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.	

OBJECTOR MARK PETRI'S MOTION TO LIFT STAY FOR LIMITED DISCOVERY AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

As detailed in the objection, Mark Petri, as trustee for the Julia Winkler Petri 2014 Trust ("Petri") opposes Lead Counsel's Motion for Attorneys' Fees. Petri objects because the $11.25 million request is unwarranted due in part to the diversion of fees to firms that were not appointed by the Court, but that have contributed money to Mississippi Attorney General Jim Hood's political campaigns. Rules 23(a)(4) and (g)(4) require class representatives and their attorneys to protect the class, and this requirement is not met because Mississippi Public Employees' Retirement System ("MissPERS") has a pattern and practice of awarding lucrative legal work to firms that support the attorney general. This conflict is only exacerbated by the involvement of the other named plaintiff, Arkansas Teacher Retirement System ("ATRS"), whose director recently testified that it does not monitor or object to questionable attorneys' fees diverted by lead counsel to politically-connected firms. To fairly prosecute his objection, Petri requires limited discovery into the billing performed in this case and lead counsel's fee sharing arrangements with other firms.

The Court previously ordered a stay on "all proceedings in the Action other than proceedings necessary to carry out or enforce the terms and conditions of the Stipulation." Dkt. 111 at 12. Accordingly, Petri moves the court to lift this stay to discover information necessary to fully analyze the fee request. The proposed discovery will be limited in scope—focused on counsel's billing and payments Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") will make and has made to other law firms while representing MissPERS and ATRS. This information is needed to comply with Rule 23(h). *See Redman v. Radioshack Corp.,* 768 F.3d 622, 637 (7th Cir. 2014); *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"). Petri will file the interrogatories he intends to serve prior to the presentment of this motion.

ARGUMENT

While MissPERS is not among the largest public retirement funds in the country, it is among the most prolific in securities litigation. Its litigation choices 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 attorneys' fees in this case. A former partner of 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*"); *see* Objection at 11-13.

As detailed in Petri's objection, the history of the lead plaintiffs raises reasonable questions about the adequacy of the class's representation and the reasonableness of counsel's fee request. Only discovery can uncover the answers. *See* Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 Okla. L. Rev. 237, 248-50, 271 (2017) (detailing the unsavory pay-to-play arrangements plaguing securities litigation and suggesting that judges order disclosures of campaign contributions or other quid pro quo payments). Here, just as in the case described by the *BLB&G* complaint, Bernstein Litowitz was appointed by the Court, but when the case settled, other Jim Hood-contributing law firms have shown up—Gadow Tyler, PLLC ("Gadow Tyler") and Klausner, Kaufman, Jensen & Levinson. Plaintiffs do not disclose how much either firm might receive from the $11.25 million fee request. About Gadow Tyler, plaintiffs say the firm spent 306.8 hours doing unspecified tasks. Dkt. 119-7 at 2. ***What purpose were these hours billed? When were they billed?*** About Klausner, Kaufman, plaintiffs say nothing at all. *Id.* Dkt. 119 at 39. ***Will any other firms undisclosed by MissPERS be compensated? If so, how much, and for what reason?***

Similar inquiries should also be answered by ATRS, which is involved 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. Co.*, No. 11-10230-MLW, 2018 U.S. Dist. LEXIS 217874, at *12 (D. Mass. Sep. 25, 2018). This inquiry reveals that at minimum, ATRS has proved incapable of monitoring billing it its own cases, which is why Petri and his *pro bono* counsel should be allowed to step in and guard the classes' interests by obtaining discovery specifically tailored to the fee request pending before the Court.

I. MissPERS's pattern and practice of awarding pay-for-play business to the political supporters of Mississippi Attorney General Jim Hood.

A. The credible kickback scheme pleaded in *BLB&G*.

As Petri outlines in his objection, MissPERS's apparent affinity for undisclosed kickbacks was exposed by *BLB&G*, which unsealed pleadings by a former Bernstein Litowitz partner. According to the complaint, after a settlement in principle was reached 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, 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 securities court. *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). Nor were the fees paid to three additional undisclosed Mississippi law firms. *Id.* The whistleblower further 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.

