UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE STERICYCLE SECURITES LITIGATION	Case No. 1:16-cv-07145 CLASS ACTION Hon. Andrea R. Wood
MARK PETRI, Objector.	

OBJECTION

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INTRODUCTION

Lead counsel requests over $11 million—25% of the gross fund and nearly three times their purported but insufficiently evidenced lodestar—in a case that rode the coattails of previous actions and settled before a motion to dismiss had been resolved or discovery had been conducted. In any class action, such a request would be excessive. Here, it casts doubt on the adequacy of the class's representation because of lead representatives' history of directing fees to politically-connected firms and ATRS's admitted abdication of any responsibility to review its counsel's fee application.

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). However, rather than revitalizing the supervisory role of class representatives by enlisting large sophisticated funds, "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.*

Lead plaintiff MissPERS is among the most prolific public retirement funds in securities litigation. Its litigation decisions are under the exclusive control of Mississippi Attorney General Jim Hood, who regularly receives campaign contributions from numerous securities plaintiffs' firms, including every law firm seeking fees in this case. In fact, a former partner of lead counsel Bernstein

Litowitz ("BLB&G"), 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*"). His complaint alleged that the firm assigned pointless work (and a $112,500 payment) 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. While the that complaint was never tested—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.

Under Hood's control, MissPERS has become one of the nation's most prolific lead plaintiffs. "Bernstein Litowitz and its lawyers are the leading contributors to Hood, and Hood appears to be a fervent admirer of Bernstein Litowitz. Between 2005 and 2011, the firm represented Mississippi PERS in ten separate class actions," over three times more than any other securities law firm. Decl. of M. Frank Bednarz Ex. E, at 7.

MissPERS displayed a narrow sense of candor in the *BLB&G* proceedings. Attempting to keep the complaint forever sealed, BLB&G filed a letter from George W. Neville, Special Assistant Attorney General of Mississippi, to the firm representing the putative whistleblower. *See* Bednarz Decl. Ex. A. (Neville continues to oversee securities cases for Hood and logged time in this case. *See* Dkt. 119-2 at 5.) The letter told the whistleblower not to disclose the payment, which MissPERS has never denied. To the contrary, the letter stated: "it is a policy of the State of Mississippi and its agencies to engage local counsel in litigation." *See* Bednarz Decl. Ex. A at 3.[1] This policy has teeth, as the letter stresses in bold print: "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." *Id.* at 4. The letter also asserts that the whistleblower "was aware that a judgment was made

[1] The *BLB&G* district court responded to this 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 (S.D.N.Y. Mar. 8, 2016).

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." *Id.* at 3. MissPERS reached its decisions against disclosure 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.* In fact, the rule was amended just three weeks prior to the fee application, after the settlement papers and notice to the class had been filed. MissPERS concluded that it could be awarded fees in spite of the not providing previously-required class notice. *See* S.D.N.Y. Local Civil Rule 23.1.[2]

For its part, co-lead plaintiff ATRS's past practices offer class members no assurance of adequate representation. It is embroiled in an ongoing inquiry into a $4.1 million payment to a politically-connected firm that performed *no work for the class* in the underlying litigation. *See Ark. Teacher Ret. Sys. v. State St. Bank & Tr.*, No. 11-10230-MLW, 2018 U.S. Dist. LEXIS 217874, at *12 (D. Mass. Sep. 25, 2018). ATRS's then-executive director George Hopkins testified that he had no awareness of this payment, but nevertheless opined that its outside counsel had no obligation to disclose the arrangement to either ATRS or to the class! *Ark. Teacher Ret. Sys. v. State St. Bank & Tr.*, No. 11-10230-MLW, 2018 U.S. Dist. LEXIS 111320, at *10 (D. Mass. June 28, 2018) ("*State Street*"). Moreover, Hopkins testified in that case that he did not fully review the fee application submitted by the attorneys to bill the class over $75 million because he was pleased with their work. Bednarz Decl. Ex. G (*State Street* Mar. 7, 2017 Hearing Tr.) at 97-98. In view of this disinterest, a retired federal judge concluded "[w]e cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately represent the class moving forward." *State Street*, 2018 U.S. Dist. LEXIS 111320, at *10. At minimum, ATRS has proved incapable of monitoring billing in its cases.

