A158. In February 2006, Hood retained Bernstein Litowitz for the first time as lead counsel for MissPERS in the Delphi Corporation securities class action "just days after receiving $25,000 in donations" from the firm's attorneys. *Id.* (quoting Editorial Board, *Pay-to-Play and the Tort Bar*, WALL ST. J. (Oct. 31, 2009)). Between 2005 and 2011, Bernstein Litowitz donated $122,000 to Jim Hood, which is more than any other securities firm and represented 3.1% of *all* campaign contributions Hood received in this period. Dkt. 120-8 at 7. Courts appointed Bernstein Litowitz to represent MissPERS in ten securities cases in this period, more than three times as many as any other firm. *Id*.

Between October 13 and 25, 2016, four Bernstein Litowitz partners in New York and Louisiana donated a total of $20,000 to Jim Hood's campaign, three years before his next election campaign, and just days after St. Paul Teachers' Retirement Fund withdrew its motion for appointment in this case. *See* A159 (citing undisputed exhibits in record).

In 2019, Bernstein Litowitz partners donated $21,800 to Hood in his unsuccessful campaign to be elected governor of Mississippi. A159. These contributions came from seven different partners (all outside of Mississippi) between April 5 and 30, 2019—shortly after the district court granted plaintiffs' motion for preliminary approval. *Id.* In addition to these contributions, Bernstein Litowitz partner G. Anthony Gelderman (from Louisiana) donated on at least two other occasions to Jim Hood, and the firm itself contributed $15,000 directly to Hood and provided unspecified "in-kind" benefits on two occasions in 2016 and 2017. *Id*.

Gadow, a Mississippi firm never mentioned in this case prior to co-signing the motion for preliminary approval, also has a track record of supporting Hood. The firm itself provided $13,500 of in-kind benefits regularly from 2016 to 2018, along with $5,000 cash and a $250 contribution from "Gadow Law," sharing the same address as the firm, each in 2017, two years before Hood's next election campaign. A161. Additionally, all four members of Gadow, including late name partner John Gadow, individually contributed reported amounts directly to Hood's campaign, mostly *in between* election years. *Id*. John Gadow's widow and then-college-age daughter also contributed directly to Hood's campaign between 2016 and 2018. *Id.* Before Hood appointed their predecessor firm "Pond, Gadow & Tyler" to a high-profile antitrust case against Microsoft, it was primarily a bankruptcy firm. *Id.* at 8. To this day, Gadow files hundreds of personal bankruptcies a year for flat fees as low as $900. *Id*. Gadow Tyler's website has the URL http://www.bankruptcylawjackson.com, and the front page does not mention securities law as of July 28, 2020.[3]

Finally, the Florida-based Klausner law firm (first mentioned in a declaration filed with plaintiffs' June 17, 2019 fee motion) also recently contributed $1,000 to Jim Hood's gubernatorial campaign, on April 11, 2019. *Id.* at 7.

Petri argued that the direct pecuniary contributions of Bernstein Litowitz and Gadow understate their support for Jim Hood because both firms have made massive *indirect* contributions to his campaign and at least two immediate family members of Gadow partners have volunteered or worked directly for the Hood campaign. *Id.* at 9.

During Hood's last election, in 2015, by far the biggest contributor was the Democratic Attorneys General Association ("DAGA"), which is a Section 527

[3] *See also* http://web.archive.org/web/20180823033418/http://www.bankruptcylawjackson.com/ (August 2018 Internet Archive).

organization—a tax-exempt advocacy group that can raise unlimited money from donors. 26 U.S.C. § 527. Over 40% of Hood's fundraising for his 2015 reelection, $880,000, came from DAGA. Dkt. 120-22 at 18, 19, 26, 29, 31. In turn, securities plaintiffs' firms like Bernstein Litowitz were significant funders of DAGA—particularly in 2015, an off-cycle election year where DAGA sent money to only one candidate: Jim Hood. Dkt. 120-22.

For example, twelve days before the election, on October 22, 2015, Bernstein Litowitz contributed $100,000 to DAGA (Dkt. 120-22 at 5) and the ***very same day*** DAGA sent Jim Hood $150,000. *Id*. at 26. On August 28, 2015, John Gadow and Blake Tyler, PA (consisting of two other Gadow partners) made contributions to DAGA totaling $100,000. *Id.* at 5, 12. In 2015, DAGA received at least $625,000 from securities firms including: Bernstein Litowitz; the Gadow law firm; Blake Tyler, PA; Lieff Cabraser; Cohen Milstein; Kaplan Fox; Grant & Eisenhofer; Baron & Budd; Kessler Topaz; and Motley Rice. A163 (citing undisputed exhibits in record). All of these firms have represented MissPERS. Dkt. 120-8 at 10. Petri argued that class counsel's combined $200,000 contribution to DAGA in 2015 were *de facto* contributions to Hood. A163.

Additionally, immediate family members of Gadow provided direct contributions by working or volunteering for the Hood campaign. A163.

E. ATRS fails to provide oversight in *State Street*.

Because ATRS's recently-retired director testified in other litigation that the fund does not inquire about questionable referral-fee arrangements, Petri argued that ATRS could not safeguard its own potential conflicts, let alone those of MissPERS. Dkt. 120 at 12.

Recently, the District of Massachusetts scrutinized lead plaintiff ATRS for a $4.1 million dollar "bare referral fee" paid by different class counsel to politically-connected lawyers. *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. 11-10230-MLW, 2020 U.S.

Dist. LEXIS 33552, at *134 (D. Mass. Feb. 27, 2020) ("*State Street II*"). The fee was not disclosed to that court until well after the initial fee award—and only after the district court appointed a special master to investigate the fee award. *Id*. at *19.

State Street did not involve Bernstein Litowitz, but instead, Labaton Sucharow LLP ("Labaton"), which represented ATRS. Pensions like ATRS generally retain monitoring counsel for an open-ended engagement to identify potential securities-law violations that victimize the client fund. *See generally* Michael J. Kaufman & John M. Wunderlich, *The Bromberg Balance: Proper Portfolio-Monitoring Agreements in Securities Class Actions*, 68 SMU L. REV. 771 (2015). Bernstein Litowitz was on the cutting edge of this trend and has been monitoring counsel for MissPERS since about 2006 and ATRS since 2004. *Pay-to-Play and the Tort Bar*, *supra*.

Labaton was so eager to serve as ATRS' monitoring counsel like Bernstein Litowitz that it agreed to share 20% of its future ATRS fees with Chargois & Herron, a law firm that then had offices in Arkansas and Texas but had no experience in securities. *State Street I*, 404 F. Supp. 3d at 509-10. The *State Street* special master deposed Damon Chargois and Labaton partners about this fee-sharing agreement, and they agreed essentially that Chargois was paid $4.1 million from a settlement he did no work toward because he introduced an Arkansas state senator ten years earlier. *Id.* at 512. The judge presiding over *State Street* expressed skepticism about this testimony, and "whether all those millions of dollars stopped with Mr. Chargois." *Id.* at 513. Indeed, when Chargois and Labaton were arguing about fees by email, Chargois wrote: "***We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas***." *Id*. at 510 (emphasis in original).

George Hopkins, the executive director of ATRS until fall 2018, not only didn't know about the "referral" arrangement that resulted in Labaton paying $4.1 million to an attorney that did no work in *State Street*, but Hopkins testified that he didn't *want* to

know. A115-16. Even before the $4.1 million payment to Chargois emerged, Hopkins had testified that there was "a pay grade issue for me to look at all those hundreds of pages" of class counsel's fee request. A126. Hopkins left ATRS in November 2018, *see* Michael R. Wickline, *Some on panel urge review of systems' rehiring of law firm*, Arkansas Democrat Gazette (May 17, 2020), just three months before the settling parties here submitted this settlement for approval, Dkt. 108.

F. Petri provides evidence that market rates are well below 25% in other securities class actions when less politically-active lead plaintiffs negotiate rates.

Petri argued that other public investment funds do not allow such rates on similarly-sized settlements obtained prior to resolving the motion to dismiss. Dkt. 120 at 8. For example, New York State Common Retirement Fund ("NY Funds") allows only an 8% fee for a $45 million fund settled prior to resolution of the motion to dismiss. A142. Similarly, another Bernstein Litowitz client, the Chicago School Teachers' Pension explained that "Chicago Teachers entered into a retention agreement with BLB&G that provided for a percentage fee of 15% if a settlement was reached after a ruling on a motion to dismiss and before a ruling on summary judgment." A202 ($50M settlement).

Petri's filings cited empirical research showing that law firms engaged in pay-to-play charge higher rates. Dkt. 120 at 8; A158. "The evidence presented here shows that the hard bargaining by state pension funds [for lower attorneys' fees] largely disappears when decisionmakers for those funds receive political contributions—particularly when those contributions are large." Stephen J. Choi, *et al.*, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 678 (2011) ("Choi").

G. Nearly ten months after the fairness hearing, the district court denies discovery and awards substantially all the fees class counsel requested.

At the fairness hearing on July 22, 2019, the district court reserved judgment on both the fee motion and Petri's motion for discovery. A186. After assuring itself that Petri did not oppose approval of the settlement for a $45 million common fund, the court granted final approval. Dkt. 140 at 43.

On May 19, 2020, the district court overruled Petri's objection, denied his motion to lift stay on discovery, and substantially approved the entire requested 25% fee award, though on the net fund, rather than the gross fund, a reduction of approximately $225,000 depending on administrative costs, and a small reduction in requested expenses. ER4.

The court decided that 25% was an appropriate fee award given the good outcome and because higher percentages had been awarded in other cases. A3. The court faulted Petri for attaching no empirical data (although Petri did cite such data), A158, and for instead attaching a "letter from an unrelated class action in another district." A3. Because the court decided 25% was an appropriate percentage, it found that a lodestar crosscheck was unnecessary. *Id*.