MissPERS itself confirmed an astonishingly narrow sense of candor during the *BLB&G* proceedings. In an effort to keep the complaint forever sealed, Bernstein Litowitz filed a letter from George W. Neville, Special Assistant Attorney General of Mississippi to the firm representing the putative whistleblower. *See* Declaration of M. Frank Bednarz, Exhibit ("Bednarz Ex.") A. (Neville continues to oversee securities cases for Jim Hood and logged time in this case. *See* Dkt. 119-2 at 5.) The letter first asserts that the Attorney General is "not constrained by the parameters of the traditional attorney-client relationship." *Id.* at 2. Instead, he "is that State for the purposes of litigation." *Id.*[1] 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

[1] The *BLB&G* district court responded to this 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.

attorneys such as the local counsel in the *Satyam* case." *Id.* at 3. 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 (quoting *State ex rel. Allain v. Miss. Pub. Servo Comm'n*, 418 So.2d 779, 782 (Miss. 1982)). 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." *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.* The rule had been amended effectively 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-requisite notice to the class. *See* S.D.N.Y. Local Civil Rule 23.1.[2] To the extent that Bernstein Litowitz suggests that the complaint unsealed in *BLB&G* is false, this should be proved through discovery. Discovery will also serve to guard against any lack of candor and potentially inadequate representation suggested by MissPERS.

In sum, Mississippi's attorney general asserts he has boundless authority to divert work to local firms and indeed MissPERS policy *requires* outside firms to retain "local counsel" in Mississippi, which MissPERS refuses to disclose to courts whenever possible. Jim Hood may find this desirable, but it is inadequate to protect absent class members asked to pay premiums for questionable costs of doing business with Mississippi. This Court should require 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

[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. No similar rule exists in this district

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).

B. Political donations from plaintiffs' firms to Jim Hood.

Because Jim Hood has 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 has endorsed 25% attorneys' fees on the gross common fund—more than is even allowed under its retention agreement with Bernstein Litowitz.[3] Other public investment funds do not allow such rates on large settlements obtained prior to resolving the motion to dismiss. *See* Bednarz Ex. I (New York funds' fee table limiting attorneys' fees for a settlement like this to 8%). Empirical research confirms this observation. "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). Few securities firms have given contributions as large as those from Bernstein Litowitz to Jim Hood.

When Jim Hood was first elected Mississippi Attorney General in 2003, he received no campaign contributions from any out-of-state securities firms. 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. *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. Bednarz 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.*

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[3] *See* Bednarz Ex. V at 1 (limiting fees as "a percentage of the recovery achieved for the class, *net of expenses*") (emphasis added).

For this reason alone, it's prudent to require counsel to disclose its campaign contributions. *See In re Diamond Foods, Inc.*, 295 F.R.D. 240, 256 (N.D. Cal. 2013) (recounting how it required firms to disclose "any campaign contributions made directly or indirectly to any fundraiser or political campaign in Mississippi"). The district court in *Diamond Foods* found that representation in that case was 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 Jim Hood.

Between October 13 and 25, 2016, four Bernstein Litowitz partners donated a total of $20,000 to Jim Hood's campaign. *See* N8 (Gelderman), N9 (Silk), N11 (Berger), N13 (Graziano).[4] The contributions are remarkable because Hood would not face reelection again until 2019. Apparently, something prompted four different Bernstein Litowitz partners in New York and Louisiana to spontaneously provide political support for the Mississippi Attorney General days after St. Paul Teachers' Retirement Fund withdrew its motion for appointment in this case, leaving MissPERS and ATRS with an uncontested motion for the appointment of Bernstein Litowitz. Dkt. 36 (Oct. 7, 2016). Bernstein Litowitz partners have also donated $21,800 to Hood recently in his current campaign to be elected governor of Mississippi. These contributions came from seven different partners between April 5 and 30, 2019—shortly after this court granted plaintiffs' motion for preliminary approval. *See* Q17 (Gelderman), Q18 (Silk), Q20 (Ross), Q21 (van Kwawegen), Q25 (Browne and Lebovitch), and Q30 (Graziano). In addition to these contributions, Bernstein Litowitz partner G. Anthony Gelderman has donated on at least two other occasions to Jim Hood (L2, O21), and the firm itself contributed $15,000 directly to Hood and provided unspecified "in-kind" benefits on two occasions in 2016 and 2017. M3, O12; Q35.

