No. 20-2055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re: STERICYCLE, INC. SECURITIES LITIGATION,

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

Reply Brief of Appellant Mark Petri

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Introduction

The district court awarded over $11 million in attorneys' fees in a case where no discovery had occurred, before the court decided any substantive motions, and where the class will recover less than 1% of purported damages. Plaintiffs never produced the billing records that *Redman* and Rule 23(h) require and would have likely shown overbilling here, but even by their 10,000-foot billing overview, they admit a multiplier of 2.76 for such meager results.

Synthroid I requires a fee award that "emulates the incentives a private client would put in place" *ex ante* by a savvy and unconflicted private client to maximize recovery. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001). The court needed no emulation here: such an *ex ante* deal with *this* class counsel was in the record, A201-A202, but the court never mentioned it. The court rejected the near certainty that the class was being overbilled because of pay-to-play shenanigans, asserting implausibly there was "no evidence." Plaintiffs' repetition of the "abuse of discretion" standard of review does not excuse these errors of law. Instead, they ask for a reading of *Synthroid I* that expressly contradicts *Synthroid I*'s reasoning and analysis; plaintiffs' argument simply demonstrates the district court's error of law.

The district court refused to consider the credible allegations of pay-to-play as "speculation," but this reason for denying discovery is a Catch-22 abuse of discretion: without discovery or a whistleblower, no pay-to-play arrangement will ever have as much evidence as Petri presented here. And as discussed in Section III below, though plaintiffs expressly denied the existence of other documents Petri requested, they never denied—and still do not deny—the existence of fee-sharing agreements different from the one presented to the court only after Petri's objection.

These errors of law and multiple abuses of discretion require reversal.

Argument

I. The district court erred as a matter of law by failing to consider evidence of the appropriate market-approximating rate.

A. Retention agreements by sophisticated clients in comparable securities litigation are relevant as a matter of law under *Synthroid I*.

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 showed that the fee here was much higher than a market-approximating rate. Instead, the district court looked at unrelated cases cited by plaintiffs that did not support the fee award here. *Id*. Petri noted that this was error as a matter of law. OB19-24.[1]

The Chicago Teachers' retention agreement showed the very same class counsel here charging a 15% rate for securities litigation further along than this case. A201-02. Petri noted the legal error of the district court failing to mention it at all. OB22-23. Plaintiffs don't mention the Chicago Teachers agreement, either, much less distinguish it, and simply argue the district court had the discretion to ignore it because it looked at four unenumerated factors mentioned by *Synthroid I* as pertaining to market rates. PB26-32.

But that is exactly backwards. *Synthroid I* was discussing four factors that *markets* use to determine rates. 264 F.3d at 721. But when it did so, *Synthroid I* was not establishing a four-factor test for *courts* to use: after all, "a list of factors without a rule of decision is just a chopped salad." *Id.* at 719 (rejecting Second Circuit multi-factor approach). The sentence from *Synthroid I* quoted by the plaintiffs and the district court

[1] "OB" and "PB" refer to the Opening and Plaintiffs' Briefs respectively. "SA" refers to Petri's Supplemental Appendix.

provides no rule of decision. It would be odd if on page 719, *Synthroid* criticizes multi-factor tests without a rule of decision, but then establishes exactly such a test without rule of decision in a single sentence on page 721 that the rest of the opinion never mentions again. That's simply a misreading of *Synthroid I*, and the plaintiffs and district court commit legal error in adopting that misreading.

Yes, when better evidence of *ex ante* negotiations are unavailable, a court should approximate a rate. But it is hard to imagine better evidence of the market rate than a *retention agreement by a sophisticated client using the same law firm for the same sort of litigation*! Indeed, *Synthroid I* says just that: "The first benchmark is actual agreements." 264 F.3d at 719. The district court got *Synthroid I* upside down by ignoring the "first benchmark" to apply a four-factor test *Synthroid I* never established. Plaintiffs repeat the error rather than defend it.

Even if a throwaway line in *Synthroid I* about four factors markets use to determine rates was, contrary *Synthroid I*'s critique of multi-factor tests used by other circuits, meant to dictate a test for district courts, Petri demonstrated that the district court erred.

First, Petri discussed in detail why the cases the district court looked at for similar rates weren't analogous to a case settled without discovery piggybacking on a successful *qui tam* suit. OB23-24; OB38. Plaintiffs do not dispute Petri's arguments, and simply argue that the district court did not abuse its discretion misreading plaintiffs' cherry-picked and distinguishable cases. PB30-32. Plaintiffs then cite a study speaking of *average* rates in securities litigation (PB31-32) while ignoring Petri's argument that this was hardly an average case in risk or difficulty (OB20-23), and that market rates take the stage of the case into account. *See Synthroid I*, 264 F.3d at 722.