Therefore, with this objection, objector Mark Petri, as trustee for the Julia Winkler Petri 2014 Trust, created under Article III, Section (D) of the Margaret Gregory Reiter 1988 Trust, created by

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[2] After *BLB&G*, the Southern District of New York 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. Local Civil Rule 23.1.

Agreement dated June 9, 1988, as amended July 22, 1992 (the "Trust") is filing a motion to lift the discovery stay for purposes of seeking limited discovery tailored to the subject of his objection. To aid his objection and the Court's review, Petri seeks information about the billing performed in this case and lead counsel's fee-sharing arrangements with other firms, including referral fees. Petri files this objection identifying the deficiencies with the fee request and respectfully asks this Court to hold the fee request in abeyance pending discovery into specific areas relevant to the issues or, at a minimum, to reduce the fees awarded. Petri reserves the right to supplement his objection following the production of any permitted discovery.

ARGUMENT

I. Objector Petri is a class member and intends to appear through *pro bono* counsel at the fairness hearing.

Objector Petri is a trustee of the Trust, with sole authority to act on its behalf in this litigation. Declaration of Mark Petri ¶ 3. The Trust purchased 180 shares of Stericycle, Inc. common stock for an average cost of $138.0148 per share on May 28, 2015, and continues to hold these shares. *Id.* ¶ 4; *id.* Exs. 1-2. He is not covered by any exclusion. *Id.* ¶ 5. Petri therefore is a member of the settlement class with standing to object. Fed. R. Civ. P. 23(e)(5). Petri's address is 9822 N. Valley Drive, Mequon, Wisconsin 53092, and his telephone number is (262) 241-3537. Petri Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents Petri *pro bono*, and CCAF attorney M. Frank Bednarz intends to appear at the fairness hearing on his behalf. CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017). Petri brings this objection through CCAF in good faith to protect the interests of the class. Petri Decl. ¶ 9. His objection applies to the entire class; he adopts any objections not inconsistent with this one.

II. The Court owes a fiduciary duty to unnamed class members.

A district court must act as a "fiduciary of the class," for the rights and interests of absent class members. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002). Because the relationship between class members and their counsel becomes directly adversarial when awarding fees from a common fund, it is incumbent upon the Court to "carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998) (cleaned up).

III. Neither the lead plaintiffs nor lead counsel have demonstrated they are adequate representatives of the class's interests with respect to the fee request.

Rule 23(g)(4) requires class counsel to "fairly and adequately represent the interests of the class." *See also* Fed. R. Civ. P. 23(a)(4). This requirement demands that the named representatives and class counsel "keep the interests of the entire class at the forefront." *Conrad v. Boiron, Inc.*, 869 F.3d 536, 539 (7th Cir. 2017); *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006). Those who are beholden agents of class counsel may not serve as class representatives. Inadequacy can manifest itself from the case's inception based upon background facts, or it can reveal itself in the proceedings. Here, both indications are present.

For reasons described at length above and in Petri's accompanying discovery motion, Bernstein Litowitz and MissPERS's relationship appears to contain disqualifying *quid pro quo* elements. ATRS, likewise, has been implicated in unseemly pay-to-play representations and their former director has testified that they do not zealously supervise retained counsel's billing practices. 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 Sw. Airlines Voucher Litig.*, 799 F.3d 701, 714 (7th Cir. 2015); *see also Physicians Healthsource v. Allscripts Health Sols.,* 2017 U.S. Dist. LEXIS 84696, 2017 WL 2391751, *32-*35 (N.D. Ill. Jun. 6, 2017) (refusing to certify class where putative representative had demonstrated either a lack of candor or disregard for the class's interests); *Swift v. First USA Bank*, 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").