[4] Due to the large number of citations to voluminous campaign contribution disclosures, citations will be abbreviated by exhibit letter and number representing page of the entire exhibit, irrespective of what the internal page numbers reflect. So "N9" refers to Bednarz. Ex. N, page 9 of the exhibit (which is labelled "page 4 of 9" of the contribution records), showing a $5000 contribution by Bernstein Litowitz partner Gerald H. Silk on October 25, 2016.

"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) ("*BoNY Mellon*") (discussing political contributions and citing numerous law review articles on the subject). *BoNY 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. As a result, unlike in *BoNY Mellon*, the contributions to several of Hood's campaigns went ***directly*** to the person ultimately in charge of selecting outside counsel for MissPERS.

Gadow Tyler, a firm never mentioned in this case prior to co-signing the motion for preliminary approval, also has a long track record supporting the attorney general. The firm itself provided $13,500 of in-kind benefits regularly from 2016 to 2018 (N8, O22, P30), along with $5,000 cash and a $250 contribution from "Gadow Law," sharing the same address as Gadow Tyler, each in 2017. O22. Again, these contributions are interesting because Hood would not face election again until this year. Additionally, all four members of Gadow Tyler, including late name partner John Gadow, individually contributed reported amounts to directly to the Jim Hood campaign, mostly *in between* election years. *See* L2 (Gadow); P13 (Tyler); O27 (Kirschberg, both cash and in-kind contribution); N6, O13 (Boyles). John Gadow's widow and then-college-age daughter have also contributed directly to Jim Hood's campaign between 2016 and 2018. O27, P18, N9.

Finally, the Florida law firm that Bernstein Litowitz mentions only once, curiously described as "Plaintiffs' Counsel," buried in the John Browne Declaration, Dkt. 119 at 39 n.8—Klausner, Kaufman, Jensen & Levinson—has also recently contributed to Jim Hood's gubernatorial campaign, on April 11, 2019. Q23. That said, the direct political contributions of Bernstein Litowitz and Gadow Tyler understate their support for Jim Hood, since both firms have made massive *indirect* contributions

to his campaign and at least two immediate family members of Gadow Tyler partners have volunteered or worked directly for the Hood campaign.

1. Political donations to Hood funneled through the Democratic Attorneys General Association.

During Hood's last election, in 2015, by far the biggest contributor was the Democratic Attorneys General Association ("DAGA"), which is a Section 527 organization—a tax-exempt advocacy group that can raise unlimited money from donors. Jim Hood raised a little over $2 million for his reelection in 2015, and over 40% of it, $880,000, was provided by DAGA. Significant funders of DAGA in turn were securities plaintiffs' firms like Bernstein Litowitz—particularly in 2015. "[T]here 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." *Diamond Foods, Inc.*, 295 F.R.D. at 256. This "possibility" is compelling in the case of counsel's 2015 donations to DAGA.