As for discovery, the district court found that Petri "provided no evidence of any wrongdoing or illicit understanding between Class Counsel and MissPERS." A5-6. "Absent such evidence, the Court finds the mere allegation that Class Counsel has made political donations to the campaigns of a figure associated with MissPERS insufficient to justify additional discovery." A6. Further, the court noted that it "sees no reason to delay payouts to the class by allowing further discovery." *Id.*

Petri timely appealed this final decision. A205.

Summary of the Argument

The district court awarded over $11 million in attorneys' fees in a case where no discovery had occurred and before the court decided any substantive motions. Objecting class member Mark Petri argued that class members were overpaying the lawyers because this was a pay-to-play securities action: there was a strong likelihood that law firm Bernstein Litowitz diverted pointless legal work to politically-connected firms at the behest of co-lead plaintiff MissPERS and its executive, former Mississippi Attorney General Jim Hood. In exchange, MissPERS recommended a 25% fee percentage, when similarly-situated plaintiffs agree to 8% to 15% under the circumstances. The district court's denial of discovery caught Petri in a Catch-22: despite credible allegations regarding this kickback scheme in a previously-filed whistleblower complaint, Petri could not *prove* the diversions to other firms were political kickbacks without discovery and thus was not permitted to make discovery necessary to make that case. A6. The district court further bootstrapped by waiting nearly ten months to rule against Petri's motion for discovery on the grounds that discovery would delay the case—when the modest discovery and associated briefing would have concluded well before then had the court permitted discovery when Petri first made the motion.

Even without discovery regarding the kickbacks, the district court committed an error of law in setting a fee award based only on an abstract percentage without reference to what this Court actually requires—a fee award that "emulates the incentives a private client would put in place" *ex ante* by a savvy and unconflicted private client in order to maximize recovery. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*"). The district court categorically failed to reckon such a fee award, and looked at nearly none of the relevant benchmarks. The district court disregarded a fee agreement used by a less-conflicted lead plaintiff as a "letter from an

unrelated class action in another district." A3. But real fee agreements by vigilant clients are relevant, and they show an intuitively sensible pattern: percentage awards are smaller at earlier stages of the case, when the attorneys have done less work and bear less risk. Indeed, the court set the fee award without even inquiring into the named plaintiffs' own retention agreements. Further, the market-rate percentage for attorneys' fees is smaller when the fund is larger, as this Court observed in *Synthroid II* and *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956 (7th Cir. 2013). The district court did not consider this effect, nor the fact that class counsel rode the coattails of previously-successful litigation against Stericycle for its billing practices, nor that it bore little risk at the time of settlement because the motion to dismiss remained unresolved. Having failed to apply this Court's market-approximating approach, the fee award should be vacated.

Separately, the district court erred as a matter of law in approving the fee request without requiring class counsel's detailed billing. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). The court further erred in refusing to perform a lodestar cross-check under the unique facts of this case. In this Circuit, the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). As Petri argued below, the detailed billing was unusually important in this case in order to discern what portion of 25% fee award endorsed by named plaintiffs was justified by work rationally incurred in the case—and what portion of the fee award represents bloat from political patronage, which a faithful agent for the class would not agree to *ex ante*. The lower court's failure to articulate a *reason* it would not check the lodestar here was independent error and requires vacatur.

Argument

I. The district court erred as a matter of law by failing to consider evidence of the appropriate market-approximating rate for a $45 million securities common fund settled prior to resolution of the motion to dismiss.

The district court failed to set an appropriate percentage as this court required in *Synthroid I*, and failed to even look at all the appropriate evidence. The Seventh Circuit has "held repeatedly" that in common fund cases such as this, an appropriate fee is "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718. The district court erred as a matter of law because it ignored market evidence of an appropriate rate.

First, the district court erred when it credited a cherry-picked selection of cases where attorneys' fees of 30% or more were approved in dissimilar and smaller settlements, but refused to look at "actual agreements" by other clients engaged in such litigation, though such contracts "*define* the market." *Synthroid I*, 264 F.3d at 719-20 (emphasis in original).

Second, the district court erred by placing weight on plaintiffs' proposal to be paid "only" 25% given MissPERS's history, as Petri argued, of directing Bernstein Litowitz to employ favored Mississippi attorneys and all three firms' large contributions to Jim Hood's political campaigns.

A. Retention agreements by sophisticated clients in comparable securities litigation was relevant as a matter of law under *Synthroid I*, and the district court improperly ignored them.

The district court credited plaintiffs' cherry-picked selection of fee awards from smaller settlements, mostly settled in cases further along in litigation, for the proposition that "fees of one-third to 40% of the class settlement amount are typical in this District." A3. But the district court ignored this Circuit's command to employ

market-approximating rates, which would not be simple percentage figures undifferentiated by the size of the fund or the stage of the case. None of the cases that the district court relied upon for such percentages were at all analogous. Worse, the district court committed an error of law in disregarding evidence that Petri provided of other clients in similarly-sized settlements with similar procedural postures who insisted on much more modest fee awards.

This Court has "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *Synthroid I*, 264 F.3d at 718. "When a fee is set by a court rather than by contract, the object is to set it at a level that will approximate what the market would set. … The judge, in other words, is trying to mimic the market in legal services." *Gaskill v. Gordon*, 160 F.3d 361 (7th Cir. 1998) (cleaned up). The judge "must step in and play surrogate client." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

Essentially the district court imagined that the market rate or *ex ante* fee agreement would consist of one term: a percentage, but this does not capture the real or idealized market for legal services. There are at least two important variables.

First, a surrogate client would agree to a "market rate, as a percentage of recovery, [that] likely falls as the stakes increase." *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*"). As a matter of rational economic incentives, this phenomenon occurs because it does not take ten times as much work to resolve a $45 million litigation as a $4.5 million suit—"the recovery will not necessarily increase in proportion to the number of hours devoted to the case." *Synthroid I*, 264 F.3d at 721.

Second, the market has shown that "[s]ystems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements." *Synthroid I*, 264 F.3d at 722. That is, fees in private agreements increase as the case

passes key milestones and the risk to attorneys increases. The phenomenon does not only exist in Seventh Circuit case law: other securities plaintiffs—when not guided by political concerns—insist on lower rates for large settlements struck prior to discovery taking place. *E.g.*, A142 (N.Y. Funds fee grid).

The reason percentages increase for later stages of litigation is two-fold. First, the further a case proceeds, the more hours it takes to prosecute, and rational attorneys and understanding clients will bargain to allow for that expense. Second, as the case clears each hurdle of litigation—motion to dismiss, summary judgment, certification, and trial—plaintiffs and their counsel bear more risk of failure. By settling *prior* to resolution of the motion to dismiss, plaintiffs' counsel ensures they will not walk away with nothing. If plaintiffs clear these hurdles, the reward to counsel must be higher because in the counterfactual where the case had been dismissed, they would have earned nothing. For this reason, sophisticated private agreements, including those cited by Petri, take into account both the percentage of the fund and the stage of proceeding. As an "earlier settlement" of above-average size this case warrants lower fees than in *Synthroid II*, where the late-stage risk was "significant." 325 F.3d at 978.

The district court misunderstood Petri's argument that the case was less risky due to the early settlement. A2. Certainly *ex ante* there was some risk the case would be dismissed, though perhaps less than in most cases because successful False Claim Act settlements suggested that many of plaintiffs' allegations had some grounding. But class counsel eliminated this risk *ex post* by settling early. While this does not influence the strength of the case *ex ante*, rational clients know that earlier settlements require less work and risk by the attorneys working for them, which they build into their *ex ante* fee schedule. If they did not, and instead stipulated to a 25% fee under any circumstance, plaintiffs' counsel would have too strong an incentive to settle early to maximize the return per hour invested even if it results in a less optimal result for the class.

Sophisticated private plaintiffs in complex contingent-fee litigation negotiate fees that increase in percentage as the case progresses to better reward class counsel for taking larger risks and successfully overcoming litigation hurdles.

The court committed legal error when it failed to look at "*ex ante* arrangements [that] have been widely available since the changes to securities practice." *Synthroid I*, 264 F.3d at 720. While 15 U.S.C. § 78u-4(a)'s mechanical lead-plaintiff selection process precludes competitive bidding between lead plaintiffs in this case, the district court could have looked to fee structures set in securities actions where firms *did* compete for appointment by a less-conflicted institutional plaintiff. These proposals likewise show a declining percentage of the fund tends to be awarded, just as this Court previously observed. "A court must give counsel the market rate for legal services" and the "market rate, as a percentage of recovery, likely falls as the stakes increase." *Synthroid II*, 325 F.3d at 975. The retention agreements of other sophisticated clients show that the market rate for large settlements obtained prior to resolution of the motion to dismiss is much less than 25%. For example, NY Funds' retention agreement would allow an 8% fee for a $45 million settlement reached prior to resolution of a motion to dismiss. A142. The district court dismissed this evidence as "an objector's letter from an unrelated class action in another district," but in fact it constitutes an example of the benchmarks under *Synthroid I*.

Petri also provided an example of a $50 million settlement litigated by Bernstein Litowitz, where Chicago Teachers had negotiated a 15% fee for litigation farther along than in this case—after the motion to dismiss, but prior to certification or summary judgment. A201. This retention agreement is highly relevant as it shows the rate that an unconflicted union agreed to pay the same lead counsel—Bernstein Litowitz—in litigation that settled successfully for nearly the same amount—$50 million. A202. Indeed, the fact that it settled for $50 million *after* the motion to dismiss was resolved

suggests that it could not have seemed a *much* more valuable case *ex ante* than this case. The district court's failure to even mention this evidence—one of the *Synthroid I* benchmarks—was legal error.

Instead, the district court relied on fee awards cherry-picked by class counsel's briefing showing the approval of awards "between one-third and 40%." A3. The district court clearly erred in adopting class counsel's misstatement of the holdings: the actual range was less than 20% to one-third. Moreover, not one of these cases concerned a settlement as large as $45 million that was settled prior to the motion to dismiss.

