UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE BROILER CHICKEN ANTITRUST LITIGATION	Case No. 1:16-cv-08637
This Document Relates To:	Honorable Thomas M. Durkin
All End-User Consumer Plaintiff Actions	
JOHN ANDREN, Objector.	

OBJECTION TO MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARD

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INTRODUCTION

End-user consumer plaintiff class counsel Hagens Berman Sobol Shapiro LLP ("Hagens Berman") and Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") (collectively, "class counsel") seek a Rule 23(h) award of fees and expenses that is nearly 38% of the $181 million class settlement fund—a percentage that greatly exceeds the bids they have submitted to serve as class counsel in other antitrust class actions, the sliding scale this Circuit applies to large settlements such as this, and the mean and median percentages that empirical data show are far more appropriate. To further establish the excessiveness of the fee award, objector John Andren is requesting additional data from class counsel regarding their fee bids in class actions. At a minimum, this Court should reduce class counsel's fee award and return over $30 million to the class.

I. Objector John Andren is a member of the class and intends to appear through counsel at the fairness hearing.

As documented in the accompanying Declaration of John Andren ("Andren Decl."), Andren is a member of the class. Andren is an attorney with Hamilton Lincoln Law Institute, which represents him in this matter. During the period from January 1, 2009 to July 31, 2019, Andren purchased fresh or frozen raw chicken, whole cut-up birds within packages, or "white meat" parts including chicken breasts or wings in both the District of Columbia and Florida. Andren purchased these products for personal and household use and not for resale or distribution to retailers. Andren Decl. ¶ 3. Andren filed a claim through the settlement website and was assigned Claim Number 129172865. *Id.* ¶ 4.

HLLI, through its subunit the Center for Class Action Fairness ("CCAF"), represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Briseño v. Henderson*, 998 F.3d 1014 (9th Cir. 2021) (sustaining CCAF's client's objection to a lopsided claims-made settlement with illusory injunctive relief); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (same; noting that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 716-17 (6th Cir. 2013) (same; noting CCAF's client's "numerous, detailed, and substantive"

objections). Since it was founded in 2009, CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 55-57 & n.37 (2018). CCAF has recouped over $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017) (more than $100 million at time). Andren brings this objection through CCAF in good faith to protect the interests of the class. Andren Decl. ¶ 6. His objection applies to the entire class; he adopts the arguments in any objections to fee requests and amicus briefs not inconsistent with this one. Andren intends to appear through his counsel at the final approval hearing.

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

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013). Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations." *Id.* A district court therefore must act as a "fiduciary of the class," for the rights and interests of absent class members. *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). The Seventh Circuit has instructed district courts as fiduciaries "to exercise the highest degree of vigilance in scrutinizing proposed settlements" and attorneys' fee awards in class actions. *Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646, 652 (7th Cir. 2006). At the fee-setting stage, the relationship between class members and counsel turns 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) (internal quotation omitted). Given this natural adversity, there can be no deference to class counsel's recommendation. *In re Southwest Airlines Voucher Litig.*, 799 F.3d 701, 713 (7th Cir. 2015).

Moreover, "in most common-fund cases, defendants have little interest in challenging class counsel's timesheets." *Gutierrez v. Wells Fargo, NA*, No. 07-cv-05923 WHA, 2015 WL 2438274, at *6 (N.D. Cal. May 21, 2015). No individual class member has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded objectors) serve as the last line of defense against overreaching fee requests. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23. 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).

III. Class counsel's fee request is excessive and contains signs of self-dealing.

In recognition of the absence of an actual market and the concern plaintiffs' lawyers will be overpaid, the Seventh Circuit requires district courts to "assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 635 (7th Cir. 2011). Such concerns are heightened when, as here, "the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC,* 662 F.3d 913, 917 (7th Cir. 2011). The *ex ante* approach recognizes that "[i]t is inherently illogical for lawyers to undertake litigation on the basis of the risks and rewards they perceive at the beginning, yet be compensated on the basis of the risks and rewards the court perceives at the end of the litigation." *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990) (Walker, J.)).