For example, 12 days before the election, on October 22, 2015, Bernstein Litowitz contributed $100,000 to DAGA (S5) and the ***very same day*** DAGA sent Jim Hood payment for $150,000. S26. On August 28, 2015, John Gadow and Blake Tyler, PA (consisting of two other Gadow Tyler partners) each made contributions of $50,000 (S4, S12), for a total of $100,000. The size of these contributions is at least interesting considering that before Hood appointed their predecessor firm "Pond, Gadow & Tyler" to a high-profile case against Microsoft, it was primarily a bankruptcy firm. To this day, Gadow Tyler files hundreds of personal bankruptcies a year for flat fees as low as $900.[5]

[5] Bednarz Ex. W. In the Kirschberg Declaration, a Gadow Tyler partner avers that $500/hour is the "hourly rates for the attorneys in my firm . . . the usual and customary rates set by the firm for each individual." Dkt. 119-7. Such rates would seem to be higher than survey-reported rates for Mississippi bankruptcy attorneys, which is why Objector seeks corroborating evidence from Gadow Tyler. *See* United States Consumer Law Attorney Fee Survey Report, 2015-19, attached as Bednarz Ex. U, at 93-94 (median Mississippi attorney with 20.6 years in practice at $350/hr).

In 2015 DAGA received at least $625,000 from Bernstein Litowitz, Gadow, Blake Tyler, PA, and numerous other securities firms including Lieff Cabraser (R9); Cohen Milstein (S6); Kaplan Fox (R3, R4, R5, S2, S3, S10); Grant & Eisenhofer (S7, S13, S18); Baron & Budd (S7); Kessler Topaz (S12); and Motley Rice (S13). All of these firms have represented MissPERS. *E.g.* Bednarz Ex. E at 8-9.

Counsel might demur that it would be unlawful for donors to a Section 527 organization like DAGA to "earmark" their donations to particular candidates. But no earmarking would have been necessary because Jim Hood was the *only* candidate DAGA contributed to in 2015. Donors would know that DAGA would send much of the money it raised in 2015 to Jim Hood because it reserves little money year-to-year, had no permanent staff at the time, only three states even had attorney-general elections in 2015, and Hood had received most of the off-year 2007 and 2011 contributions made by DAGA.[6] According to followthemoney.org, Hood has received more all time from the organization than any other candidate except Mark Herring of Virginia. Bednarz Ex. T.

In any event, contributions to DAGA in 2015 virtually effected contributions to Jim Hood, and counsel's combined $200,000 contribution to DAGA should be considered as significant support for Jim Hood.

2. Work by Gadow Tyler family on Hood 2019 gubernatorial campaign.

Additionally, immediate family members of Gadow Tyler provide direct contributions by working or volunteering for the Hood campaign. In particular, the wife of attorney Kirschberg received $17,991.75 for her work on Hood's campaign for governor. P7, Q5. And the daughter of John Gadow has received $18,271.37 so far for her work on the campaign. P7, Q5.

The full extent of this work is unclear because Hood's financial disclosures only reflect payments to and from the campaign, and not other forms of support. It is also unclear whether any of the Gadow Tyler attorneys may have relatives in the Attorney General's Office, as was alleged in

[6] DAGA lent handsome support ($880,000) to Hood in 2015, even though his race was not particularly close (he won 55.3% to 44.7%). Meanwhile, DAGA contributed *$0* to Kentucky Democrat Andy Beshear, one of only three AG elections in 2015, who narrowly squeaked out a 50.1% to 49.9% victory over his Republican opponent.

the complaint underlying *BLB&G*. For this reason, Objector seeks discovery of additional volunteer work for the Hood campaign and employment by the Mississippi Attorney General's Office. Discovery is necessary here because "even the appearance of such arrangements threatens to sap the legitimacy of the selection and compensation of lead counsel in PSLRA cases." *BoNY Mellon*, 148 F. Supp. 3d at 308.

II. ATRS's history suggests it is also an inadequate representative.

The ostensibly pay-for-play relationship Jim Hood prefers for MissPERS counsel is not cured by the involvement of ATRS, which has recently proved to be unwilling or incapable of monitoring expenditures for undisclosed referral arrangements.

A. The $4.1 million "bare" referral fee paid by ATRS's counsel in *State Street* demonstrates the powerful incentives class counsel has to acquire clients.