Second, the district court confused available cash with more relevant metrics of corporate worth, leading it to a clearly erroneous conclusion of the quality of counsel's

performance. OB24; A2. Plaintiffs repeat the district court's error without addressing Petri's refutation. PB28. Plaintiffs also bizarrely claim that no other firm would have taken this case. *Id.* In fact a rival plaintiff withdrew because of smaller qualified loss. OB6.

Rather than address Petri's arguments why the district court's reasoning ignoring the fee agreement was legal error (OB19-24), plaintiffs simply quote that reasoning. PB33.[2]

The "Yes it is/No it isn't" repartee of Monty Python's Argument Clinic is entertaining, but not illuminating; Petri is hard-pressed to reply when plaintiffs aren't addressing his arguments other than to repeat the district court's erroneous reasoning. For the reasons stated in Petri's opening brief, the district court applied the wrong test under *Synthroid I* and ignored dispositive evidence that the fee request was too high. And even under the district court's legally erroneous reading of *Synthroid I* as simply requiring a tallying of four factors, the district court's reasoning and reading of precedent was clearly erroneous.

B. Like the district court, plaintiffs do not even address Choi's study, which confirms an intuition from basic economics that firms paying *de facto* kickbacks charge higher fees.

Plaintiffs repeat the district court's argument that Petri did not "attach any empirical data." PB33; A3. This is wrong; Petri attached the first benchmark, evidence of the retention agreement between this class counsel and the Chicago Teachers. A201-02. And both below and in this court, Petri relies on Stephen J. Choi, *et al.*, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 678 (2011) ("Choi").

[2] Plaintiffs do argue (PB33) that the *Orbital* district court rejected analysis of the submitted fee agreement and awarded 28%, but *Orbital* did not claim to be using a market-approximating rate, which the Fourth Circuit does not require. Dkt. 133-14.

OB15; OB31. Choi demonstrates empirically that firms that use pay-to-play to obtain institutional-investor clients charge dramatically higher rates than firms with unconflicted clients. OB31. Plaintiffs deal with this empirical data exactly as the district court did: by pretending it doesn't exist, never mentioning Choi once, much less distinguishing or rebutting his study.

Perhaps plaintiffs mean to ascribe legal significance to the verb "attach" in that Petri merely cited Choi (OB15) rather than attaching the study as an evidentiary exhibit. But plaintiffs cite no authority for such a proposition. This published peer-reviewed study is available in databases and online.[3] This Court routinely relies on empirical data from publicly available law-review articles and studies, even when not peer-reviewed or attached as an exhibit in the record. *See, e.g., In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 723 (7th Cir. 2016); *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013); *Pearson v. Target Corp.*, 893 F.3d 980, 986-87 (7th Cir. 2018).[4] The district court erred (OB31), and plaintiffs repeat the error rather than defending it.

C. The district court erred in failing to consider facts demonstrating that there is a "pay-to-play" problem here.

Plaintiffs call (PB35) the pay-to-play allegations "demonstrably false," but they don't demonstrate falsehood. Plaintiffs do not deny that every firm paid here recently gave money to former Mississippi Attorney General Jim Hood. Plaintiffs do not deny that Bernstein Litowitz partners in New York have contributed to Hood regularly and

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[3] *E.g.*, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2576&context=articles.

[4] Note too that good-faith objections are already underincentivized. OB43 n.6. If courts require objectors to generate an expensive expert report from scratch when objections are typically due two weeks after plaintiffs file a fee request, plaintiffs will almost always be able to shield requests from Rule 23(h) challenge.

substantially since 2006, with the first donations arriving just days after the firm was first retained to represent MissPERS. Plaintiffs do not deny that Bernstein Litowitz partners continued to contribute to Hood throughout this litigation. Plaintiffs do not deny that days after Bernstein Litowitz's lead counsel application became unopposed, its partners gave $20,000 to Hood—even though it was an off-year and Hood would not face election for three years. OB11. These unusual off-cycle contributions comprised 6.7% of all contributions Hood received in 2016. Dkt. 120-17.

Nor do plaintiffs deny the allegations pleaded by a former of counsel in *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016) ("*BLB&G*"). Plaintiffs do not deny that, as described by the underlying complaint, Bernstein Litowitz diverted $112,500 worth of work to politically connected Mississippi lawyers at the direction of MissPERS. *Id*. at 138. Plaintiffs instead quote a carefully crafted letter from the case's plaintiff. PB39-40. Petri quoted the same letter and observed "None of the allegations were withdrawn." OB26-27. Plaintiffs do not deny that Bernstein Litowitz's own filings in *BLB&G* confirmed what a deputy attorney general described as "policy of the State of Mississippi and its agencies to engage local counsel in litigation." A90. Plaintiffs do not discuss the filings from *BLB&G* at all.