Class counsel goes to considerable lengths to assert that a 33% flat fee—really a whopping 37.8% of the settlement fund—is a reliable and accurate *ex ante* valuation of the litigation, and that the sliding scale fee schedule that is preferable in the Seventh Circuit is not appropriate. But class counsel's request is grossly excessive in light of the diminishing marginal rates regularly applied to funds of this

size and the risks and opportunity cost of the litigation, as evidenced by data from similar common fund cases and class counsel's *ex ante* bids in other class-action cases. *See In re Synthroid Mkt. Litig.* ("*Synthroid I*"), 264 F.3d 712, 719 (7th Cir. 2001).

The history of this litigation is relevant to understand the minimal risk that class counsel faced and why the requested fee would overpay them. In October 2016, Hagens Berman aggressively sought to be named counsel to represent indirect purchasers. Dkt 117. A rival firm, Cotchett, also sought the role as lead counsel (Dkt. 116), and the district court approved its application to act as lead counsel in a four-firm leaderships structure. Dkt. 144. In November 2017, class counsel moved to split the class and proposed to represent the end-user purchasers because of a conflict with the other indirect purchasers. Dkt. 216. The district court agreed but left open the decision on who should serve as lead counsel for the new subclass. Dkt. 243. Class counsel again sought to be named lead counsel for the new end-user subclass, and similar to its October 2016 motion, provided a detailed motion seeking appointment as lead counsel for the end-users, which the court granted. Dkt. 247 and 248. Both of its motions seeking appointment were long on resume, but conspicuously failed to mention proposed fees or fee structure or that a fee of 33% of a common fund is the *ex ante* value of the litigation and what class counsel would be seeking as a fee.

Approximately two years after initiating the lawsuit, class counsel learned that the U.S. Department of Justice had begun a criminal investigation of the defendants that led to indictments against several of the defendants and executives and a guilty plea from Pilgrim's Pride. *United States v. Pilgrim's Pride Corp.*, 20-CR-0330-RM (D. Colo.). The posture of the class case became more favorable and the litigation less onerous once DOJ picked up the laboring oar of investigation and discovery and there was the accompanying prospect of criminal liability. Although class counsel may have expended time and effort initially developing the case without piggy-backing off a government investigation, the government's eventual criminal investigation and prosecutions no doubt assisted the civil class case and eased settlement, reducing the risk to class counsel that its efforts would be fruitless.

Class counsel did not account for this reduced risk in their fee request and instead seek a fee that is excessive once it is properly calculated and analyzed in the light of (1) counsel's history of

bidding *ex ante* or requesting *ex post* lower percentage-based awards; and (2) this Circuit's sliding scale approach for megafunds. A proper fee analysis will return tens of millions of dollars to the class.

A. Out-of-pocket costs are not a class benefit and should be excluded when calculating attorneys' fees.

As a threshold matter, class counsel includes the full settlement fund in the denominator of its fee request, but excludes costs from the numerator. The result is a percentage request that artificially appears lower than it is. The "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 v. RadioShack*, 768 F.3d 622, 630 (7th Cir. 2014). Out-of-pocket costs, although paid through the settlement fund, are not benefits to the class and thus not part of "what the class members received." *Id.* Although some cases refer to notice and administrative costs, there is good reason to deduct all litigation costs before setting the fee award. "If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses." *In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994). Accordingly, for purposes of calculating attorneys' fees, "costs are part of the settlement but not part of the value received from the settlement by the members of the class" and should be excluded. *Pearson*, 772 F.3d at 781.

The total funds available to the class are $181 million, from which class counsel is seeking $68,480,000: $59,730,000 in fees and $8,750,000 in expenses. Dkt. 5161 at 2. This is 37.8% of the settlement fund. When calculating a percentage of attorneys' fees, however, "costs are part of the settlement but not part of the value received from the settlement by the members of the class" and the calculation should exclude them. *Pearson*, 772 F.3d at 781. In the Seventh Circuit, class counsel is not entitled to a 33% commission on their out-of-pocket costs.