The excessive fee request manifests the unwillingness of the class representatives to oversee counsel. *See, e.g., In re Chiron Corp. Sec. Litig.,* 2007 U.S. Dist. LEXIS 91140 (N.D. Cal. Nov. 30, 2007)

(questioning adequacy of a repeat plaintiff who endorsed class counsel's excessive 25% request); *In re Razorfish, Inc. Sec. Litig.*, 143 F. Supp. 2d 304, 311 (S.D.N.Y. 2001) ("an excessive compensation proposal can cast in doubt the ability of proposed lead counsel to adequately represent the class."). The putative representatives have not discharged their "obligation to represent the interests of the class in dealings with both the defendant and class counsel." *Sw. Airlines Voucher*, 799 F.3d at 714. Nor have counsel demonstrated they can adequately represent the class.

IV. The fee request contains signs of self-dealing.

"From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Accordingly, courts cannot rely merely on "arms-length negotiations" to protect the class. *Redman v. RadioShack*, 768 F.3d 622, 628 (7th Cir. 2014) (calling that "naïve"). Simply as a matter of economic reality, a "defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class." *Eubank*, 753 F.3d at 720.

The disproportionate fee request here indicates the self-dealing the Seventh Circuit has warned against. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Such self-dealing is particularly harmful in securities litigation such as this: shareholders are injured to the extent their purchase prices were inflated by fraud on the market, and the funds to pay class members and a possibly excessive fee request are coming out of the corporate treasury and thus reduce the value of their current shares. Here, if a class member's damages claim after the attorney-fee deduction is low enough, she will recover nothing at all because of the $10 minimum distribution; the settlement will make her worse off than if the case had simply been dismissed. *See Robert F. Booth Trust v. Crowley,* 687 F.3d 314, 319 (7th Cir. 2012) (terminating derivative lawsuit where "[t]he only goal of this suit appears to be fees for the plaintiffs' lawyers"); *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016) (similar). The disproportion is even more alarming than usual because of the documented history of MissPERS's counsel paying excessive fees for unnecessary legal work doled out to curry political favor with the Mississippi Attorney General and ATRS apparently being unwilling or incapable of monitoring expenditures for undisclosed referral arrangements with politically connected firms.

A. Class counsel's fee request is disproportionate given the low risk, early-stage settlement, and relatively low recovery as a portion of damages.

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." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). Further, counsel must not recover a disproportionate share of the settlement in fees. For that analysis, "[t]he ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman*, 768 F.3d at 630. The PSLRA also provides that "[t]otal attorneys' fees *and* expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount…*actually paid* to the class. 15 U.S.C. § 78u-4(a)(6) (emphasis added).

Here, defendants will pay a total of $45 million. Class counsel are requesting 25% of that fund, or $11.25 million, plus reimbursement of a combined $214,925.88 in expenses. Dkt. 118 at 1. Class counsel wrongly ask the Court to calculate their fee request based on the overall $45 million fund, before subtracting the litigation expenses and unspecified notice and administration costs. Under the PSLRA and Circuit precedent, those costs should be excluded because they "are part of the settlement but not part of the value received from the settlement by the members of the class." *Redman*, 768 F.3d at 630. The costs "benefit class counsel and the defendant as well as the class members" and "shed no light on the fairness of the division of the settlement pie between class counsel and class members." *Id.* The fee analysis must exclude all expenses from the denominator.

Even 25% of the net fund is excessive, however, according to the market rate for cases such as this, which settle prior to discovery or resolution of a motion to dismiss, have minimal risk due to the numerous prior admissions and settlements in other cases involving the same underlying fraud allegations, and result in a relatively small settlement compared to the alleged damages.

1. Market rates are lower for pre-motion to dismiss settlements.

"A court must give counsel the market rate for legal services." *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*"). That market rate "depends in part on the risk of

nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721. Under Seventh Circuit law, the "market rate, as a percentage of recovery, likely falls as the stakes increase." *Synthroid II*, 325 F.3d at 975.