- *Taubenfeld v. Aon Corp.*, affirmed a 30% award for a $7.5 million settlement. 415 F.3d 597, 600 (7th Cir. 2005).
- *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, predates *Synthroid I* and awarded 33⅓% fee of a $14 million securities fund, where the plaintiffs had survived dismissal years earlier. No. 97-cv-7694, 2001 U.S. Dist. LEXIS 20397, at *8 (N.D. Ill. Dec. 6, 2001).
- *Goldsmith v. Technology Solutions Co*., is even older and awarded 33⅓% fees (less than half of lodestar) from a $4.6 million settlement reached nearly at "the conclusion of fact discovery." 1995 U.S. Dist. LEXIS 15093, at *10, *15, *28 (N.D. Ill. Oct. 11, 1995).
- *Swift v. Direct Buy, Inc.*, awarded "less than 20% of the [attributed $4.9M] Total Settlement Value," which was "below the fees and expenses [counsel] actually incurred" in a case that survived a motion to dismiss and where limited discovery had occurred. No. 2:11-cv-401, 2013 U.S. Dist. LEXIS 152618, at *30, *32 (N.D. Ind. Oct. 24, 2013).

The district court cites *Swift* and *Goldsmith* as "cases upon which Petri relies, which he claims support awarding Lead Counsel a lower fee award," A3, but in fact Petri cited these cases to distinguish them because plaintiffs relied on them in support

of their fee motion. *Compare* Dkt. 118 at 8 *with* Dkt. 120 at 9. Petri merely distinguished these cases for being smaller and later-settled (and in the case of *Swift*—where less than 20% had actually been awarded—lower fees). This motley crew of smaller and more-fully-litigated settlements in no way established that "30% or more" is the baseline market-approximating rate for a $45,000,000 securities settlement reached before discovery began.

The district court also found that the settlement was a good result considering "Stericycle was reporting only $52 million in available cash at the time of the settlement." A2. Plaintiffs had argued that this proved the case risky, but Petri pointed out that this was a *non sequitur* because Stericycle is not near bankruptcy, and its market value is in the billions. Dkt. 138 at 11. The district court's finding is analogous to asserting Elon Musk is not really a billionaire because his wealth is tied up in investments rather than cash.

The settlement result demonstrates that the quality of representation and stakes of the case cannot save the fee request. Most securities cases settle. Plaintiffs alleged a loss of approximately $7.6 billion in market capitalization from the underlying fraud allegations. Dkt. 84 ¶ 15. The $45,000,000 recovery is 0.6% of this alleged loss. The class is compromising over 99% of the alleged loss, while class counsel is receiving close to three times their purported (undetailed and perhaps inflated) lodestar.

B. MissPERS's conflicts mean the district court erred in relying on their *ex post* recommendation of a 25% fee award.

While the retention agreements cited by Petri involved different litigation with different *ex ante* risks, they were more reliable indicators than lead plaintiffs' recommendation to award 25%. The district court erred in crediting "Lead Counsel's" own fee recommendation, A3, which was unreliable due to the apparent pay-to-play relationship between MissPERS and Bernstein Litowitz.

Securities class actions have long been recognized as fostering an unhealthily cozy relationship between plaintiffs' firms and the named plaintiffs they most frequently represent. The Private Securities Litigation Reform Act (PSLRA) attempted to stem this problem by, *inter alia*: eliminating class-representative bonuses, limiting named plaintiffs to five representative actions in any three-year period, and requiring courts, after an application process, to presumptively select the lead plaintiff with the largest loss in the underlying security. 15 U.S.C. §§ 78u-4(a)(3)(B)(iii); 78u-4(a)(3)(B)(vi); 78u-4(a)(4). The idea was that large sophisticated funds would select counsel on a competitive basis and reduce the windfalls to class counsel. And this has happened in some instances. Choi, *supra*. But in other instances, institutional investors select not on the basis of the best value to the class, but the best value to themselves or their managers: "an informal quid pro quo could develop in which law firms specializing in securities class actions would contribute to the campaign coffers of the elected officials who oversee those funds, and that, in exchange (and in the hopes of getting more contributions), those officials would use their control over the funds to select those firms to serve as lead counsel for cases in which the funds are the lead plaintiff." *In re Cendant Corp. Litig.*, 264 F.3d 201, 270 n.49 (3d Cir. 2001). Some institutional plaintiffs have become captured by class counsel, "complacent and unwilling to object to an excessive fee request, thus defeating the Reform Act's goal of lead plaintiff-controlled, rather than lead counsel-controlled, litigation." *Id.*

Petri presented evidence that lead plaintiffs MissPERS and ATRS fall in the latter category. MissPERS is among the most prolific public retirement funds in securities litigation. Its litigation decisions were under the exclusive control of Mississippi Attorney General Jim Hood, who regularly received campaign contributions from securities plaintiffs' firms that represent MissPERS, including every law firm seeking fees in this case. Dkt. 120-8. In fact, a former partner of lead counsel Bernstein Litowitz

pleaded that the firm "regularly engage[d] in a kickback scheme with the Mississippi Attorney General's Office." *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016) ("*BLB&G*").

For example, Bernstein Litowitz assigned needless work—and fees—to a Mississippi lawyer related to a deputy attorney general after an agreement-in-principle had already been reached in underlying litigation. *Id*. at 137. The former partner learned that the Mississippi attorney had no relevant experience but was "married to a Special Assistant Attorney General in the Mississippi AG's Office." *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, No. 14-cv-6867, 2016 U.S. Dist. LEXIS 35385, at *5 (S.D.N.Y. Mar. 8, 2016). Neither this Mississippi attorney nor the fees paid were ever disclosed to the approving court. *Id.* at *5 n.4. When confronted about the payment, another partner allegedly asked "Do you ever want us to work with Mississippi again?" 814 F.3d at 137.

While the *BLB&G* complaint was never adjudicated—it was dismissed upon stipulation that it should remain forever sealed—filings *on behalf of MissPERS* in the later-unsealed docket corroborate the alleged scheme. Attempting to keep the complaint forever sealed, Bernstein Litowitz did not deny the undisclosed payment occurred. Instead an assistant attorney general, George W. Neville, wrote "it is a policy of the State of Mississippi and its agencies to engage local counsel in litigation." A90. Further "no state agency may employ legal counsel without the prior approval of the attorney general, and any such special legal counsel . . . serves at his pleasure and may be dismissed by him." A91. The letter also asserts that the former partner "was aware that a judgment was made by every law firm involved—including lead counsel for Mississippi and its agency MPERS—that it was unnecessary to submit affidavits from, or otherwise disclose, those lawyers who were not named class counsel on the case and were to be paid out of . . . lead counsel's award." A90. Further, an expert report Berstein

Litowitz commissioned assumed "relevant facts, the following appear to be undisputed," including that "The Mississippi Attorney General . . . asked BLB&G to have Mr. Martin [the Mississippi attorney] do some work on the … case" and paid his legal fees without disclosing it to the court overseeing the underlying case. Dkt. 120-7 at 4-5.

Because Hood had sole authority to retain outside counsel on behalf of MissPERS, the potential conflict is much more acute than when decisions are made by committee or by non-political staff. This partially explains why MissPERS endorsed 25% attorneys' fees on the *gross* common fund—more than is even allowed under its apparent retention agreement with Bernstein Litowitz that Petri located. A144. (The district court improperly denied discovery into the retention agreements. *See* Section II.)

Even in this case, MissPERS says the *BLB&G* complaint was "subsequently withdrawn" (Dkt. 134 at 8), but it does not deny that Mississippi counsel was paid, nor that the payment was undisclosed to the approving court, nor that the counsel was related by marriage to staff in the Attorney General's office. Instead, Bernstein Litowitz cites a one-page unsworn statement by the *BLB&G* plaintiff that says: "it is now my belief that, although I had a good faith basis for asserting the allegations and claims in the S.D.N.Y. Action at the time the complaint was filed, the information presents insurmountable factual and legal challenges to my ability to recovery other than a breach of contract claim [related to revenue sharing for business he brought to the firm]." A92. This statement is not a withdrawal of *allegations* so much as a carefully-worded statement by settling parties withdrawing a *filing*. None of the allegations were withdrawn. As in the Sherlock Holmes story *Silver Blaze*, the "dog's failure to bark" is telling: the omission "conveys a powerful message." *Cf. Johnson v. Acevedo*, 572 F.3d 398, 401 (7th Cir. 2009). And as discussed above, the basic facts are *confirmed* by the Neville letter and the expert opinion filed in the underlying *BL&BG* docket.

Another district court summarized Bernstein Litowitz's non-denials this way: "The alleged payments of kickbacks by the Bernstein Litowitz firm, which apparently were not denied by MissPERS and its counsel and indeed may have been solicited by MissPERS, are disappointing, at best." *Cambridge Ret. Sys. v. Mednax, Inc.*, No. 18-61572-CIV, 2018 U.S. Dist. LEXIS 207064, at *41 (S.D. Fla. Dec. 6, 2018).

Here, just as in the case described by the *BLB&G* complaint, Bernstein Litowitz was appointed by the district court, but when the case settled, two other Hood-contributing law firms showed up—Gadow and Klausner. A72; Dkt. 119 at 39 n.8. Plaintiffs did not initially disclose how much from the fee request these firms would receive. About Gadow, plaintiffs say the firm billed 306.8 hours, but fails to disclose what work these attorneys undertook or when those hours were billed, only vaguely describing Gadow's work as "consulting" on litigation strategy, unspecified "legal research," "reviewing substantive pleadings," and attending a mediation. Dkt. 119-7 ¶ 2. After Petri filed his objection, plaintiffs further disclosed that the Klausner firm had billed 27.8 hours for work described as "advising Boynton Beach and St. Lucie regarding the claims asserted in the Action and the benefits Class of filing the initial complaint, as well as the preparation and filing of the initial complaint." Dkt. 133-4 ¶ 3. Class counsel represented that all three firms would split fees in proportion to their claimed lodestar, but did not disclose whether any agreements existed between the firms.