Performing the arithmetic *Pearson* requires, we remove the almost $9 million costs from the $181 settlement fund, leaving a $172.25 million common fund. Applying the proposed 33% flat fee to that $172.25 million would result in a fee award of about $56.8 million, or nearly $3 million less than class counsel's request. But this is still unreasonably high because it ignores the best evidence of a market rate evidenced by precedent, empirical data, and class counsel's past *ex ante* bids.

B. Class counsel's past fee bids and requests show that a 33% award would pay a substantially above-market rate for the risk and opportunity cost in this case.

It is only the parties entered into this partial settlement that class counsel asserts that a flat fee of 33% is standard within the Seventh Circuit, particularly in cases with common funds in excess of $90 million. In both the Motion for Attorneys' Fees and the Response Regarding Application of Sliding Scale to Attorneys' Fees, counsel cite district court cases involving antitrust cases in which the fee award was at or near 33%, thereby concluding that there is ample support for a 33% fee award as the *ex ante* valuation of the litigation, and that the sliding scale is inapplicable because those cases, like this one, involved high-risk, high-stakes multi-million dollar complex and fact intensive litigation.

As for "data from similar common fund cases," class counsel cherry picks the most attorney-generous sample of settlements as supposed support for its position. Class counsel also argue that the lodestar cross-check is in line with the 33% flat fee request and indicative of *ex ante* expectations. This is nothing more than *ex post* reasoning dressed-up as *ex ante* evidence for the requested fee award. Both the flat fee request and the lodestar multipliers cannot be evidence of *ex ante* value for the litigation. For instance, if class counsel had achieved a greater settlement award such that the common fund was 3 or 4 times greater than the $181 million figure (perhaps because potential damages were greater), but the lodestar remained constant, then either the 33% flat fee or the range of multipliers class counsel reference as consistent with *ex ante* expectations would be dramatically inconsistent. Conversely, if the common fund reached upon settlement was significantly less than $181 million, yet the lodestar remained constant, again, either the 33% flat fee or the range or multipliers cited by class counsel could be evidence of their *ex ante* expectations of the value of the litigation, but not both.

Ex post awards overshoot the market partly because they are usually awarded without adversarial presentation. *See Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014) ("By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that "caselaw" is so generous to Class attorneys."). The major force that exerts downward pressure *ex ante*—the threat of losing the representation to another firm—dissipates before settlement.

In recognition of the absence of an actual market and the concern class lawyers will be overpaid, the Seventh Circuit requires district courts to "assign fees that mimic a hypothetical *ex ante* bargain between the class and its attorneys." *Williams*, 658 F.3d at 635. Because no such market actually exists, the Seventh Circuit has suggested several "benchmarks" to help district courts estimate the market fee: (1) actual fee contracts between plaintiffs and their attorneys; (2) data from similar common fund cases where fees were privately negotiated; and (3) information from class-counsel auctions. *Synthroid I*, 264 F.3d at 719-20.

Class counsel nevertheless fails to mention in either their fee motion or Sliding Scale Response their fee requests or awards in the antitrust cases undertaken by the two primary class counsel firms cited in the motions to be named as lead class counsel. The firms represented that those cases involved multiple defendants, complex legal and factual issues, and featured experienced, sophisticated opposing counsel. Those cases also were similar to this one in that they involved high-risk, high-stakes, multi-million dollar complex litigation. If only we had some way to determine how class counsel valued, *ex ante*, these other similar class-action antitrust cases. Thankfully, we do. Hagens Berman, one of the two primary lead counsel firms for the end-user class, has, on multiple occasions, submitted fee structure bids as part of a motion seeking appointment as lead counsel. These bids are usually sealed, but twice, a Ninth Circuit decision required Hagens Berman to disclose the bid. *In re Lithium Ion Batteries Antitrust Litig.*, Case No. 13-MD-2420-YGR (N.D. Cal), Dkt. 2630-2 (appeal pending) (attached as Bednarz Decl. Ex. A); *In re Optical Disk Drive Prods. Antitrust Litig.*, Case No. 10-MD-2134-VRW (N.D. Cal) Dkt. 2900 (attached as Bednarz Decl. Ex. B), reported at *In re Optical Disk Drive Antitrust Litig.*, 959 F.3d 922, 934 (9th Cir. 2020).[1] In both instances, the bids were structured as a sliding-scale such that the fee award percentage declined as the size of the recovery for the class grew. Moreover, the fee structure bid that Hagens Berman submitted in the *Optical Disk Drive* litigation was inclusive of costs such that the sliding scale percentages included both attorney fees and out-of-pocket