Plaintiffs refashion Petri's arguments into strawmen because they cannot deny the central facts: As a matter of policy, MissPERS diverts works to politically-favored "local counsel" in Mississippi. OB10. To the contrary, they admit that work performed by Gadow Tyler, PLLC, a Mississippi firm that mainly files consumer bankruptcies, was "understood *ex ante*." PB15. Plaintiffs do not deny that Bernstein Litowitz nonetheless did not disclose the work and existence of Gadow Tyler until plaintiffs announced the settlement. OB6. Plaintiffs do not deny that they did not disclose the Klausner firm, another recent Jim Hood contributor, until the fee motion, where they were mentioned once on a footnote on page 39 of a supporting declaration. OB7.

Nor do plaintiffs dispute the basic economic concept that firms compelled to pay *de facto* kickbacks must make up for this costs by passing along higher rates. *See* Choi, 8 J. EMPIRICAL LEGAL STUD. at 678. Plaintiffs deal with the empirical research proving this basic intuition exactly as the district court did: by not citing it and pretending it doesn't exist.

1. The *BLB&G* complaint alleges that MissPERS directed work diverted to politically connected firms, and plaintiffs do not deny this.

Plaintiffs attack *BLB&G* by reciting caveats that Petri already discussed in his opening brief (OB26-28), and never grapple with the undisputed facts suggesting that former Mississippi Attorney General Jim Hood used his oversight of MissPERS to direct plum assignments to local firms politically connected to Hood—exactly what occurred here.

In *BLB&G*, a former Bernstein Litowitz attorney filed a sealed complaint alleging breach of contract, alleging the firm forced him to resign for trying to expose the use of kickbacks while representing MissPERS. 814 F.3d at 143. The Second Circuit unsealed the complaint, which alleged that Bernstein Litowitz assigned unnecessary work (and a $112,500 payment) to a Mississippi lawyer related to an assistant attorney general. *Id.* at 137. In fact, Bernstein Litowitz allegedly paid *four* other Mississippi law firms not disclosed in the underlying class action 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). To be sure, the allegations in the *BLB&G* complaint "are exactly that—simply allegations," 814 F.3d at 136, but Bernstein Litowitz's own filings in the case confirm the facts relevant here. Plaintiffs do not mention these filings, despite Petri's discussion of them in his opening brief. OB8-9; OB26.

The issue on appeal in *BLB&G* was whether the district court should unseal the settled complaint. MissPERS and Bernstein Litowitz maintained they should remain

perpetually sealed, and in support filed a letter from George W. Neville, Special Assistant Attorney General of Mississippi (and a billing attorney in this case, Dkt. 119-2 ¶ 11) to the attorney for the *BLB&G* plaintiff. A88. The letter instructed the whistleblower not to disclose the payment, which MissPERS has never itself 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." A90. By the State of Mississippi, Neville explained that he means Jim Hood: "the Attorney General has complete authority over litigation, such as those matters Bruce worked on, that are brought on behalf of the State as well as all state entities. … Therefore, the Attorney General serves not only as counsel to the State, but is the State for purposes of litigation." A89. The policy to engage local counsel 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." A91. Bernstein Litowitz also hired an expert to opine that no violation of legal ethics occurred assuming the truth of these facts. OB27.

Plaintiffs do not deny any of the particulars in *BLB&G*. They simply call the allegations "withdrawn." PB39. Plaintiffs block-quote the same carefully-worded withdrawal letter from the *BLB&G* plaintiff as Petri quoted in his opening brief (OB27), but plaintiffs do not quibble with any fact alleged in the *BLB&G* complaint. Plaintiffs do not dispute that the supposed withdrawal letter, which obliquely discusses the difficulty of recovery in dismissing his employment case (A92) but does not actually withdraw any factual allegation. Nor do plaintiffs dispute or even address the admissions that MissPERS itself made in the *BLB&G* docket. MissPERS did in fact divert work to local counsel without disclosing it to the court, which it admitted. OB26-27.

For this reason, in a rare instance where a court unearthed the existence of *BLB&G* on its own, it found *BLB&G*'s undisputed facts disqualifying. "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 *Mednax*, a MissPERS plaintiff group had the largest loss among potential lead plaintiffs, but the district court declined to appoint Bernstein Litowitz given the troubling allegations.[5] Plaintiffs falsely claim (PB36) that "not a single court" found the conduct alleged in *BLB&G* problematic. *Accord* PB37. Both plaintiffs and the district court ignore *Mednax*, which Petri cited repeatedly. OB28; OB35; A158; SA18.