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. As an "earlier settlement," this case warrants far lower fees than in *Synthroid II*, where the risk was "significant." 325 F.3d at 978. In fact, empirical data show the market rate for large settlements obtained prior to resolution of a motion to dismiss is 8%. *See* Bednarz Decl. Ex. I (New York funds' fee table limiting attorneys' fees for a settlement like this to 8%).

One possible explanation for the larger fee sought here is that "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). Both firms seeking fees have a history of making political donations to Jim Hood, who has sole authority to retain outside counsel on behalf of MissPERS. In fact, few securities firms have given contributions as large as those from BLB&G to Hood. In February 2006, Hood retained BLB&G 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. *Pay-to-Play and the Tort Bar*, WALL ST. J. (Oct. 31, 2009). Between 2005 and 2011, BLB&G donated $122,000 to Hood, which is more than any other securities firm and represented 3.1% of *all* campaign contributions Hood received in this period. Bednarz Decl. Ex. E at 7. With their exceptional "pay" Bernstein Litowitz achieved remarkable "play," being appointed to represent MissPERS in 10 cases in this period, more than three times as many as any other securities firm. *Id.*

To justify their fee request, lead counsel assert that courts in this Circuit have awarded fees in the range of 33 1/3 to 40% of recovery "[i]n complex class actions like this one." Fee Mem. 8. The three cherry-picked examples they cite in support of this statement, however, are outliers with little in

common with the present case. Critically, *Retsky Family Limited Partnership* and *Goldsmith* predate much of the Seventh Circuit's modern free jurisprudence, and *Retsky* cites for the supposed 33 1/3 to 40% market rate (i) an out-of-Circuit case now from over 25 years ago, and (ii) an individually negotiated contingency fee case in which the Seventh Circuit expressly held that what might be a market fee in one type of litigation "does not demonstrate that the same percentage is the 'market rate'" in other, less risky types of litigation. *Retsky Family Ltd. P'ship v. Price Waterhouse LLC*, No. 97 C 7694, 2001 U.S. Dist. LEXIS 20397, at *10-*11 (N.D. Ill. Dec. 6, 2001); *see Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986). *Goldsmith v. Technology Solutions Co.*, meanwhile, involved "very real" risk, a settlement reached nearly at "the conclusion of fact discovery" such that plaintiffs' counsel were "fully informed about the facts of this case," and a fee less than half of plaintiffs' lodestar. 1995 U.S. Dist. LEXIS 15093, at *10, *15, *28 (N.D. Ill. Oct. 11, 1995); *see also Swift v. Direct Buy, Inc.*, No. 2:11-cv-401, 2013 U.S. Dist. LEXIS 152618, at *30, *32 (N.D. Ind. Oct. 24, 2013) (awarding "less than 20% of the Total Settlement Value," which was "below the fees and expenses [counsel] actually incurred"). Other examples appear to be rubber-stamped proposed orders submitted by plaintiffs' counsel. *See, e.g.*, *Roth v. AON Corp.*, No. 04-C-6835 (N.D. Ill. Nov. 18, 2009) (Dkt. 119-11); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09-C-7666 (N.D. Ill. Jan. 22, 2014) (Dkt. 119-12); *San Antonio Fire & Police Pension Fund v. Dole Food Co.*, No. 1:15-cv-1140 (D. Del. July 18, 2017) (Dkt. 100) (cited at Fee Mem. 9). Others involved different risk profiles and outcomes. *E.g.*, *Beesley v. Int'l Paper Co.*, 2014 U.S. Dist. LEXIS 12037 (S.D. Ill. Jan. 31, 2014) (seven-year "trailblazing" litigation). In short, these cases, and the other cases lead counsel cite, which involve different facts than those here, fail to establish that the market rate for *this case* is the hefty 25% of the gross fund sought by lead counsel.