[1] The district court solicited bids in the *Optical Disk Drive* litigation and Hagen Berman submitted an unsolicited bid in the *Lithium Batteries* litigation.

expenses, and the *Lithium* bid capped costs at $3.5 million. Below are the details of the *Optical Disk Drive* and the *Lithium Batteries* bids, respectively:

	Pleading through Decision on Motion to dismiss	After Motion to Dismiss through adjudication of Class Certification	After adjudication of Summary Judgment	Through Trial Verdict and Appeal
First $5,000,000	0%	0%	0%	0%
$5,000,001 - $25,000,000	5%	14%	14%	14%
$25,000,001 - $50,000,000	4%	13%	13.25%	14%
$50,000,001 - $75,000,000	3%	12%	13%	14%
$75,000,001 - $100,000,000	2.5%	11.5%	12.5%	13.5%
$100,000,001 - $200,000,000	2%	10%	11%	12%
$200,000,001 - $400,000,000	1.5%	7%	8%	9%
$400,000,001 and above	1%	5%	6%	7%

	Pleading through Decision on Motion to dismiss	After Motion to Dismiss through adjudication of Class Certification	After adjudication of Summary Judgment	Through Trial Verdict and Appeal
First $5,000,000	0%	0%	0%	0%
$5,000,001 - $25,000,000	8%	17%	17%	17%
25,000,001 - $50,000,000	7%	16%	16.25%	17%
$50,000,001 - $75,000,000	6%	15%	16%	17%
$75,000,001 - $100,000,000	5.5%	14.5%	15.5%	16.5%
$100,000,001 - $200,000,000	5%	13%	14%	15%
$200,000,001 - $400,000,000	4.5%	10%	11%	12%
$400,000,001 and above	4%	8%	9%	10%

The fee structure bids Hagens Berman has submitted in other similar antitrust cases *ex ante* its appointment as lead counsel, rather than *ex post* appointment and settlement, is the best evidence before the court of how class counsel values the litigation on an *ex ante* basis. *In re Optical Disk Drive*, 959 F.3d at 934-35 (competitive bid is starting point to determine reasonable fee); *Synthroid I*, 264 F.3d at 720 (competitive bids are key benchmark for gauging market rate because it shows what an attorney would be willing to accept as compensation). Putative lead counsel are well positioned to assess their risk and price their services accordingly based on their lodestar in similar class actions and their broader litigation experience. *See, e.g.*, *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190, 1196 (N.D. IL 1996) ("knowledgeable law firms are well qualified to [assess *ex ante* risks] every day in establishing fee arrangements with their own clients"). For example, if *ex ante*, an attorney believes she has a very low chance of success, then she would propose a larger percentage of the recovery or a guaranteed minimum payment, as she would in the marketplace, to compensate her for that risk. *See In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n.9 ("any sensible lawyer will have pegged his or her proposal high enough to take into account the possibility of ending up with no recovery"). And there is no reason to believe that complex antitrust litigation or class-action MDL cases are significantly more costly in the Seventh Circuit than in the Ninth Circuit, but that is the essence of class counsel's claim regarding the 33% flat fee. Indeed, Ninth Circuit case law further undermines class counsel's assertions regarding the 33% flat fee. That Circuit has consistently noted that the benchmark fee award for "mega-fund" cases (settlements in excess of $100 million) is 25%. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1297 (9th Cir. 1994)