Plaintiffs cite cases they claim to "rejected [] outright" the idea that campaign contributions may create a conflict, but the most of these predate *BLB&G*, and concern belated challenges raised by *defendants* against class certification. For example, one court faults defendant for "belatedly-raised insinuations" it should have raised before appointment. *Pub. Emples. Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 110 (S.D.N.Y. 2011). Courts will not warmly receive a defendant that sandbags concerns for years. *Cf. generally* Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 FLA. L. REV. 1089, 1126 (2013) (discussing why courts cannot rely on defendants to police plaintiff-side conflicts). *Semtech* (PB37) had a similar posture.

Diamond Foods (PB37) did not "reject the idea outright," much less imagine a "constitutional protection" against the disclosure of lead counsel's campaign

[5] *Mednax* declined to except MissPERS from 15 U.S.C. § 78u-4(a)(3)(B)(vi)'s prohibition on serial plaintiffs: the "five in three years" rule. 2018 U.S. Dist. LEXIS 207064, at *42.

contributions as plaintiffs suggest.[6] *Diamond Foods* not only allowed discovery on the topic, "the Court made special inquiries" during counsel selection and again on class certification. *In re Diamond Foods, Inc.*, 295 F.R.D. 240, 256 (N.D. Cal. 2013). *Diamond Foods* found a different law firm satisfactory because it had given no donations after the litigation began. As Petri observed, and plaintiffs don't dispute, this is untrue here. OB35-36 & n.36.

2. Plaintiffs' excuses for the diversion of work to previously undisclosed firms do not withstand scrutiny.

Plaintiffs argue that conflict of interest could not exist because MissPERS's "first-to-approach" policy allegedly requires it to retain the first qualified monitoring firm to approach it about potential litigation. But plaintiffs do not respond to Petri's argument that since *every* monitoring firm patronized Jim Hood, the policy does not eliminate the potential conflict, but simply relocates it upstream to when monitoring firms acquire or retain "qualified" status.

First, *every* firm to have represented MissPERS in securities litigation has donated to former Attorney General Jim Hood. The "first-to-approach" policy does not foreclose political favoritism as plaintiffs claim. PB38-39. The policy allegedly requires MissPERS to select the first law firm to approach the Attorney General's Office *out of a panel of eleven qualified firms*. SA67. In the past, MissPERS has not always followed this policy. *See Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization,*

[6] Inquiry into political contributions does not violate the Constitution; rather, such inquiries safeguard absent class members' constitutional due process rights to adequate representation. *Cf. Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) (political contributions to judges). As plaintiffs' brief contradictorily notes, many contributions are public as a matter of course. PB50.

LLC, 616 F. Supp. 2d 461, 466 (S.D.N.Y. 2009) (case brought to MissPERS's attention not by any monitoring counsel, but by Pond Gadow, a predecessor to Gadow Tyler).

But even if MissPERS rigorously followed the first-to-approach policy, it would not prevent political influence because plaintiffs do not dispute that each and every firm appointed by MissPERS in a securities case is a political donor to Jim Hood. OB8; A103; A155. Thus, the policy does *not* remove the "appearance of any political favoritism" as claimed (PB38), it simply relocates *when* political favoritism manifests. How does a firm get to be on the panel of qualified monitoring firms? How does a panel firm remain there? Bernstein Litowitz's undisputed history of political donations provides a strong clue. "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." OB11 (quoting *Pay-to-Play and the Tort Bar*, WALL ST. J. (Oct. 31, 2009)).

Plaintiffs argue (PB39 n.6) that *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 307 (S.D.N.Y. 2015) found that MissPERS's purported first-to-approach rule rendered political contributions a non-issue. This greatly misrepresents the opinion. In *Mellon Corp.*, Bernstein Litowitz gave just $2000 to the Oregon Attorney General in seven years, and Oregon co-counsel made several contributions, some of them small and from years earlier. 148 F. Supp. 3d at 308-09. Even though the case settled, even though defendant therefore withdrew its objections to certification related to the contributions, even though no objector raised the issue, even though the settlement came after years of contentious litigation, and even though the settlement provided a fractional lodestar multiplier of 0.96, the district court discussed the issue at length. *Id*. at 307-308 & n.31 (citing, *inter alia*, Choi). Only because the fee award was so proportionally modest, "it is unnecessary to decide what might be warranted in comparable circumstances if the question whether to approve the fee request were a

close call." *Id.* at 309. In this case with its 2.76 multiplier and large donations and admitted Mississippi policies, Petri has shown much more damning conduct than *Mellon Corp*. addressed.