ATRS is presently being scrutinized by another court for an undisclosed $4.1 million dollar "bare referral fee" paid by a different securities class counsel to politically-connected lawyers. *State Street*, 2018 U.S. Dist. LEXIS 217874, at *12. To be clear, the *State Street* matter does not involve Bernstein Litowitz, but it does raise a serious question about whether ATRS can adequately protect the class against excessive and/or politically-motivated fee requests.

The firm involved in *State Street*—Labaton Sucharow LLP ("Labaton")—became a "monitoring counsel" for ATRS several years after Bernstein Litowitz 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). Bernstein Litowitz was on the cutting edge of this trend and has been monitoring counsel for MissPERS since about 2006 and ATRS since 2004. Documents cited by the special master in *State Street* show that Labaton was eager to be retained by ATRS as Bernstein Litowitz had been, and frustrated that it was taking so long. To grease the wheels, 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.[7] 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 in 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).

Whatever Labaton may have been buying with its 20% referral fee, the fact that a seasoned securities firm would pay such high overhead cost for gaining a scintilla of access to a large pension fund demonstrates the high risk of tit-for-tat corruption in these arrangements. The existence of such payments, almost invariably concealed from courts, also suggests that attorneys in securities litigation enjoy much better than market rates, which is the entire point of Petri's objection.[8]

B. ATRS's director testified that the fund does not inquire about questionable referral fee arrangements, so it cannot safeguard its own potential conflicts, let alone those of MissPERS.

The executive director of ATRS 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 the underlying case—he

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[7] 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).

[8] As part of a proposed resolution with the *State Street* special master, Labaton surveyed all of its securities cases and found that *one third* of them had referral fee agreements, although Labaton assured the court none of them were "bare" referral fees like Chargois & Herron enjoyed. Bednarz Ex. K. Few of these referral arrangements appear to have been disclosed to courts besides the *pro forma* disclosures provided in S.D.N.Y. (*BLB&G* illustrates how fee sharing can be problematic even if it is not "bare": when the recipient firm conducts worthless work simply for the sake of billing.)

didn't *want* to know. George Hopkins, who served as executive director of ATRS until last fall wrote a declaration in support of Labaton which said:

> I told Mr. Belfi [a Labaton partner] that I did not want to know the specifics of fee allocations between Labaton and other attorneys. I also told Mr. Belfi that if I ever wanted to know the details of Labaton's fee-sharing agreements, I would ask him. Those were my instructions, and I believe that a lawyer should follow the client's instructions.

Bednarz Ex. F at 2. He further opined that "I believe that my knowledge of and involvement with fee agreements between attorneys would inevitably distract from my focus, which is protecting the class." *Id.* at 3. An odd statement, because the interests of class and counsel inevitably diverge when it comes time to decide how much of the fund counsel should earn. Even before the $4.1 million payment to Chargois emerged, Hopkins testified that there was "a pay grade issue for me to look at all those hundreds of pages" of class counsel's fee request. Bednarz Ex. G at 98.

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) (Easterbrook, J.). Either way, a class representative who abdicates any responsibility to supervise class counsel is not adequate. *See, e.g., Foley v. Buckley's Great Steaks, Inc.*, 2015 WL 1578881 (D.N.H. Apr. 9, 2015); *In re Ocean Bank*, 2007 WL 1063042, 2007 U.S. Dist. LEXIS 29443, at *20 (N.D. Ill. Apr. 9, 2007).

The failure to guard against excess fees is especially clear in this case, where ATRS has enthusiastically endorsed a fee request larger than its master agreement with Bernstein Litowitz would seem to suggest appropriate. As of 2014, the biennial master contract between ATRS and Bernstein Litowitz 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." Bednarz Ex. H at 9 (S.D.N.Y. Judge Rakoff quoting ATRS master agreement during testimony of George Hopkins). The $45 million settlement is in no way "a smaller" settlement—it 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 are no special circumstances that would warrant a higher-than-normal fee here. To the contrary, it was settled before a single deposition or motion contested by the defendant was resolved. Bernstein Litowitz might reply, accurately, that almost all ATRS settlements request a full 25% in attorneys' fees, even settlements much larger than this one, but that's the whole problem. Funds have little interest in monitoring attorneys' fees because the fund's share of the fee award is so dilute.