Andren recognizes that it is too late to conduct competitive bidding to assign lead counsel. Nonetheless, applying the bid Hagens Berman submitted in *Lithium Batters* (the higher of the two known bids) is consistent with Seventh Circuit's requirement that attorneys' fees be based on market rates. Moreover, it demonstrates that class counsel's 33% flat fee request is excessive. Hagens Berman submitted the bid in March 2013 along with a motion to be named sole lead counsel. The bid included a sliding scale fee percentage for different tiers of dollar recovery depending on when and how the case was resolved (e.g., motion to dismiss, summary judgment, etc.). If this Court declines to apply

the sliding scale approach formulated by the Seventh Circuit in *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003) ("*Synthroid II*"), Hagens Berman's past bids are a significantly more accurate indicator of the *ex ante* market rate for this litigation than the requested 33% flat fee. Using actual bids submitted by class counsel in other similar antitrust cases is a more reliable way to "mimic [the] bargain between the class and its attorneys." *Williams*, 658 F.3d at 635.

Applying the sliding structure from Hagens Berman's past bids yields fees about $6 million ***less*** than under the *Syntroid II* sliding scale (which we discuss in Section III.C below) that class counsel vigorously argues is not appropriate for this type of litigation:

Recovery tier	% fee/tier	Fee award
First $5,000,000	0%	$0
$5,000,0001 - $25,000,000	17%	$3,400,000
$25,000,001 - $50,000,000	16.25%	$4,062,500
$50,000,001 - $75,000,000	16%	$4,000,000
$75,000,001 - $100,000,000	15.5%	$3,875,000
$100,000,001 - $172,000,000	14%	$10,080,000
Total Fee		$25,417,500

Andren acknowledges that each case is unique and presents unique challenges, but the issues in this case that counsel highlights in the fee request and the Sliding Scale Response were not so extraordinary, unique or unexpected as compared to the cases in which Hagens Berman submitted fee bids as to justify a flat 33% fee. If anything, the opposite is true: the government investigation (and Pilgrim's Pride's knowledge of their eventual guilty plea) reduced risk substantially. The fee structure bids submitted by Hagens Berman in similarly complex antitrust litigation provide the district court an accurate and reliable metric with respect to an appropriate fee award. It is the best insight into the *ex ante* value placed on similar litigation by experienced and sophisticated class counsel. The district court, in its capacity as a fiduciary for the unnamed class members, must use that information in assessing the fee award request. *In re Continental Ill. Secs. Litig.*, 962 F.2d at 572 (discussing how "the

judge has so step in and play surrogate client" when selecting class counsel). In so doing, the court must reject counsel's request for a 33% flat fee and implement a sliding-scale approach that is favored in the Seventh Circuit and which Hagens Berman has demonstrated a willingness to use when seeking to win appointment as lead counsel in similarly large and complex antitrust cases.

Furthermore, details regarding class counsel's fee requests in other cases demonstrate that the requested 33% flat fee is excessive. Class counsel specifically highlighted the *In re Electronic Books Antitrust Litig.*, No. 11-MD-2293 (S.D.N.Y.) in both motions to be named lead counsel. (Dkt. 117 at 4, 8; Dkt 247 at 4). Both Hagens Berman and Cohen Milstein served as lead counsel in that antitrust class action. In that case there were two potential scenarios for recovery after settlement contingent upon the results of an appeal, the greatest being a $400 million recovery for consumers and $160 million recovery for states that had joined the class action. Under that scenario, class counsel sought a fee of 7% of the recovery to consumers (excluding costs) and a 17% fee for the recovery due to the states. Under a different scenario resulting in a smaller recovery, class counsel sought a fee of 17% of the recovery for the consumers and 26% of the recovery for the states. Including prior payments by defendants to consumers, "the total amount of fees and expenses, measured as a percentage of the total payments by all defendants, would equal 12.2 percent under the first scenario and 18.4 percent under the second scenario." *In re Electronic Books Antitrust Litig.*, 11-MD-2293 (Dkt. 666 at 14) (attached as Bednarz Ex. C). Those are percentages far below 33% and more in line with Hagen's bids.