Second, plaintiffs' explanation for diverting work to Gadow Tyler cannot withstand scrutiny. While plaintiffs assert categorically that they "never decided to participate in a case or select a law firm to represent it in a particular action based on political contributions," and "Mississippi often engages local counsel to aid their retained national law firms," they do not explain why they selected *this* firm. PB13-14.

No disclosed policy seems to govern Gadow Tyler's employment. Plaintiffs argue that MissPERS "understood *ex ante* that Gadow Tyler's work would have included assistance with MissPERS' document collection and review." PB15. But this assertion raises more questions than it answers. What policy required the selection of prolific Jim Hood contributors like Gadow Tyler here? If Bernstein Litowitz understood "*ex ante*" Gadow Tyler would participate, why omit that in their application for lead counsel appointment? Dkt. 30, 31. Finally, if Gadow Tyler was supposed to perform "discovery and other local matters to minimize costs to the class" (PB14-15), how did they bill 300 hours when there was never discovery? (While plaintiffs make much of the confirmatory discovery that apparently occurred after the Stericycle agreement-in-principle to settle the case (PB7), plaintiffs also claim that 98% of the time Gadow Tyler spent on the case occurred *before* that agreement (PB15), so they weren't working on discovery.)

The uncontradicted Neville letter filed in *BLB&G* suggests the existence of "policy of this office to provide work to qualified minority attorneys," (A156-57), but Gadow Tyler does not appear to be a minority firm and plaintiffs do not call it such. The stated rationale behind MissPERS's requirement to award work locally appears quite flexible.

Because plaintiffs provided no detailed hours, the only clue we have about their work comes from a paragraph of their declaration. The attorneys' work

> included legal research … meeting with Bernstein Litowitz attorneys to discuss case staffing and strategy, attending and participating in the mediation session held in Chicago, and participating in ongoing discussions about litigation strategy, settlement negotiations, and the settlement approval process. Furthermore, Gadow Tyler reviewed and edited certain lead plaintiff submissions, engaged in regular communications with the Office of the Mississippi Attorney General about case developments, and prepared … regular reports to [MissPERS].

SA74-SA75.

None of these activities square with MissPERS's chimeric excuses for requiring the participation of local counsel.

The *BLB&G* complaint suggests that potential political favoritism occurs not only at the time of selecting lead counsel, but also during litigation, when politically connected firms receive legal work. Petri requested discovery of campaign contributions and *employment* relationships with the Attorney General's Office for precisely this reason.

While plaintiffs assert that the district court did not require Petri to *prove* political corruption (PB50), the district court found "**no evidence** of any wrongdoing or illicit understanding between Class Counsel and MissPERS." A6 (emphasis added). But the uncontested filings in *BLB&G*—put into the record below by Petri—are evidence. The campaign contributions are evidence. The adverse inference from refusal to produce fee-sharing agreements and previous allocations is evidence. And there is also evidence in the fact that Gadow Tyler's $500/hour rates greatly exceed standard billing rates in Jackson, Mississippi (A161 n.5), let alone for attorneys who plaintiffs do not deny file consumer bankruptcies for flat fees as low as $900. OB12. And this is before considering

the nearly 3x multiplier awarded here. And, most importantly, there is the additional evidence that the requested rate here is nearly twice that of Bernstein Litowitz's retainer with Chicago Teachers. A201-02.

Gadow Tyler contributed six figures toward Jim Hood's political career since 2015. OB13. This patronage is significant in a state where all of Hood's contributions received in the ten months before his 2015 reelection totaled just $1.52 million. SA34. Perhaps Gadow Tyler could parlay its generous gifts into work like that performed here, where a claim of just over 300 hours of not-specifically described work turned into $423,000 for three attorneys.

To the extent that the district court did not erroneously require Petri to *prove* his allegations without discovery, it clearly erred in finding "no evidence of any wrongdoing."

D. Pay-to-play means MissPERS's acquiescence to a 25% rate is not a market rate under *Synthroid I*.

Plaintiffs suggest that the diversion of work to Gadow Tyler and the Klausner firm does not matter because the overall fee award was supposedly "reasonable," but this assumes the conclusion. Petri argued the fee award to be excessive, and that the conflict confirms the excessiveness because less conflicted plaintiffs provide better oversight.

Petri argued that firms compelled to pay political patronage rationally charge higher fees and "friendlier" politically-controlled clients like MissPERS provide less sharp scrutiny of such fees. OB15; OB31; A158. Choi tested this proposition by creating a database of securities settlements and then controlling for independent variables such as types of claims, settlement size, client type, length of litigation, and government involvement, among others. Choi, 8 J. EMPIRICAL LEGAL STUD. at 657-59. Choi found that securities settlements staffed by attorneys who give "large contributions" (above

$10,000) to politicians that oversee pension funds have attorneys' fees request, *ceteris paribus*, 13.2% higher than settlements where such large contributions don't exist. Choi, 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.* Here, class counsel's contributions to Jim Hood run into six digits and comprise a noticeable percentage of all campaign contributions he received; these sums easily exceed Choi's threshold for "large contribution." *See id.* at 671.