ATRS's sworn indifference and ignorance of attorneys' fees diverted to firms with ties to Arkansas officials makes it manifestly unqualified to protect the class from any MissPERS kickbacks.

III. The limited discovery Objector Petri seeks is well-tailored to balancing the needs of the class against the burden of specific interrogatories and document requests.

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. *See In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979) (holding district court abused its discretion in "refus[ing] to permit discovery" into settlement negotiations). Other circuits agree: "[A]n approval of a class action settlement offer by a lower court must be overturned if that court acted without [knowledge of] sufficient facts concerning the claim or if it failed to allow objectors to develop on the record facts going to the propriety of the settlement." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (internal quotations omitted); *accord Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Cohen v. Young*, 127 F.2d 721, 726 (6th Cir. 1942). *See also* Newberg on Class Actions § 11:57 (4th ed.) ("[P]rior discovery . . . most probably will not supply the objector with the material necessary to support an attack on the proposed settlement" so "the objector must secure evidence through ***independent discovery***.") (emphasis added). "As a fiduciary for the class, the district court must act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is." *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2011) (internal quotations omitted). "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. *Id.* at 994; *see also In re Capital One TCPA Litig.*, No. 12-cv-10064, Dkt. 209 (N.D. Ill. Oct. 30, 2014) (granting objector's motion to lift stay obtain discovery regarding class counsel's fee request); *Bowling v. Pfizer, Inc.*, 159 F.R.D. 492, 498 (S.D. Ohio 1994) (granting objectors' motion for discovery regarding attorneys' fees).

Rule 23(h) 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 review all of the materials that may have been submitted in support of the motion and, in an appropriate case, conduct discovery concerning the fees request").

Objector discovery is particularly appropriate here because the settlement's structure prevents defendant from seeking the requested discovery to challenge the adequacy of class representation. Defendant has stipulated to class certification for purposes of settlement (Settlement ¶ 2). Similarly, the defendant has no interest in contesting the payment of fees made from a lump sum common fund. *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). 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. & Sales Practices 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.* (quoting *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014)).

Here, the record regarding both fees and representational adequacy is not sufficiently developed. If objectors cannot seek discovery to develop the record regarding such submissions, no one will, and the fairness hearing becomes mere pretense. "[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." *In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 743-44 (3d Cir. 2001) (internal quotation and citation omitted).

Petri seeks limited discovery regarding class counsel and the named representative because the record is insufficient. "Because class actions are rife with potential conflicts of interest between class counsel and class members . . . district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp*., 356 F.3d 781, 785 (7th Cir. 2004). The potential for conflict is particularly "rife" here given the history of the lead plaintiffs and especially the relationship between Bernstein Litowitz and MissPERS. Questions as to the relationship between putative class counsel and the named representative warrant allowing discovery. *See Worth v. CVS Pharmacy*, 2018 WL 1611374, 2018 U.S. Dist. LEXIS 56760 (E.D.N.Y. Apr. 3, 2018). The detailed billing has special salience in this case in view of the *BLB&G* complaint, which alleged pointless post-settlement work performed for the sake of fattening the bills of political allies. Good cause exists to allow such discovery, given the history of lead plaintiff MissPERS, which causes reasonable skepticism of both the lodestar figure and the "risk" reported by Bernstein Litowitz.

CONCLUSION

Objector Petri respectfully moves the Court to lift the stay on proceedings to permit limited discovery regarding counsel's billing, the actual proposed distribution of fees, and the relationship between lead plaintiffs and the firms who stand to benefit from their lack of oversight. Objector will file proposed interrogatories Monday July 8, prior to presentment of this motion.

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

Certificate of Service

The undersigned certifies he electronically filed the foregoing Motion to Lift Stay to Conduct Limited Discovery 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