2. The risk in this case was low, given the numerous prior admissions and settlements, militating for a smaller percentage fee award

Relevant to risk is whether the litigation followed a criminal or civil proceeding against the defendant involving the same underlying conduct. *E.g., In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1014-1015 (E.D. Wisc. 2010) ("Although a fee of 25% is still on the high side of a reasonable fee, … [t]his is not a case in which a criminal prosecution against the

defendants preceded the class's civil suit."). Plaintiffs acknowledge, and even rely on in the complaint, "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. For example, in February 2016—months before this action was filed—a court in this district approved an earlier related *qui tam* settlement that was supported by the U.S. Attorney General and 16 state Attorneys General, and defendants also settled a private class action filed in 2013 for $259 million on behalf of non-governmental customers arising from the same overcharges. *Id.*; Fee Mem. 13. These settlements "confirmed" "[t]he contours of the fraud" at issue, Dkt. 84 ¶ 8, which substantially reduced the risk.

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 million recovery is 0.59% of this loss. If lead counsel can recover 25% of the gross settlement fund, with a multiplier close to 3 times their proclaimed lodestar, what incentive will counsel have to pursue meritorious complaints and fight for true relief for the class?

B. The fee request does not comply with Rule 23(h) by failing to disclose how fees will be allocated—a critical concern due to role of MissPERS and ATRS.

Class counsel's fee request further violates Rule 23(h) because neither it nor the settlement agreement identifies how the attorney fee award will be allocated among the plaintiffs' firms. Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1). It is not sufficient that class members are able to make "generalized arguments about the size of the total fee"; the notice must enable them to determine *which* attorneys seek *what* fees for *what* work. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). The fee request fails to provide this basic information and thus undermines Rule 23(h)'s policy of "ensur[ing] that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *Id.*

This violation of Rule 23(h) unfairly shields class counsel's fee request from scrutiny and raises particular concern in light of MissPERS's apparent past affinity for undisclosed kickbacks, as exposed by *BLB&G*. There, as discussed above, the court affirmed unsealing a complaint, voluntarily dismissed 13 days after filing, in which a former BLB&G partner alleged that, after a settlement in principle was reached in a securities class action, a BLB&G partner "assigned two unnecessary legal research projects" to an attorney in Mississippi which resulted in a $112,500 payment to the Mississippi attorney for "ridiculous" work that "contained no meaningful analysis." *BLB&G*, 814 F.3d at 137. When confronted about the payment, another Bernstein Litowitz partner allegedly asked "Do you ever want us to work with Mississippi again?" *Id.* The whistleblower 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 court. *Id.* at *5 n.4. Nor were the fees paid to three additional undisclosed Mississippi law firms. *Id.* The whistleblower 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. He further alleged that Bernstein Litowitz ultimately "forced him to resign because he voiced concerns regarding a 'kickback scheme' whereby the firm was retained … in exchange for the firm's paying legal fees to friends and relatives of employees of the Mississippi Attorney General's Office for unnecessary, irrelevant, poor quality legal work." *Id.* at *1.

Here, just as in the case described by the *BLB&G* complaint, BLB&G was appointed by the Court, but when the case settled two other Jim Hood-contributing law firms have shown up—Gadow Tyler, PLLC ("Gadow Tyler") and Klausner, Kaufman, Jensen & Levinson. *See* Motion to Lift Stay for Limited Discovery (describing firms' financial support and political ties to Hood). Plaintiffs do not disclose how much either firm might receive from the $11.25 million fee request. About Gadow Tyler, 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 Tyler's work as "consulting" on litigation strategy, unspecified "legal research," "reviewing substantive pleadings," and attending a

mediation. Dkt. 119-7 ¶ 2. Any fees for unnecessary, duplicative, or post-settlement work doled out to maintain MissPERS as a client certainly goes above any "market rate" and should be rejected and returned to the class.