MissPERS's history of Attorney-General-directed favoritism is further suggested by the fact that all three firms and many partners of those firms have given campaign contributions to Jim Hood in his runs for attorney general and most recently for governor of Mississippi, as discussed in detail in the Statement of the Case at pages 11-13. Firms funneled additional money through the Democratic Attorneys General Association ("DAGA"): in 2015, the Bernstein Litowitz and Gadow firms and

their attorneys also gave hundreds of thousands of dollars to DAGA, which sent Hood $880,000, over 40% of his campaign budget that year. *See* Statement of Facts, page 13 above. Mississippi was one of only three states with attorney-general elections in 2015, and Hood's campaign was the only one DAGA funded that year. *Id*. For this reason, "there is a sufficient possibility that at least a portion of these contributions, though made to a national, separate organization, might eventually be provided to Attorney General Hood's political campaigns that they should have been disclosed to the Court. Indeed, DAGA provided $850,000 to Hood's 2007 campaign and $550,000 to his 2011 campaign." *In re Diamond Foods, Inc.*, 295 F.R.D. 240, 256 (N.D. Cal. 2013).

This "possibility" is compelling here. *Diamond Foods* found no cause for alarm for the donations because they were only made prior to a different firm's appointment as interim class counsel, but the donations here were ongoing. *See* pages 11-13 above. And the timing of forwarded donations from DAGA discussed at pages 12-13 above is even more suggestive.

"Such arrangements suggest a conflict of interest on the part of a lead plaintiff between an official's interest in campaign contributions and its fiduciary duty to the class." *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 307 (S.D.N.Y. 2015) (discussing political contributions and citing numerous law review articles on the subject). *N.Y. Mellon* ultimately concluded that campaign contributions in that case did not compromise class interests because the contributions were made to individuals not directly responsible for hiring outside securities counsel. *Id.* at 308-09. Here, however, the contributions were made to the campaign of the official, who (according to Special Assistant Attorney General Neville), has "complete authority over litigation," and "is the state's chief legal officer and is charged with managing all litigation on behalf of the state," including "control over the selection of outside counsel to represent state agencies" like MissPERS. A90. The *BLB&G* district court responded to

MissPERS's sweeping argument with appropriate skepticism: "the parties have pointed to no precedent holding that when public officials seek to use the public's attorneys to assign business to their own friends or family, unbeknownst to the public, such actions are being taken on behalf of the public such that ethical duties owed to the client would extend to such a self-dealing official." 2016 U.S. Dist. LEXIS 35385, at *35 n.15. In any event, unlike in *N.Y. Mellon*, the contributions to several of Hood's campaigns went ***directly*** to the person ultimately in charge of selecting outside counsel for MissPERS.

ATRS's involvement does not remedy the concerns about MissPERS's political dealings. ATRS itself failed to guard against its counsel paying an undisclosed $4.1 million dollar "bare referral fee" to politically-connected lawyers further shows why scrutiny of the fee division is necessary. *State Street II*, 2018 U.S. Dist. LEXIS 217874, at *12. The firm involved in *State Street*—Labaton—agreed to share an incredible 20% of its future fees with a small firm that then had offices in Arkansas and Texas, Chargois & Herron, but no experience in securities. *Id.* at *18. The *State Street* special master deposed Damon Chargois and Labaton partners about this fee sharing agreement, and they agreed essentially that Chargois was paid $4.1 million from a settlement he did no work in because he introduced an Arkansas state senator ten years earlier. 404 F. Supp. 3d at 512. The *State Street* judge expressed understandable skepticism about this testimony, and "whether all those millions of dollars stopped with Mr. Chargois." *Id.* at 513. Indeed, when Chargois and Labaton were arguing about fees by email Chargois wrote: "***We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas***." *Id.* at 510 (emphasis in original); *see also* Jack Newsham, *Labaton's Political Donations Line Up With Pursuit of Client, Records Show*, Law.com (Feb. 20, 2020). The questionable referral fee arrangement predated recent ATRS staff, dating to the tenure of a previous Arkansas State Treasurer who was provided free rent by a Chargois' partner and was subsequently convicted of political

corruption in 2014. *State Street II*, 2020 U.S. Dist. LEXIS 33552, at *72-*73 n.13. While the *State Street* matter does not involve Bernstein Litowitz, Petri is entitled to discovery over whether Bernstein Litowitz made similar arrangements with ATRS..

ATRS's former director George Hopkins testified that he was not interested in attorneys' fees. "I believe that my knowledge of and involvement with fee agreements between attorneys would inevitably distract from my focus, which is protecting the class." A117. Hopkins earlier testified that there was "a pay grade issue for me to look at all those hundreds of pages" of class counsel's fee request. A126. At best, Hopkins's stance was a mind-boggling dereliction of duty. At worst, it recalls the need for an "ostrich" jury instruction in federal criminal law. *E.g., United States v. Ramsey*, 785 F.2d 184, 188-91 (7th Cir. 1986). Either way, ATRS's failure to safeguard class funds or even look at the fee request in that *State Street* suggest that it cannot adequately protect the class against excessive and/or politically-motivated fees here.

From a hypothetical *ex ante* perspective, one would suspect that attorneys' fees performed for clients who receive political donations are higher. This is because political clients would be "friendlier" than faithful fiduciaries to people who personally benefit them, and plaintiffs' attorneys would rationally seek larger fees to offset the cost of their patronage.

And empirical research shows exactly this effect. Securities settlements staffed by attorneys who give "large contributions" (above $10,000) to politicians that oversee pension funds have attorneys' fees request 13.2% higher on average than settlement where such large contributions don't exist. Choi, *et al*., 8 J. EMPIRICAL LEGAL STUD. at 668. "These findings … suggest that larger campaign contributions temper the zeal of state pension funds to squeeze lower fees out of their attorneys." *Id.* The district court ignored this empirical study, remarking instead that "Petri does not attach any empirical data." A3.

Due to the apparent conflicts with the named plaintiffs and their client, the district court erred in crediting almost dispositive weight to the recommended 25% fee. Plaintiffs' relationship with lead counsel preclude their agreement from being a reliable indicator of the *ex ante* market value for their legal work. *Cf. Synthroid I*, 264 F.3d at 718.

The district court thus ignored evidence of actual agreements, which better reflect the market rate in this case, and ignored evidence Petri cited, and this refusal to apply—or even cite—the *Synthroid I* benchmarks is an independent error of law requiring vacatur.

II. The district court erred in denying the modest discovery Petri sought.

The court's reasons to deny discovery—reliance on a percentage fee award and the purported delay discovery would cause—do not withstand scrutiny, especially given that the district court took nearly ten months to act.

A. Discovery into work purportedly billed by the three firms was relevant to determining the market-based rate, even for a percent-of-fund award.

The district court abused its discretion in denying discovery into whether the fee request diverts money to tit-for-tat payoffs contrary to class interest. Petri credibly alleged that Bernstein Litowitz and MissPERS's relationship may contain disqualifying *quid pro quo* elements. Such conflicted relationships mean that the putative representatives are not "capable of saying no if they believe counsel are failing to act in the best interests of the class." *In re Southwest Air. Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015); *see also Swift v. First USA Bank*, No. 98 C 8238, 1999 U.S. Dist. LEXIS 19474, at *16 (N.D. Ill. Dec. 15, 1999) (refusing to certify class because plaintiffs' attorneys had initially agreed to pay lead plaintiff's husband a "finders fee"). Based on Petri's argument, "[t]he putative representatives have not discharged their obligation to

represent the interests of the class in dealings with both the defendant and class counsel." *Southwest*, 799 F.3d at 714 (cleaned up).

While an objector's right to discovery is not absolute, depriving objectors of discovery relevant to the fairness of the settlement, certification, or attorneys' fees is an abuse of discretion. In *Redman*, it was error to permit class counsel to submit "the details of class counsel's hours" after the objection deadline, unfairly handicapping the objectors. 768 F.3d at 638. Here, class counsel *never* provided the data and the court erroneously refused class members the opportunity to discover them. "Allowing class members an opportunity thoroughly to examine counsel's fee motion [and] inquire into the bases for various charges" "is essential" to protecting class members and ensuring the court is presented with and "adequately-tested" information. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *cf. also Redman*, 768 F.3d at 638 (citing *Mercury Interactive* favorably).

Rule 23(h) similarly contemplates as much. The Advisory Committee Notes instruct that the court may permit "objector discovery relevant to the objections." Fed. R. Civ. P. 23, 2003 Advisory Committee Notes, ¶ 69; *see also* 5 MOORE'S FEDERAL PRACTICE § 23.124[4] (Matthew Bender 3d ed. 2009) (objectors should receive "an adequate opportunity to…, in an appropriate case, conduct discovery concerning the fees request").

Objector discovery is particularly appropriate here because the settlement's structure means the defendant has no interest in contesting the payment of fees made from a lump sum common fund. *Continental Ill.*, 962 F.2d at 573. Without a good-faith public-minded objector, the Court "can't vindicate the class's rights because the friendly presentation means it lacks essential information." *In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 556 (7th Cir. 2017). "That is why objectors play an essential role in judicial review of proposed settlements of class actions and why judges must be both

vigilant and realistic in that review." *Id*. (cleaned up). "[T]he contribution a particular class member's attorney [can make], by providing an adversarial context in which the district court could evaluate the fairness of attorneys' fees, [is] substantial." *Cendant*, 243 F.3d at 743-44 (cleaned up).

The district court categorized Petri's discovery requests as "(i) Lead Counsel's billing methods; (ii) how Lead Plaintiffs intend to split the attorneys' fee among Class Counsel; and (iii) Lead Counsel's financial and political relationship with MissPERS." A5.

The district court's reasoning for rejecting all three categories of discovery sought by Petri was fatally flawed.