The only case from this district cited by class counsel in either motion for appointment, *In re Stericycle, Inc., Sterisafe Contract Litig.*, 13-CV-5795, MDL 2455 (N.D. IL), also indicates that the 33% flat fee is excessive. Although not an antitrust litigation, the case involved complex issues related to pricing and pricing practices. Hagens Berman served as lead counsel and submitted a fee request that amounted to "just 8.79% of the total class recovery and 13.56% of the cash payment." *In re Stericyle, Inc., Sterisafe Contract Litig.*, 13-CV-5795, MDL 2455 (N.D. IL) (Dkt. 318 at 1, 7) (attached as Bednarz Ex. D).

Class counsel's request for a 33% flat fee is demonstrably out of line with what has been sought in similar cases. Andren expects his interrogatories seeking limited discovery of fee awards and

bids for Hagens Berman and Cohen Milstein in other complex antitrust cases will further show the excessiveness of a 33% award. Such information is far more probative of the *ex ante* market rate than "survey participants," self-interested legal arguments, or dueling empirical data. *See* Dkt. 5049 at 3-6.

With respect to the other *Synthroid I* factors, they too show that the fee request is unduly inflated. "[S]electing competent counsel using a competitive process generates a lower percentage-of-the-fund fee arrangement than Eisenberg and Miller's mean and median percentages, which mostly reflect awards granted *ex post*," and exceed the request here. *Capital One TCPA*, 80 F. Supp. 3d 781, 803 (N.D. Ill. 2015); *see also In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 947 n.7 (N.D. Ill. 2001).

C. Class counsel's Rule 23(h) request grossly exceeds the market rate because fees for a $181 million megafund should include diminishing marginal rates.

Class counsel's request for 37.8% of the $181 million common fund grossly exceeds the market rate for funds of that size. "The market rate for legal fees 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, diminishing marginal rates should apply to a $181 million fund to more accurately reflect the market because "negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate." *See Silverman v. Motorola*, 739 F.3d 956, 959 (7th Cir. 2013); *Synthroid II,* 325 F.3d at 975 (noting that the "market rate, as a percentage of recovery, likely falls as the stakes increase"); *Synthroid I*, 264 F.3d at 721 ("Both negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case."). As Judge Easterbrook reasoned:

> Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards).

Silverman, 739 F.3d at 959 (observing that is just as expensive to litigate a $100 million case as a $200 million case because "costs of litigation do not depend on the outcome").

For example, in *Synthroid II*, the Seventh Circuit ordered fees for consumer class counsel of 30% of the first $10 million, 25% of the next $10 million, 22% of the band from $20 to $46 million, and 15% of everything else on a fund totaling $88 million. 325 F.3d at 980. *Synthroid II* was a fraud suit against a drug manufacturer which included two classes: a consumer class and a third-party payor class. *Id.* at 976. The court took into account that the consumer class counsel in that case had assumed as great a risk as counsel for the third-party payor class in those proceedings and thus, awarded fees that applied the same marginal rate awarded to the third-party payor class counsel. *Id.* at 980. The Seventh Circuit recognized that class counsel had assumed "a significant risk, for the consumer class did not have an easy road." *Id.* at 977. There is no evidence that this case involves greater risk than *Synthroid II*. And, "[a]s Eisenberg and Miler concluded in 2004 and again in 2010, 'the overwhelmingly important determinant of the fee is simply the size of the recovery obtained by the class,' not the subject matter of the litigation." *In re Capital One TCPA*, 80 F. Supp.3d at 803 (quoting Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248, 250 (2010)). Class counsel presents little reason to accept their view that some vaguely referenced class members might negotiate a flat 33% for a case such as this, while discarding legal precedent, sound analytical reasoning, and empirical data showing otherwise. Courts have applied sliding scales in antitrust actions, contrary to class counsel's claim that a flat 33% fee is common in large antitrust class actions, and nothing in *Synthroid* limits its application to antitrust cases. Class counsel's citation to a handful of district court case should be seen for what they are—cherry-picked outliers. *See* Dkt. 5161 at 11 (citing *Kleen Prod. LLC v. Int'l Paper Co.*, 2017 WL 5247928 (N.D. Ill. Oct. 17, 2017). And, it can hardly be said that class counsel had a difficult road here. *See* Section II.