Plaintiffs ignore Petri's arguments and try to recast him as a conspiracy theorist positing secret agreements with many co-conspirators. PB23; PB26; PB35. These mischaracterizations crumble under scrutiny.

For one thing, Petri never alleged any kind of illicit agreement between class counsel and ATRS at all. Petri simply argued that *State Street* proved that ATRS was incapable of monitoring outside counsel. ATRS failed to second-guess a different firm that agreed to pay $3 million to politically connected lawyers who did no work, but had provided free rent to a former Arkansas treasurer convicted of public corruption. OB30-31. ATRS could not detect questionable fee diversions from its own backyard, so one cannot trust them to monitor counsel here.

But to the extent any secret agreement exists, it's an open secret. *Every* MissPERS-approved monitoring counsel was a patron of Hood. OB31. And based on MissPERS's uncontradicted letter in the *BLB&G* docket, Hood himself insisted that formally retained counsel divert work to local counsel not disclosed to district courts. Petri is making reasonable inferences, rather than baseless speculation.

Tit-for-tat relationships require no express agreement. *Cf. Caperton*, 556 U.S. at 886 (conflict created by monetary contribution even absent "allegation of a *quid pro quo* agreement"). The players simply understand unwritten requirements (like the one to divert work to political friends) and know that failure to perform them may kill off the

golden goose. As a Bernstein Litowitz partner allegedly put it, "[d]o you ever want us to work with Mississippi again?" *BLB&G*, 814 F.3d at 137; *compare* A91 (Mississippi policy is that outside counsel "serves at his pleasure and may be dismissed by him").

Petri does not know whether an illicit agreement exists, but even a tacitly understood arrangement would disadvantage the class. Firms compelled to pay political patronage rationally charge higher fees and avoid scrutiny for these fees, as Choi confirms. Absent class members should not be compelled to provide *de facto* contributions for political patronage. Petri has met the burden for a court to fulfill its fiduciary duty to absent class members and investigate the evidence here.

II. *Redman* and Rule 23(h) require discovery of detailed billing information in this case. While a district court has the discretion not to perform a cross-check, it has the obligation to explain *why* it is exercising that 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. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). Here, class counsel *never* provided the data and the court erroneously refused class members the opportunity to discover them. "Allowing class members an opportunity to 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 receives "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* favorably).

Plaintiffs justify the lack of discovery of billing records on the fact that the district court chose not to perform a cross-check. PB51-55. But plaintiffs cannot deny that the district court's reasoning was circular: "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." A3-A4. Petri argued that this failure to explain the exercise of discretion constitutes an abuse of discretion. OB41-42.

Plaintiffs incorrectly contend the district court explained its reasoning a page-and-a-half earlier in its five-and-a-half page order. PB54. But the full quote shows nothing of the sort. It says: "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.'" A2 (quoting *Florin v. Nationsbank of Ga., N.A.*, 34 F.3d 560, 566 (7th Cir. 1994)). That the percentage method "may" be suitable in no way explains why the court exercised its discretion to *not* perform a lodestar cross-check *here*.[7]

Plaintiffs next misrepresent Petri's argument about the district court cases cited by the district court for not performing a cross-check. PB54-55. As Petri argued, each of these courts ***explained*** why they were not conducting a lodestar cross-check, and most did an exemplary job of considering all available *Synthroid I* benchmarks. OB41-42. The court here did not, and "[n]one of the cases the district court cited endorse such deficient analysis." *Id.* Petri does not argue a district court can never forego a lodestar cross-check, but that the court must explain that exercise of discretion to give an appellate court something to review. *Contra* PB55.

Plaintiffs argue repeatedly that the purported 2.76 lodestar multiplier "readily confirms the reasonableness of the fee award." PB2; PB53; PB56. But plaintiffs assume

[7] Plaintiffs object (PB54 n.12) that *Foman* and *Steenes* involve other questions of law. But Petri cited these cases (OB39) for the generally-applicable principle that an exercise of discretion "without any justifying reason … is not an exercise of discretion; it is merely abuse of that discretion." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The principle certainly applies here. *E.g.*, *Johnson v. NPAS Solutions, LLC,* -- F.3d --, 2020 WL 5553312 (11th Cir. Sept. 17, 2020) (court must give explanation for rejecting objection).

the conclusion. Even though plaintiffs' billing only itemizes names, rates, and total hours spent, Petri made specific objections to both the rates claimed and the multiplier. SA15-16; SA20-21. Petri questioned, for example, the propriety of billing staff attorneys at rates up to $395/hour. *Id. Cf. In re Anthem, Inc. Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137, at *130 (N.D. Cal. Aug. 17, 2018) (finding staff and contract attorney "markup of approximately 729%" and reducing rate). The district court did not address these arguments because it concluded it need not perform *any* cross-check.