The court discounted (i) entirely because the it awarded fees on the basis of the percentage of fund. This was mistaken because the discovery bears on the appropriateness of the fee award no matter what method was selected. *Redman*, 768 F.3d at 637-38 (failure to provide "details of class counsel's hours and expenses" violated Rule 23(h)); *see also* N.D. Ill. Local Rule 54.3(d) (movant seeking attorneys' fees must provide, upon request by responding party, "time and work records" and "the hours for which compensation will and will not be sought"). Detailed billing also has special salience in this case in view of the *BLB&G* complaint, which alleged pointless work performed for the sake of fattening the bills of political allies. Only by scrutinizing these bills could the district court determine whether similar political dealings had occurred here, which would be reflected in pointless legal work undertaken for the excuse of generating a bill. In any event, as argued in section III, when an objector comes forward with information suggesting fees are diverted to attorneys who performed no meaningful work in the case, Rule 23(h) should demand that the court conduct a lodestar crosscheck.

As for (ii), the distribution of fees among class counsel, even though plaintiffs asserted for the first time in reply to Petri's motion that fees would be distributed in proportion to each firm's claimed lodestar, any other fee-sharing agreements would still be probative to the concern about political kick-backs. *Cf.* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (illuminating repeat-player phenomenon and concluding that fees should be allocated "through a transparent process, not through the backdoor of settlement").

As for (iii), the political relationship between Bernstein Litowitz and MissPERS, the court found that "Petri's argument is purely speculative. He has provided no evidence of any wrongdoing or illicit understanding between Class Counsel and MissPERS. Absent such evidence, the Court finds the mere allegation that Class Counsel has made political donations to the campaigns of a figure associated with MissPERS insufficient to justify additional discovery, particularly when Lead Counsel's request for attorneys' fees is detailed and reasonable." *Id.* at 5-6. The district court has proposed a Catch-22: Petri could only receive such material if he could *prove* pay-for-play political corruption. But if he could prove it, Petri would have no need for discovery. Petri made a *prima facie* showing that the discovery request had a good-faith basis and was not a fishing expedition. If this much smoke does not merit an investigation for fire, when would it?

Instead, the Court should have required Bernstein Litowitz and MissPERS to "respond to questions . . . disclosing whether any payments have been made or are to be made to any counsel or any person or entity affiliated with MissPERS or any of the attorneys or decisionmakers in the Mississippi Attorney General's Office." *Cambridge Ret. Sys. v. Mednax, Inc.*, No. 18-61572-CIV, 2018 U.S. Dist. LEXIS 207064, at *41 (S.D. Fla. Dec. 6, 2018); *see also Diamond Foods*, 295 F.R.D. at 256 (recounting how court required

firms to disclose "any campaign contributions made directly or indirectly to any fundraiser or political campaign in Mississippi").[4]

Finally, the lower court remarked it "sees no reason to delay payouts to the class by allowing further discovery." *Id.* at 5. Preposterously, this finding arrived over nine months after the fairness hearing—more than enough time to have conducted the modest discovery requested and even completed briefing on the results of the discovery. And the finding speaks of "further discovery" when no discovery whatsoever had occurred in the case, which was stayed pending resolution of never-resolved motions to dismiss.[5]

The district court abused its discretion in denying discovery narrowly tailored to the history of the firms in this case and the unexpected appearance of two heretofore

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[4] The district court in *Diamond Foods* found class counsel's representation adequate in part because neither the lead counsel in that case—Lieff Cabraser—nor "their individual attorneys made contributions to Attorney General Hood *after* counsel were approved by the Court in June 2012." *Id*. at 256. Here, Bernstein Litowitz's contributions have flowed unabated to Hood.

[5] Lead plaintiffs complained (Dkt. 132 at 3) that Petri's motion was untimely because they publicly sought appointment as lead plaintiffs in September 2016; the *BLB&G* lawsuit became public in February 2016; and *State Street* has been publicized since mid-2017. Plaintiffs premised their argument on the absurd view that Petri should have anticipated two or three years ago that lead plaintiffs would settle and file an excessive fee request and made his discovery requests then—while discovery was stayed under the PSLRA. But of course, Petri and other class members had no notice of the appointment of lead counsel, much less notice about the size of the fees that plaintiffs intended to request, nor could any observer even discern the participation of two of the three firms awarded fees. Moreover, even if Petri somehow sought to intervene to conduct discovery in 2016, plaintiffs would have likely successfully argued that such collateral discovery requests were not ripe when there was not even a fee request. The district court did not decide the timeliness of Petri's motion.

undisclosed but politically-attuned firms with plaintiffs' fee requests, including a Mississippi firm focusing on personal bankruptcies. For this independent reason, the fee order should be vacated.

B. The district court also improperly refused discovery into plaintiffs' retentions agreements, which are relevant *Synthroid I* benchmarks.

The district court also denied discovery relating to the first *Synthroid I* benchmark—the retention and fee agreements of named plaintiffs. The lower court did not even mention these discovery requests, which do not fall within the three categories discussed above. A5. In particular, Petri sought the retention agreements for the plaintiffs in this case. A175. These are clearly relevant. Plaintiffs opposed this request because Petri supposedly already had access to the agreements, but this is untrue. Petri's counsel found a copy of the MissPERS master agreement online (A143), but does not know whether a new version might exist, and did not have a copy of the master retention agreement between MissPERS and Bernstein Litowitz, which would illuminate potential guidelines for fees in individual engagements. As for ATRS, Petri does not have this agreement at all, but simply quoted testimony from ATRS's former director about an earlier agreement it had with Bernstein Litowitz. A136.

Both of these sources suggested the 25% fee was too high even according to the MissPERS and ATRS agreements, so the court should have allowed at least confirmatory discovery. In the first place, the 2016 MissPERS agreement specified the award should be "a percentage of the recovery achieved for the class, *net of expenses*." A144. Class counsel instead sought a full 25% of the gross $45 million fund, so MissPERS failed to enforce the unambiguous blackletter of the master agreement.

The MissPERS agreement also contained a table limiting a percentage fee to 25%—*and less than 25%* for recoveries *to MissPERS* greater than $10 million. A147. For example, the maximum fee for a $45 million individual settlement on this table would

have been $5.75 million, or 12.8%. The table does not control the fee request in this matter because it keys fees to the recovery to MissPERS individually rather than the class, and MissPERS individually presumably recovered much less than $10 million in the settlement. But it shows yet another example that private parties agree to declining percentages of fees as the recovery increases. Petri does not have a copy of the ATRS agreement, but as of 2014, the biennial master contract between ATRS and Bernstein Litowitz evidently stated "the range of the fee could be as low as 5 percent of the recovery in a very large case ranging upward to a maximum of no more than 25 percent for smaller cases with special circumstances." A135 (S.D.N.Y. Judge Rakoff quoting ATRS master agreement during testimony of ATRS director George Hopkins). The $45 million settlement is larger than most securities settlements. Lynn A. Baker, Michael Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1389 (2015) (surveying more than 400 securities settlements and finding median settlement amount of $10,700,000). Moreover, there were no "special circumstances" to award the maximum 25% fee here. To the contrary, the case settled before parties took a single deposition and before the court decided any contested motion, and it was litigation piggybacked on an already-successful *qui tam* suit.

The district court erred as a matter of law in ignoring this evidence and abused its discretion in not allowing limited discovery into the retention agreements, which could have been produced quite rapidly. Vacatur is required for these independent reasons.

III. Lodestar crosscheck should be performed where an objector makes a *prima facie* showing of excessive billing and potential pay-to-play.

"A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d

682, 687 (7th Cir. 2008) (emphasis in original). Judges and commentators have remarked on necessity of a lodestar crosscheck, especially when analyzing fees in securities class action settlements. *See, e.g.*, Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND. (2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf, at 23 ("important safeguard"); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. LEGAL ETHICS 1453, 1454 (2005) ("courts making common fund fee awards are ethically bound to perform a lodestar cross-check").

In this Circuit, the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store,* 897 F.3d at 833. Reviewing lodestar billing ensures that "attorneys' fees don't ride an escalator called risk into the financial stratosphere." *Redman*, 768 F.3d at 633. Indeed, this Court has suggested that a lodestar multiplier of two might be a "sensible ceiling" to avoid unwarranted attorney windfalls. *Skelton v. Gen. Motors Corp*., 860 F. 2d 250, 258 (7th Cir. 1988); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) (citing *Skelton* approvingly); *Florin v. Nationsbank, N.A*., 34 F.3d 560, 565 (7th Cir. 1994) (same).

Especially under the circumstances of this case—where an objector presents evidence that a named plaintiff diverts attorneys' fees for political purposes—it was an abuse of discretion for the district court not to conduct a lodestar crosscheck. The district court noted that it was not *required* to conduct a lodestar cross-check in every case, but offered no reason to so exercise its discretion in *this case*. The lower court's failure to explain its exercise of discretion is an abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *In re Steenes*, 918 F.3d 554, 557 (7th Cir. 2019).

This Circuit employs a market-approximating approach, imagining attorneys' fees if set *ex ante* among savvy clients on behalf of the class. Sometimes a securities

plaintiff can actually serve the role through more vigilant supervision as NY Funds and Chicago Teachers' apparently provide. But in this case, a hypothetical *ex ante* bargain for the class could not rely upon the actual retention agreements of MissPERS and ATRS, must less the actual performance under those agreements, which appears deficient as discussed above. Given MissPERS's history of bestowing largess to politically-favored attorneys as the *BLB&G* complaint alleges, and given that two firms not appointed interim class counsel suddenly appeared upon the resolution of this case—just as described in *BLB&G*—Petri has made out a *prima facie* case that retention by MissPERS includes an unwritten obligation for class counsel to dole out legal work at the behest of Jim Hood. As assistant AG Neville explained, "it is a policy of the State of Mississippi and its agencies to engage local counsel in litigation." A90. This unwritten term is not free, and it comes at the expense of the class. A rational agent compelled to pay kickbacks must charge higher rates in order to offset the costs of those kickbacks in the long run—or would otherwise seek work from clients that do not require kickbacks.