It is true that the allegations in the *BLB&G* complaint "are exactly that—simply allegations," 814 F.3d at 136, but there are reasons to find them credible. The essential facts of it were admitted in the Neville letter. "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). In other cases, when *BLB&G* is referenced by rival class counsel, BLB&G responds by asserting that the whistleblower in *BLB&G* "withdrew" his charges, and produces a one-page unsworn statement 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]." Bednarz Decl. Ex. C. This statement does not seem like a "withdrawal" so much as a carefully-worded statement by settling parties. It does not specify which, if any, allegations were withdrawn. As discussed above, the basic facts are *confirmed* by the Neville letter and the expert opinion BLB&G filed in the underlying docket.[3]

ATRS's apparent history of failing 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*, 2018 U.S. Dist. LEXIS 217874, at *12. To be clear, the *State Street* matter does not involve BLB&G, but it does raise a serious question about whether ATRS can adequately protect the class against excessive and/or politically-motivated fee requests.

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[3] An expert report BLB&G 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. *See* Bednarz Decl. Ex. D at 4-5.

The firm involved in *State Street*—Labaton Sucharow LLP—became a "monitoring counsel" for ATRS several years after BLB&G was already retained in this role. Monitoring counsel are generally retained for an open-ended engagement; the goal is to identify potential securities law violations that victimized 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). On the cutting edge of this trend, Bernstein Litowitz has been monitoring counsel for MissPERS since about 2006 and ATRS since 2004. Seeking to grease the wheels to obtain a monitoring agreement, Labaton agreed to share an incredible 20% of its future fees with Chargois & Herron, a law firm that then had offices in Arkansas and Texas but had no experience in securities. 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 placed a call to an Arkansas state senator 10 years earlier.[4] The judge presiding over *State Street* expressed understandable skepticism about this testimony, and "whether all those millions of dollars stopped with Mr. Chargois," which prompted Labaton to unsuccessfully move for his removal from the case. *See* 2018 U.S. Dist. LEXIS 111320, at *61. Indeed, when Chargois and Labaton were arguing about fees by email Chargois wrote, "[w]e got you ATRS as a client ***after considerable favors, political activity, money spent and time dedicated in Arkansas***." *Id.* at *10 (emphasis added).

Accordingly, exacting scrutiny consistent with Rule 23(h) is necessary to ensure the class is not denied any recovery that rightfully belongs to them through unscrupulous pay-for-play practices.

V. A cross-check is necessary due to the involvement of MissPERS and ATRS, but the undocumented lodestar appears implausible and cannot be the basis of fees.

For similar reasons, a lodestar crosscheck becomes especially important. But lead counsel provide insufficient documentation for the Court to conduct a crosscheck and they thus fail to meet

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[4] Alternatively, perhaps Labaton perceived that Tim Herron of Chargois & Herron would have an inside track to winning retention because at the time he was providing a rent-free apartment to then-Arkansas Treasurer and ATRS Trustee Martha Shoffner, who was later convicted of public corruption—accepting cash payment in exchange selling state bonds to a particular dealer. Chad Day, ARK. DEMOCRAT-GAZETTE (May 22, 2013), *Shoffner lived rent-free near the Capitol for most of her first term, landlord says* (Bednarz Decl. Ex. J).

their burden of justifying their requested fees. The lodestar information is limited to a summary of the number of hours worked by BLB&G and Gadow Tyler attorneys and their hourly rates, Dkt. 119-6 Ex. 1, and high-level general descriptions of their work. The fee request lacks even minimal information about the number of hours expended on general categories of work and steps that were taken to avoid duplication and unnecessary churn. This does not provide a "sufficient basis for analyzing the request." *Harman v. Lyphomed*, 734 F. Supp. 294, 296 (N.D. Ill. 1990), *rev'd in other part* 945 F.2d 969 (7th Cir. 1991); *see also Tommey v. Computer Sciences Corp.*, No. 11-CV-02214-EFM, 2015 U.S. Dist. LEXIS 48011, at *8-*9 (D. Kan. Apr. 13, 2015) (without lodestar data "the Court cannot determine if the amount of proposed attorneys' fees is reasonable" even for a solely percentage-based request). Class counsel's failure to submit any breakdown of hours worked prevents class members and the Court from evaluating the reasonableness of those hours, and so should prevent the award of attorneys' fees on the basis of lodestar. *See, e.g., Otey v. Crowdflower, Inc.*, No. 12-cv-05524-JST, 2014 U.S. Dist. LEXIS 52192, at *26 (N.D. Cal. Apr. 15, 2014) ("The Court is … unable to determine whether the hours spent are reasonable, because Plaintiffs' counsel have provided no evidence or itemized records to support the hours they worked.").