Moreover, *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 258 (7th Cir. 1988), which proposed a "sensible ceiling" of a 2.0 multiplier to avoid unwarranted attorney windfalls. OB39. Plaintiffs never mention *Skelton*, which would require a significant haircut here. Plaintiffs' discussion (OB42) of *Cook v. Niedert* does not note that the *plaintiffs* in that case complained about *too much* emphasis on lodestar, the reverse from the proposition they advance. 142 F.3d 1004, 1013 (7th Cir. 1998).

Plaintiffs argue that they provided high-level billing descriptions. PB52-53. But they do not deny that hours expended are a relevant consideration for a market-based percentage fee award under Seventh Circuit law. *Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 833 (7th Cir. 2018). As in *Camp Drug*, "there was no real litigation in this case." *Id.* Plaintiffs never mention *Camp Drug*. Given the extensive evidence of pay-to-play (Sections I.B-I.D above), lodestar billing records are necessary to determine how much of the billing was that done by a faithful fiduciary, and how much was an excuse to divert political patronage.

Given the extraordinary context of this fee request, the district court's unexplained failure to cross-check constituted an independent abuse of discretion. OB42-44.

III. The district court erred in refusing discovery on pay-to-play issues.

The hearing on Petri's discovery request was July 22, 2019. Ten months later, the district court rejected discovery on the pay-to-play issues as "speculative" and because "further discovery [sic]" would cause "delay" (though the court did not find that Petri's July 1 motion—two weeks after the fee request—was untimely). A5. As Petri demonstrated in his opening brief, none of these reasons hold water. OB35-37. The district court's failure to rule was what caused the delay; and precedents about delay of settlement (PB45) are hardly relevant when Petri did not challenge the settlement. Plaintiffs assert *ipse dixit* that the limited discovery would have been "harassing," (PB45) and repeat the district court's "delay" assertion, but do not deny that if the court had granted the request in July, discovery would have been complete well before the court's May 19, 2020, ruling. When a party makes a timely motion without lack of diligence, a court cannot use its own reticence to hold that delay precludes the exercise of rights. *E.g.*, *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 554-555 (7th Cir. 1996) (amended complaint); *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017) (reopening discovery).

Plaintiffs argue (PB47-48) that the fee-sharing agreements Petri requested are unnecessary because they represented to the court that they would distribute fees in proportion to each firm's claimed lodestar. But that, once exposed to potential scrutiny, class counsel reached a *new* fee-sharing agreement does not tell us what fee-sharing agreement existed *before* Petri's objection. Imagine, for example, that, as with *State Street* and Chargois & Herron's 20% finder's fee (OB14), the politically connected firms here were usually entitled to a large percentage of the total fee without much work, and in those cases Bernstein Litowitz agreed *ex ante* to a much smaller relative multiplier as a result. (The Chargois 20% share for no work is empirical evidence of a typical pay-to-play arrangement involving one of the lead plaintiffs, ATRS, here.) It would then be

dispositive that, as Choi demonstrates, the 25% request reflected dramatic inflation at the class's expense to compensate Bernstein Litowitz for their extra anticipated costs. Even now, plaintiffs don't claim they produced the fee-sharing agreements, just that they voluntarily disclosed *an* allocation after Petri threatened to shine a light on their conduct. One must parse the negative pregnant of the plaintiffs' argument:

> The undisputed record is that ***there are no other fee sharing agreements***—the sharing of fees between counsel has been fully disclosed.

PB48 (emphasis in original).

Note both the passive voice and the lack of record citations. Plaintiffs don't say that ***they*** have disclosed the fee-sharing ***agreements*** (defined in A172) past and present, just that "the sharing of fees between counsel has been fully disclosed." Petri *does* dispute the record, which has *no* evidence whether other fee-sharing agreements made before Petri's objection exist. Plaintiffs never claimed below that they could *not* produce other agreements, just that a production order was irrelevant. SA95 ("all potential payments out of any attorneys' fee award have been disclosed to the Court" with no claim whether other agreements existed); SA74-SA76 (no representations about fee-sharing agreements' existence); SA57-SA61 (same). This is a negative pregnant. When class counsel wanted to communicate that documents Petri requested (A176 ¶ 7) did not ***exist***, they straightforwardly said so: "There are no litigation financing agreements that pertain to this case." SA59. But when it comes to fee-sharing agreements, plaintiffs dance.