Lodestar billing is necessary to estimate which proportion of the fees represents work that would have been directed by a faithful fiduciary, and which portion may be an excuse to divert political patronage. In order to better gauge the hypothetical *ex ante* fee, the district court would need to be able to quantify the diverted fees, which an *ex ante* fiduciary for the class would have never agreed to. *Cf. In re Petrobras Secs. Litig.*, 2018 WL 3091256, at *14 (S.D.N.Y. Jun. 22, 2018) ("one purpose of the lodestar check is to ensure that even an arms-length fee agreement reached between class counsel and class representatives does not result in a harvest of fees at the expense of the class."). Therefore, in the particular facts of this case, the district court abused its discretion by not requesting and examining detailed billing from all firms that stood to receive fees.

The district court entirely misunderstood the reason that this Court does not generally require district courts to cross-check a percentage fee against lodestar, and therefore provided no reason at all to ignore lodestar in this case. The district court instead asserted that "[a] district court is under no obligation to cross-check the requested fees against the lodestar." A3 (quoting from *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015)). While this Court might not require a cross-check in *every* case, and district courts have discretion in the methodology they use—the district court did not explain *why* it exercised its discretion at all. It simply found that there was "no obligation," and without any supporting analysis declared "[b]ecause the Court employs the percentage method in this case, it finds that no additional analysis or calculation based on the lodestar method is necessary." A3-A4.

None of the cases the district court cited endorse such deficient analysis. In *Dairy Farmers* itself, the district court recited the claimed lodestar, but found it "arbitrary (and under-vetted)." 80 F. Supp. 3d at 849. That court properly looked to the *Synthroid I* considerations, including the length of proceedings with substantial discovery and risk, to yield a market-approximating rate. *Id.* at 844-48. The lower court here failed to do this.

In *Williams v. Rohm & Haas Pension Plan*, this Court found "consideration of a lodestar check is not an issue of required methodology." 658 F.3d 629, 636 (7th Cir. 2011). But in *Rohm & Haas*, the district court ***did*** examine the lodestar. *Id*. In fact, the district court directed plaintiffs to submit lodestar information. *Meehan v. Rohm & Haas Pension Plan*, No. 4:04-CV-0078-SEB-WGH, 2010 U.S. Dist. LEXIS 39118 (S.D. Ind. Apr. 21, 2010). Plaintiffs moved to have this order reconsidered because the district court need not analyze lodestar at all, but the district court stood firm in requiring lodestar information, which it found relevant to determine market-approximating *ex ante* fee

terms. *Id.* at *3. Therefore, *Rohm & Haas* did not affirm the proposition that a lodestar crosscheck could be ignored without analysis in *every* case, but simply rejected objectors' arguments that the district court "did not give **proper weight** to the lodestar cross-check." 658 F.3d at 636 (emphasis). This Court also rejected objectors' argument that "any percentage fee award exceeding a certain lodestar multiplier is excessive," and affirmed the district court's fully-informed finding "that a pure percentage fee approach best replicated the market" in that case. *Id.*

Likewise, in *Cook v. Niedert*, this Court affirmed a district court that had examined both percentage and lodestar. 142 F.3d 1004, 1013 (7th Cir. 1998). In *Cook*, it was the *plaintiffs* who complained that the district court had placed too much emphasis on lodestar. "But we have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach." *Id. Cook* also parenthetically quotes *Harman v. Lyphomed, Inc.*, that a *percentage* cross-check "is a reasonable, though not essential 'check' for the judge." 945 F.2d 969, 974 (7th Cir. 1991). Again, this does not provide a reason to ignore lodestar when it would help set a reasonable *ex ante* fee award. The district court abused its discretion in not explaining why it was appropriate to exercise its discretion to ignore lodestar in this case.

Here, the hypothetical *ex ante* bargain required actual lodestar information to gauge the amount of fees diverted to apparently-political ends. None of the *Synthroid I* benchmarks support affirming named plaintiffs' 25% fee terms. First, no reliable *ex ante* bargain exists here. "It is unfortunate that the district judge originally assigned to this case did not consider the possibility of establishing a fee schedule when [s]he appointed a lead plaintiff and approved that party's choice of counsel." *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013). Second, the retention agreements with MissPERS and ATRS could not control the fees because Petri presented credible reasons to believe

they were conflicted—unlike the representatives in *Silverman*.[6] "A district judge, looking out for the interests of all class members, sometimes must consider issues that the class representatives and their lawyers prefer to let pass." *Id.* at 959. In any event, the district court neither granted discovery nor commented upon these agreements. And third, as discussed in Section I.A, the district court's grab-bag of different cases awarded larger fees in no way demonstrates that 25% is the market rate for a $45 million settlement reached prior to discovery.

Under these circumstances, the lower court should have disentangled the amount of the fee award attributable to the fair market rate for the work performed from the surplus premium levied in order to assure Jim Hood's desired diversions (and perhaps also those of ATRS) to previously-undisclosed counsel. Petri alleged kickbacks were likely paid in this case; an economically rational party only pays these kickbacks if assured above-market rates for the underlying work. Only through detailed billing

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[6] While *Silverman* affirmed an "exceptionally high" 27.5% award for a larger fund of $200 million, the *Silverman* plaintiffs reached settlement after substantial discovery and more than $5 million invested by class counsel out-of-pocket. 736 F.3d at 958. And objectors in *Silverman* raised none of the evidence Petri did here.

Silverman suggests that absent class members who are institutional investors with large stakes "looking out for themselves" have an incentive to police large fee requests. 739 F.3d at 959. This is incorrect in practice. An institutional investor with a 10% stake in this settlement—and it's not clear such an investor with such a large stake exists, as the largest institutional investors are buy-and-hold index funds—is paying only $1,100,000 of the attorneys' fees, and would be litigating over a six-figure reduction in fees at most. Petri's counsel is unaware of any institutional investor that monitors securities-litigation attorney-fee requests, much less is willing to devote hundreds of hours of attorney time investigating or litigating such requests—or incurring the wrath of powerful securities litigation firms by engaging in such challenges.

could the court have approximated the magnitude of the kickbacks and thereby approximate the fair market value of the legal work without them.

In this case, due to the peculiar problems raised by MissPERS as lead plaintiff, the district court should have performed a lodestar cross-check as Petri argued. The district court's failure to do this—and failure to provide *any* non-circular reason lodestar would not be examined—was an abuse of discretion and independent reason to vacate the fee award.

Conclusion

The fee award should be vacated, and the case remanded for calculation of fees based on benchmarks that approximate a competitive market of sophisticated purchasers to preclude rent-seeking by political actors and their patrons. On remand, class counsel should be required to disclose all side agreements relating to the Rule 23(g) and PSLRA selection process and fee allocation and detailed billing for all firms, and the district court should supervise the allocation of the Rule 23(h) fee award. Petri requests that Circuit Rule 36 apply on remand.

Dated: July 28, 2020

Respectfully submitted,

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Statement Regarding Oral Argument

Petri requests under Cir. R. 34(f) that the Court hear oral argument in his case because it presents significant issues concerning attorneys' fees in class-action settlements. Exploration at oral argument would aid this Court's decisional process and benefit the judicial system.

Petri is working with the *pro bono* assistance of the non-profit Hamilton Lincoln Law Institute's Center for Class Action Fairness. This Court and the national press have repeatedly recognized the Center's good faith in raising these public-policy issues. *See, e.g., Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780, 787 (7th Cir. 2014); Editorial Board, *The Anthem Class-Action Con*, WALL ST. J., Feb. 11, 2018; Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug. 13, 2013. Neither Petri nor the Center has settled an appeal for a *quid pro quo* payment to themselves; they bring this appeal in good faith.

A favorable resolution in this appeal would provide guidance to district courts in Rule 23(h) requests, and reduce the windfalls achieved by class counsel at the expense of absent class members.

Certificate of Compliance with Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 30(d)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, Type Style Requirements, and Appendix Requirements:

1. This brief complies with the type-volume limitation of Cir. R. 32(c) because:

This brief contains 13,912 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 12-point Palatino Linotype font.

3. All materials required by Cir. R. 30(a) & (b) are included in the appendix.

Executed on July 28, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on July 28, 2020, I caused to be electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system pursuant to Cir. R. 25(a), thereby effecting service on all counsel of record, who are registered for electronic filing.

/s/ Theodore H. Frank
Theodore H. Frank

Required Short Appendix

Statement of Compliance
with Circuit Rule 30(d)

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Objector-Appellant Mark Petri.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ST. LUCIE COUNTY FIRE DISTRICT FIREFIGHTERS PENSION TRUST FUND, et al.,	)	
Plaintiffs,	)	No. 16-cv-07145
v.	)	Judge Andrea R. Wood
STERICYCLE, INC., et al.,	)	
Defendants.	)	

ORDER

Plaintiffs' motion for an award of attorneys' fees and reimbursement of litigation expenses [116] is granted in part and denied in part. Specifically, the Court awards Class Counsel attorneys' fees in the amount of 25% of the settlement fund, net of litigation expenses and notice and administration costs. The Court also grants Plaintiffs' request for reimbursement of litigation expenses in the amount of $21,618.75 to Public Employees' Retirement System of Mississippi and $873.36 to Arkansas Teacher Retirement System. However, the Court denies Plaintiffs' request to reimburse Class Counsel's litigation expenses in the amount of $192,433.77, and instead finds that Class Counsel is entitled to a reimbursement of $134,812.30. Objector Mark G. Petri's motion to lift the stay on discovery [121] is denied. Enter Order Awarding Attorneys' Fees and Reimbursement of Litigation Expenses. See the accompanying Statement for details.

STATEMENT

Public Employees' Retirement System of Mississippi ("MissPERS") and Arkansas Teacher Retirement System ("ATRS") brought this securities class action on behalf of themselves and other shareholders in Defendant Stericycle, Inc. ("Stericycle"), alleging that Stericycle defrauded shareholders by artificially inflating its financials. (Fourth Am. Compl. at 5, Dkt. No. 84.) (The Court refers to MissPERS and ATRS collectively as "Lead Plaintiffs.") After the parties had briefed Defendants' motion to dismiss but before the Court ruled on it, the parties filed a motion for final approval of their proposed $45 million settlement. (Dkt. No. 113.) The Court approved that settlement on July 22, 2019. (Dkt. No. 139.) Now, the Court addresses the request for an award of attorneys' fees by Bernstein, Litowitz, Berger & Grossmann LLP ("Lead Counsel"), counsel for Lead Plaintiffs and Plaintiffs St. Lucie County Fire District Firefighters Pension Trust Fund and Boynton Beach Firefighters Pension Fund. (Dkt. No. 116.)