Applying the percentages from *Synthroid II* to this case based on the $181 million common fund shows that class counsel should receive at most $31.5 million and likely much less once empirical data about class counsel's bidding history, risk, and opportunity cost are considered. The excessive fee request reflects self-dealing, and the extra $28 to $35 million should be distributed to the class members, not class counsel.

Recovery Tier	Rate	Fee
$0 to $10 million	30%	$3,000,000
$10 to $20 million	25%	$2,500,000
$20 to $46 million	22%	$5,720,000
$46 to $181 million	15%	$20,250,000
	TOTAL	$31,470,000

The empirical data for megafund settlements over $100 million shows that the sliding scale appropriately compensates class counsel here and, even if the court were to apply a flat rate, the fee award should be the same. Empirical research shows that in class actions "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 Empirical L. Stud. 811, 838 (2010). In settlements ranging from $100 million to $250 million, the median award is 16.9% and the mean is 17.9%. *Id.* Other surveys report similar data. *See, e.g.*, Logan, Stuart, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Reports (March-April 2003) (empirical survey showing average recovery of 15.1% where recovery exceeded $100 million); Eisenberg & Miller, 7 J. Empirical Legal Stud. at 265 tbl. 7 (mean percentage fee in 68 class action settlements with recovery above $175.5 million was 12% and median award was 10.2% with standard deviation of 7.9%). These authorities demonstrate that the market rate, and what would be negotiated *ex ante*, is in accord with the sliding scale which, if anything, over-compensates Hagens Berman here. Because class counsel's fee request fails to account for diminishing marginal percentages in market-based rates for megafunds, and because class counsel has not met their burden of demonstrating their proposed fee request does not overcompensate them for the relatively low risk they incurred in this case, the requested fees are unreasonable and should be reduced to the sliding scale of *Synthroid II* at most and, more reasonably, to Hagens Berman's demonstrated *ex ante* market price. Either approach would return approximately $30 million or more to the class.

D. There must be consequences for class counsel seeking such an exorbitantly excessive fee.

The court must consider awarding a smaller fee in this case because class counsel, on previous instances involving complex antitrust class action litigation, indicated a willingness to compete to be named class counsel for an *ex ante* fee significantly less than what they now seek. If the only consequence from trying to claim a disproportionate share of a settlement is that class counsel will get what they would have been entitled to if they had agreed to a fair fee in the first place, there is no reason counsel should not to try for a "free roll" and seek a selfish initial fee. On the rare occasions counsel gets caught, they would be no worse off than if they had not tried; if no objector investigates and the district court fails to scrutinize the request, they receive a windfall. In the parlance of the gambler, this is playing with house money. If "the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980). An "outside-chance opportunity for a megabucks prize must cost to play." *Commonwealth Electric Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985).

CONCLUSION

The Court should deny approval of the fee request until class counsel discloses the empirical evidence of risk and opportunity cost in this case, specifically its fee bids and awards in other antitrust cases. 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 as reflected in what Hagens Berman has bid in other cases, *i.e.*, no more than $25.4 million, or suggested by the sliding scale in *Synthroid II*, *i.e.*, $31.5 million. Either result is more proportionate to the benefit realized by the class, reflects this Circuit's *ex ante* approach to fees, and returns millions of dollars to the consumer class.

Dated: November 10, 2021

/s/ M. Frank Bednarz
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Attorney for Objector John Andren

I, John Andren, am the objector. I sign this written objection drafted by my attorneys as required by the Class Notice ¶ 14.

John Andren

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Objection via the ECF system for the Northern District of Illinois and the contemporaneously-filed declarations of John Andren, Theodore H. Frank, and M. Frank Bednarz, and exhibits thereto, thus effecting service on all attorneys registered for electronic filing.

Additionally, he caused to be served via First-Class mail a copy of this Objection and accompanying declarations and exhibits upon the following:

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