The limited information that is provided shows the lodestar is inflated due to high billing rates. For example, staff attorney billing rates are $350-$395/hour, and associates bill at up to $700/hour. *See* Dkt. 119-6. The award sought by the lead plaintiffs is also unduly high. MissPERS requests "reimbursement" of $21,618.75 allegedly based on an hourly rate derived from the salaries of staff members who worked on the case. Dkt. 119-2 ¶ 11. A transparency website for Mississippi state government shows however, that the maximum salary for an Assistant Attorney General is $129,325, while the maximum salary for Chief of Staff is $148,750; the $300/hour sought for these employees is equivalent to an annual salary and overhead of $600,000. *See* http://www.transparency.mississippi.gov/workforce/salaryStatistics.aspx.

VI. No fee multiplier is warranted.

In *Perdue v. Kenny A.*, the Supreme Court held that "there is a 'strong presumption' that the lodestar figure is reasonable" without an enhancement multiplier. 559 U.S. 542, 546, 554 (2010). An

enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that a lodestar fee alone "would not have been adequate to attract competent counsel." *Id.* at 554. *Kenny A.*'s limitation on lodestar enhancements was made with respect to attorneys' fees awarded pursuant to 42 U.S.C. § 1988; the limitation on § 1988's "reasonable" fee awards should apply equally to "reasonable" fee awards made under Rule 23(h). *In re Sears, Roebuck & Co. Front-Loading Washer Prods. Liability Litig.*, 867 F.3d 791 (7th Cir. 2017). There are no exceptional circumstances that justify class counsel's request for fees that represent a 2.84—or *any*—multiplier of their lodestar.

VII. Certain objection requirements are unduly burdensome.

Petri files this objection and accompanying notice of intent to appear by CM/ECF, which will effect service by email to all attorneys of record. N.D. Ill. L. R. 5.9. Petri objects to any unduly burdensome requirement that objectors also send a hard copy to be "received by" attorneys at their physical addresses on the objection deadline. *E.g., Hefler v. Wells Fargo & Co.*, 2018 U.S. Dist. LEXIS 150292, at *36 (N.D. Cal. Sept. 4, 2018) (paper service is "unnecessary, as electronic filing of an objection on the case docket constitutes service on the parties"). Petri further objects to any arbitrary requirements for objections in the preliminary approval order (Dkt. 111) that have no prejudicial effect but unduly burden class members' Rule 23(e) rights. *Cf. Pearson v. NBTY*, 772 F.3d 778, 786 (7th Cir. 2014) (invalidating "gimmick for defeating objectors"). Petri has not yet filed a claim, but will file one before the August 7 claims deadline. To the extent the required release in the claim form is construed as precluding any objection by Petri, Petri objects to that release as unfairly and impermissibly overbroad. *Id.*

CONCLUSION

The Court should deny fee approval until class counsel discloses detailed billing and the division of the fee award amongst counsel. Even if the Court were to grant fees without that information, it should scale the Rule 23(h) award to reflect an appropriate market rate, that is proportionate to the benefit realized by the class net costs, which would result in a fee award of perhaps $4.5 million, and still represents a multiplier over hours.

Dated: July 1, 2019

/s/ M. Frank Bednarz
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Attorney for Objector Mark Petri as 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

I, Mark Petri, as 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, am the objector. I sign this written objection drafted by my attorneys as required by the preliminary approval order.

Dated: July 1, 2019

Mark Petri, as 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

Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: July 1, 2019

/s/ M. Frank Bednarz
M. Frank Bednarz