The record is thus consistent with plaintiffs hiding an indefensible fee-sharing arrangement by agreeing to submit a more defensible allocation to the court after Petri's objection created risk of *State Street*-like exposure. We don't know because plaintiffs have never said "There are no other fee sharing agreements" instead of "The record is

that there are no other fee sharing agreements." The latter sentence is technically true in that the record lacks evidence one way or the other, but may be misleading. (Yes, it would be shocking if class counsel played so fast and loose with words, but *State Street* shows hiding behind such misleading ambiguity is a disturbingly common tactic in fee requests. *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. 11-10230-MLW, 2020 U.S. Dist. LEXIS 33552 (D. Mass. Feb. 27, 2020).) When was the *pro rata* arrangement made? Did it supersede a previous agreement? Petri also asked for disclosure of fee-sharing allocations in previous cases (A176): were they all *pro rata*? And is there a new fee-sharing agreement that Mississippi counsel will receive additional compensation in a different case for its *pro rata* agreement in this one? These are relevant questions asked in discovery, but not answered in the record.

Plaintiffs argue that Petri does not need information about political donations because they "are a matter of public record." PB49-50. But Petri requested information about donations from family members of the plaintiffs' counsel, as well as in-kind contributions. A176. That is not public record, and could hide the magnitude of the already large contributions.

IV. Plaintiffs' *ad hominem* attacks are both irrelevant and false.

"Courts expect—demand—responsible advocacy from members of the bar. … Lawyers who launch ad hominem attacks on the bench and their adversary bring dishonor only on themselves." *United States v. Kimberlin*, 898 F.2d 1262, 1266 (7th Cir. 1990). Regrettably, this has happened here: plaintiffs open their brief by criticizing Petri's attorney as a "notorious professional objector." PB1; PB22. But this Court has expressly criticized this language. "We have avoided that pejorative phrase because the merits of an objection are relevant, not amateurism or experience." *Pearson v. Target Corp.*, 968 F.3d 827, 831 n.1 (7th Cir. 2020).

Plaintiffs denigrate Petri who "purchased just 180 shares of Stericycle stock." PB22. To be clear: Petri purchased 180 shares of Stericycle stock before this litigation even started in 2015 and has lost around $12,700 on these shares, for which the settlement provides less than 1% this loss. Dkt. 120-1; Dkt. 119-4, Ex. A at 2. Petri's class membership is not a pretext, and plaintiffs cannot dispute his standing. To the extent that plaintiffs fault Petri for not being an institutional holder (PB12), he addressed this in his opening brief. OB25; OB43 n.6. Even for large institutional holders, the amount of fees do not justify the cost and risk of objecting.[8] Could a mutual fund ever justify the risk of seeking discovery from class counsel given that plaintiffs would seek punitive reciprocal discovery from an objecting fund? The vitriol in plaintiffs' filings should confirm why institutional holders rationally don't object in securities settlements. There are powerful incentives not to poke sleeping bears.

The mere attempt to distract the Court with *ad hominems* would be bad enough, but the attacks are doubly abusive because they are false. "Notorious" (PB1; PB22) means "widely and unfavorably known." But Petri's attorney Frank has, as of this brief, *won all seven Seventh Circuit appeals he has argued* relating to class actions, garnering this Court's and national praise in the process. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014); SA26-27 (quoting *New York Times* and *Wall Street Journal*). Nevertheless, the applicable legal rules don't change depending on the identity of the person making the arguments. The Court should reiterate and reemphasize its earlier holdings and expressly discourage such abusive attacks that attempt to shift litigation from the merits of a settlement or fee request to collateral litigation over Frank's career, which are sadly a regular feature of Frank's practice. SA28.

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[8] OB43 n.6. *Cf. also In re Petrobras Sec. Litig.*, No. 19-3531 (2d Cir. Oct. 1, 2020) (affirming $33,741 fee award to objector who won over $46 million for class members, despite being subjected to extensive discovery).

Plaintiffs' other insults (PB12-13) are similarly false or misleading, including misquotes of cases that have nothing to do with Frank, and knowing misrepresentations of cases where Frank won millions for class members. SA121-26; SA30-31. The *ad hominems* will be the subject of a separate motion for sanctions.

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, the court should require class counsel 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 history of fee-sharing agreements with this client, and the district court should supervise the allocation of the Rule 23(h) fee award. Circuit Rule 36 should apply on remand.

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Respectfully submitted,

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Executed on October 22, 2020.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on October 22, 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.

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