Lead Plaintiffs propose to divide the fee award among Lead Counsel and two other firms that represent Plaintiffs, Gadow Tyler, PLLC and Klausner, Kaufman, Jensen & Levinson

("KKJ&L"), based on the amount of work each firm contributed, with Lead Counsel receiving the lion's share. (Lead Pls.' Mem. of Law in Opp'n to Objector's Mot. to Lift Stay for Limited Disc. ("Mem. in Opp'n to Objector's Mot.") at 7–8, Dkt. No. 132.) (The Court refers to Lead Counsel, Gadow Tyler, PLLC, and KKJ&L collectively as "Class Counsel.") Lead Counsel moves pursuant to Federal Rule of Civil Procedure 23(h) for (i) an award of attorneys' fees in the amount of 25% of the settlement amount; (ii) reimbursement of $192,433.77 for Lead Counsel's litigation expenses; and (iii) reimbursements of $21,618.75 to MissPERS and $873.36 to ATRS for costs and expenses arising from their representation of class members. Only one class member, Mark G. Petri, has objected to Lead Counsel's motion. (Dkt. No. 120.) Petri requests that the Court lift its stay on discovery to allow limited discovery into Lead Counsel's calculation of and Lead Plaintiffs' approval of attorneys' fees. (Dkt. No. 121.)

I.

The Court first addresses the award of attorneys' fees. In this District, the "favored method for calculating fees in common-fund cases . . . sets the fee award as a percentage of the recovered settlement fund, plus expenses and interest." *In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, 80 F. Supp. 3d 838, 844 (N.D. Ill. 2015). The percentage method has the advantage of aligning counsel's interests with those of the class and may be particularly suitable for common fund cases "because of its relative simplicity of administration." *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994). The other option for calculating attorneys' fees is the lodestar method, which is based on the number of hours the attorneys contributed to the suit multiplied by a reasonable hourly billing rate. *Gastinaeu v. Wright*, 592 F.3d 747, 748 (7th Cir. 2010). The Seventh Circuit has held that "the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court." *Florin*, 34 F.3d at 566. The Court finds the percentage method reasonable here.

To determine the appropriate percentage, courts should strive to award attorneys the market price for their legal services. *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (citing *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*")). In other words, courts should attempt to give counsel an amount that the parties themselves might have bargained for, taking into consideration the quality of the legal services provided and the contingent nature of the case. *Synthroid I*, 264 F.3d at 718. Courts consider factors such as the size of awards granted in other cases; the complexity, length, and expense of the litigation; and the risk of nonpayment assumed by the attorneys. *Dairy Farmers of Am.*, 80 F. Supp. 3d at 845–48 The Seventh Circuit will reverse a district court's award of attorneys' fees as an abuse of discretion only if record does not rationally support the award. *Taubenfeld*, 415 F.3d at 600.

Applying the *Synthroid I* factors to this case, Class Counsel secured a good outcome with a $45 million settlement, especially given the early stage of the litigation and the fact that Stericycle was reporting only $52 million in available cash at the time of the settlement. (John C. Browne Decl. ("Browne Decl.") ¶ 86, Dkt. No. 119.) Class Counsel also pursued the matter entirely on a contingency basis. (*Id.* ¶ 18.) And given the complexities of the case, it faced a substantial risk of nonpayment. In order to prove Defendants' liability, Class Counsel would have had to show not only that Defendants caused Plaintiffs' losses, but that Defendants did so with the intent to defraud. (*Id.* ¶¶ 77–82.) Additionally, at the time of settlement, Defendants' motion to

dismiss was pending. (Dkt. No. 91.) If granted, Class Counsel would not have received any compensation for their services.

Nonetheless, objector Petri contends that Lead Counsel's requested 25% award is much too high, arguing that the risks of litigation were low and the parties settled early, before the Court ruled on Defendants' motion to dismiss. (Obj. to Mot. for Att'ys' Fees ("Obj.") at 7–10, Dkt. No. 120.) Petri also asserts that Lead Counsel supports its fee request with "cherry-picked examples" of attorneys' fee awards between one-third and 40% of the settlement amount, but he fails to provide sufficient authority that a lower percentage is required. (*Id.* at 8–9.) He contends that "empirical data show the market rate for large settlements obtained prior to resolution of a motion to dismiss is 8%." (*Id.* at 8.) In support of that assertion, Petri does not attach any empirical data; instead, he provides a copy of an objector's letter from an unrelated class action in another district. (*See* Obj. Ex. I at 2, 4, Dkt. No. 120-12.) Moreover, the cases upon which Petri relies, which he claims support awarding Lead Counsel a lower fee award, actually support the reasonableness of its request for 25% of the settlement amount. *See Swift v. Direct Buy, Inc.*, Nos. 2:11–CV–401–TLS, 2:11–CV–415–TLS, 2:11–CV–417–TLS, 2:12–CV–45–TLS, 2013 WL 5770633, at *8 (N.D. Ind. Oct. 24, 2013) (awarding class counsel its requested 20% of the settlement amount after noting that percentage fell far below the standard 33% award); *Goldsmith v. Tech. Sols. Co.*, No. 92 C 4374, 1995 WL 17009594, at *8–9 (N.D. Ill. Oct. 10, 1995) (awarding class counsel 33 1/3% of a $4.6 million settlement).

As Lead Counsel contends, attorneys' fees of one-third to 40% of the class settlement amount are typical in this District. *See, e.g.*, *Taubenfeld*, 415 F.3d 597, at 600 (affirming attorneys' fee award to class counsel of 30% of the $7.25 million settlement fund plus expenses, based partly on data that awards of 30–39% are routine in the Northern District of Illinois). This suit is somewhat distinguishable because the $45 million settlement amount is larger than those in many of Lead Counsel's cited cases. *See, e.g.*, *id.*; *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97-cv-7694, 2001 WL 1568856, at *4–5 (N.D. Ill. Dec. 10, 2001) (awarding attorneys one-third of the $14 million settlement in a stockholder class action). The Seventh Circuit has observed that when calculating the appropriate attorneys' fees, "the market rate, as a percentage of recovery, likely falls as the stakes increase." *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003). But in this Court's view, Lead Counsel has accounted appropriately for this correlation by proposing an award of 25% rather than 30% or more. Considering the contingent nature of Class Counsel's litigation and the positive outcome reached for class members, the Court finds that attorneys' fees of 25% of the settlement amount are reasonable.

Petri suggests a $4.5 million award would be more appropriate here, since it would still overcompensate Class Counsel under the lodestar method of calculating attorneys' fees. (Obj. at 15.) Petri also disputes Lead Counsel's lodestar calculation of its proposed fee. (Obj. at 13–15.) But Lead Counsel offers its lodestar calculation only as a cross-check for its proposed percentage-based fee. (Mem. of Law in Supp. of Lead Counsel's Mot. for an Award of Att'ys' Fees and Reimbursement of Litig. Expenses at 10–11, Dkt. No. 118.) Lead Counsel is not required to provide such information or to justify its fee award based on the lodestar method. *See Dairy Farmers of Am.*, 80 F. Supp. 3d at 849 ("A district court is under no obligation to cross-check the requested fees against the lodestar." (citing *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998))). Because the

Court employs the percentage method in this case, it finds that no additional analysis or calculation based on the lodestar method is necessary.

One further point on Class Counsel's fees—its percentage does not come out of the entire settlement amount, but is determined by "the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman. v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). The Seventh Circuit explained in *Redman* that district courts must remove litigation expenses and notice and administration costs from the settlement amount before calculating the attorneys' percentage, as such costs are "part of the settlement but not part of the value received from the settlement by members of the class." *Id.* Lead Counsel agrees as to litigation expenses but argues that the Court is not required to set aside notice and administration costs because *Redman* applies only to narrow situations in which the ultimate recovery is unknown. Lead Counsel's argument lacks merit. Courts routinely apply *Redman* to remove notice and administration costs from cash settlement amounts prior to calculating the attorneys' percentage, as demonstrated even in several of the cases upon which Lead Counsel relies in asserting the opposite. *See, e.g.*, *In re Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 226 (N.D. Ill. 2019); *Wilkins v. HSBC Bank Nev., N.A.*, No. 14-cv-190, 2015 WL 890566, at *9–12 (N.D. Ill. Feb. 27, 2015); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 WL 1399367, at *5 n.2 (N.D. Ill. Mar. 23, 2015). Thus, this Court concludes that Class Counsel is entitled to its percentage of the settlement after removing notice and administration costs. Lead Counsel estimates such costs at $900,000. (Reply in Further Supp. of Lead Counsel's Mot. at 20 n.17, Dkt. No. 134).

II.

The Court now turns to Lead Counsel's request for reimbursement of $192,433.77 in litigation expenses, which Petri does not oppose. Lead Counsel has provided a declaration detailing the litigation-related expenses incurred in this case. (Browne Decl., Ex. 6, Dkt. No. 119-8.) The Court finds all expenses reasonable, except charges related to online research. The Seventh Circuit has held that "[w]hen a court uses the percentage-of-recovery method of calculating attorney's [sic] fees, such charges are simply subsumed in the award of attorneys' fees." *Montgomery v. Aetna Plywood*, 231 F.3d 399, 409 (7th Cir. 2000); *see also Silverman v. Motorola, Inc.*, No. 07-cv-4507, 2012 WL 1597388, at *4 (N.D. Ill. May 7, 2012). Lead Counsel attributes $47,862.29 to online legal research and $9,759.18 to online factual research. (Browne Decl., Ex. 6.) Because the Court has awarded Class Counsel its fees using the percentage method, Lead Counsel may not separately recover for online research. Therefore, Lead Counsel is only entitled to a reimbursement of $134,812.30 in litigation expenses.

Lead Counsel also requests reimbursement of $21,618.75 to MissPERS and $873.36 to ATRS for their costs and expenses directly related to their representation of the class pursuant to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(4). Petri also does not object to these reimbursements. Generally, in class action suits named plaintiffs may receive a higher amount of the settlement fund to compensate their extra efforts representing the class. This practice is impermissible under the PSLRA, which requires distribution of any settlement to shareholders solely on a per share basis. 15 U.S.C. § 78u-4(a)(4). But the PSLRA does allow reimbursement of parties' reasonable costs and expenses in representing the class, including lost

wages. *Id.* Here, a representative of MissPERS attests that four employees dedicated a total of 77.5 hours of work to this case, and requests reimbursement of $21,618.75 based on those employees' salaries. (Decl. of Donald L. Kilgore at 5–6, Dkt. No. 119-2.) The Deputy Director of ATRS attests that he spent 12 hours on the case, totaling $873.36 based on his salary. (Decl. of Rod Graves at 5, Dkt. No. 119-3.) The Court finds that MissPERS and ATRS' requests for reimbursements of 77.5 and 12 hours, respectively, of employees' work on the case are reasonable. Additionally, it is reasonable to grant such reimbursements based on those employees' estimated salaries per hour. The Court therefore grants Lead Counsel's motion as to the reimbursements of MissPERS and ATRS' expenses.

III.

Finally, the Court turns to Petri's motion to lift the stay on discovery. (Dkt. No. 121.) The Court previously ordered a stay in all proceedings in this case, other than those necessary to carry out the terms of the parties' settlement agreement.[1] (Order Preliminarily Approving Settlement and Authorizing Dissemination of Notice of Settlement ¶ 20, Dkt. No. 111.) Petri requests that the Court lift that stay and allow discovery regarding (i) Lead Counsel's billing methods; (ii) how Lead Plaintiffs intend to split the attorneys' fee among Class Counsel; and (iii) Lead Counsel's financial and political relationship with MissPERS. As noted above, the Court does not need to inquire into Lead Counsel's billing methods because its fee is based on a percentage of the settlement. And Lead Plaintiffs have already explained how they intend to distribute the fee award. (*See* Mem. in Opp'n to Objector's Mot. at 7–8.) Therefore, the Court addresses only Petri's request for information regarding Lead Counsel's political contributions.

If a class member opposes a Rule 23(h) motion for attorneys' fees, the court may allow discovery relevant to the class member's objections. *See* Fed. R. Civ. P. 23(h) advisory committee's note to the 2003 amendments. "In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery." *Id.* When class counsel's motion for attorneys' fees provides thorough information supporting its entitlement to a particular award, "the burden should be on the objector to justify discovery to obtain further information." *Id.* Here, Lead Counsel has provided comprehensive information about the work it contributed to this case and how the attorneys' fees it requests are reasonable in light of that work. Accordingly, Petri bears the burden of showing why further discovery into Lead Counsel's attorneys' fees is necessary.

In support of his motion, Petri asserts that Mississippi Attorney General Jim Hood, who manages MissPERS, regularly receives campaign contributions from Class Counsel. (Objector's Mot. to Lift Stay for Limited Disc. at 5, Dkt. No. 121.) Petri argues that this connection "partially explains why MissPERS has endorsed 25% attorneys' fees on the gross common fund" and justifies the requested discovery. (*Id.*) But Petri's argument is purely speculative. He has provided

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[1] Defendants argue that the mandatory stay of discovery during the pendency of any motions to dismiss required by PSLRA § 78u-4(b)(3)(B) precludes the requested discovery. (Mem. in Opp'n to Objector's Mot. at 4–5.) But because the Court denied Defendants' motion to dismiss without prejudice in light of parties' settlement (*see* Dkt. No. 112), and so the motion is no longer pending.

no evidence of any wrongdoing or illicit understanding between Class Counsel and MissPERS. Absent such evidence, the Court finds the mere allegation that Class Counsel has made political donations to the campaigns of a figure associated with MissPERS insufficient to justify additional discovery, particularly when Lead Counsel's request for attorneys' fees is detailed and reasonable. Accordingly, the Court sees no reason to delay payouts to the class by allowing further discovery and Petri's motion is denied.

Dated: May 19, 2020

Andrea R. Wood
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re Stericycle, Inc. Securities Litigation	No. 1:16-cv-07145 Judge Andrea R. Wood CLASS ACTION

**ORDER AWARDING ATTORNEYS' FEES AND
REIMBURSEMENT OF LITIGATION EXPENSES**

WHEREAS, this matter came on for hearing on July 22, 2019 (the "Settlement Hearing") on Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses. The Court having considered all matters submitted to it at the Settlement Hearing and otherwise; and it appearing that notice of the Settlement Hearing substantially in the form approved by the Court was mailed to all Settlement Class Members who could be identified with reasonable effort, and that a summary notice of the hearing substantially in the form approved by the Court was published in *Investor's Business Daily* and transmitted over the *PR Newswire* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and Litigation Expenses requested; and

WHEREAS, this Order incorporates by reference the definitions in the Stipulation and Agreement of Settlement dated February 14, 2019 (ECF No. 108-1) (the "Stipulation"), and all capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. **Jurisdiction** – The Court has jurisdiction to enter this Order and over the subject matter of the Action, as well as personal jurisdiction over all of the Parties and each of the Settlement Class Members, for purposes of the Settlement.

2. **Notice** – Notice of Lead Counsel's motion for an award of attorneys' fees and reimbursement of Litigation Expenses was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the motion for an award of attorneys' fees and reimbursement of Litigation Expenses satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1, 78u-4, as amended (the "PSLRA"), and all other applicable law and rules; constituted the best notice practicable under the circumstances; and constituted due and sufficient notice to all persons and entities entitled thereto.

3. **Fee and Expense Award** – Plaintiffs' Counsel are hereby awarded attorneys' fees in the amount of 25% of the Settlement Fund, net of total Court-awarded Litigation Expenses and Notice and Administration Costs, which sums the Court finds to be fair and reasonable. Plaintiffs' Counsel are also hereby awarded $134,812.30 in reimbursement of Plaintiffs' Counsel's Litigation Expenses to be paid from the Settlement Fund, which sum the Court finds to be fair and reasonable. Lead Counsel shall allocate the attorneys' fees awarded amongst Plaintiffs' Counsel in the manner described in paragraph 3 of The Supplemental Declaration of John C. Browne In Support Of (I) Lead Plaintiffs' Motion For Final Approval Of Settlement And Plan Of Allocation; (II) Lead Counsel's Motion For An Award Of Attorneys' Fees And Reimbursement Of Litigation Expenses; And (III) Lead Plaintiffs' Opposition To Objector Mark Petri's Motion To Lift Stay For Limited

Discovery, such that each of the three Plaintiffs' Counsel firms will receive the same lodestar multiplier on their time as submitted to the Court. There will be no payments out of the award of attorneys' fees to any other firms or entities.

4. **Factual Findings** – In making this award of attorneys' fees and expenses to be paid from the Settlement Fund, the Court has considered and found that:

(a) The Settlement has created a fund of $45,000,000 in cash that has been funded into escrow pursuant to the terms of the Stipulation, and that numerous Settlement Class Members who submit acceptable Claim Forms will benefit from the Settlement that occurred because of the efforts of Plaintiffs' Counsel;

(b) The fee sought by Lead Counsel has been reviewed and approved as reasonable by Lead Plaintiffs, institutional investors that oversaw the prosecution and resolution of the Action;

(c) More than 304,800 copies of the Notice were mailed to potential Settlement Class Members and nominees stating that Lead Counsel would apply for (i) an award of attorneys' fees in an amount not to exceed 25% of the Settlement Fund, and (ii) reimbursement of Plaintiffs' Counsel's Litigation Expenses in an amount not to exceed $350,000, which may include reimbursement of the reasonable costs and expenses incurred by Lead Plaintiffs directly related to their representation of the Settlement Class;

(d) Lead Counsel has conducted the litigation and achieved the Settlement with skill, perseverance, and diligent advocacy;

(e) The Action raised a number of complex issues;

(f) Had Lead Counsel not achieved the Settlement there would remain a significant risk that Lead Plaintiffs and the other members of the Settlement Class may have recovered less or nothing from Defendants;

(g) The amount of attorneys' fees awarded and Litigation Expenses to be reimbursed from the Settlement Fund are fair and reasonable and consistent with awards in similar cases; and

(h) There was one objection to the requested attorneys' fees, filed by Mark Petri. The Court has considered the objection filed by Mr. Petri and it is denied.

5. **PSLRA Awards** – Lead Plaintiff the Public Employees' Retirement System of Mississippi is hereby awarded $21,618.75 from the Settlement Fund as reimbursement for its reasonable costs and expenses directly related to its representation of the Settlement Class.

6. Lead Plaintiff the Arkansas Teacher Retirement System is hereby awarded $873.36 from the Settlement Fund as reimbursement for its reasonable costs and expenses directly related to its representation of the Settlement Class.

7. **No Impact on Judgment** – Any appeal or any challenge affecting this Court's approval regarding any attorneys' fees and expense application shall in no way disturb or affect the finality of the Judgment.

8. **Retention of Jurisdiction** – Exclusive jurisdiction is hereby retained over the Parties and the Settlement Class Members for all matters relating to this Action, including the administration, interpretation, effectuation, or enforcement of the Stipulation and this Order.

9. **Termination of Settlement** – In the event that the Settlement is terminated or the Effective Date of the Settlement otherwise fails to occur, this Order shall be rendered null and void to the extent provided by the Stipulation.

10. **Entry of Order** – There is no just reason for delay in the entry of this Order, and immediate entry by the Clerk of the Court is expressly directed.

SO ORDERED this 19th day of May, 2019.

Andrea R. Wood
United States District Judge