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: *All End-User Consumer Plaintiff Actions*	Honorable Thomas M. Durkin
JOHN ANDREN, Objector.	

OBJECTOR JOHN ANDREN'S OPPOSITION TO END-USER CONSUMER PLAINTIFFS' RENEWED MOTION FOR ATTORNEYS' FEES[1]

[1] Class counsel does not dispute that John Andren is a member of the class as outlined in his original objection. Dkt. 5182 at 1-2 & Ex. 1. Pursuant to Rule 23(e)(5)(A), this objection applies to the entire class.

TABLE OF CONTENTS

Table of Contents ..... **ii**

Introduction **1**

I. The best evidence of the hypothetical *ex ante* fee agreement is the actual *ex ante* fee agreement negotiated by Chicago Teachers' Pension Fund with Cohen Milstein. 2

A. Chicago Teachers base their declining fee schedules on sound considerations: a hypothetical *ex ante* fee agreement would consider both the size of fund and stage of proceedings. 4

B. The (undisclosed) *Interest Rate Swaps* fee agreement suggests what an *ex ante* fee agreement would look like in this case. 6

II. Competitive bids by Hagens Berman provide additional support for a scaled fee award. 8

A. Consistent with Chicago Teachers' requirements, Hagens Berman's bids limit fees based on the size of recovery and stage of litigation. 9

B. The peculiarities of each case do not preclude consideration of the bids. 12

1. Class counsel overstates the different levels of government involvement between *Broiler Chicken* and past cases 12

1. Other suggested distinctions do not make *Broiler Chicken* extraordinarily more risky than cases where counsel committed to an *ex ante* fee agreement. 14

2. Class counsel omits the most glaring difference between *Resistors*, *Batteries*, *ODD* and *Broiler Chicken*: international defendants. 18

C. Class counsel previously explained why it stopped submitting unsolicited bids. 19

D. Class counsel's behavior in this case confirms that it presented a good investment opportunity *ex ante*. 20

III. *Ex post* fee awards provide vastly inferior evidence of the hypothetical *ex ante* market rate, but these awards confirm that 33% is high for settlements of this size. 22

A. *Ex post* awards usually overshoot the market-approximating rate 22

B. Class counsel's own history shows that 25% is the median fee for settlement funds between $100 and $500 million. 23

CONCLUSION **25**

CERTIFICATE OF SERVICE **27**

INTRODUCTION

The Seventh Circuit vacated and remanded the fee award to end-user consumer plaintiff class counsel ("class counsel") "for another evaluation of the bargain the parties would have struck *ex ante*." *In re Broiler Chicken Antitrust Litig. End User Consumer*, 80 F.4th 797 (7th Cir. 2023), Dkt. 6892, Slip op. 12. The panel found that the fee award "fell short in two areas: the consideration of bids made by class counsel in auctions, and the weight assigned to out-of-circuit decisions." Slip op. 6. The panel rejected class counsel's suggestion that out-of-circuit fee awards should be "categorically assigned less weight." Slip op. 10. Just as Andren argued (Dkt. 5294-1, ¶ 19; Dkt. 5340 at 6), class counsel's "continued participation" in Ninth Circuit litigation suggests that the prospect of a 25% fee award is not as "below-market" as class counsel suggested. Slip op. 11.

Thus, the panel remanded for further consideration of data flagged by Objector Andren that class counsel failed to disclose in their original fee motion.

On remand, class counsel urges that their bids and fee awards should be discounted because of dissimilarities between the cases. Many of these boil down to subjective arguments contradicted by representations in other cases. For example, class counsel flags the difficulty in proving passthrough damages to end-users. Dkt. 6911 ("Fee Mot.") at 19-20. But most direct purchasers have a mirror image challenge: proving that all of the cartel's price increases *were not* passed through. Thus, when attorneys (*including class counsel*) represent direct purchasers, they argue *their* case is riskier. Attorneys describe their settlements like the children of Lake Wobegon: every case is above average when it comes time to request attorneys' fees. Unsurprisingly, sophisticated plaintiffs do not agree: early and large settlements should tend to have proportionally smaller fee awards.

Class counsel's renewed motion discloses for the first time that they were once retained by a sophisticated plaintiff who negotiated fees *ex ante*—the Public School Teacher's Pension and Retirement Fund of Chicago ("Chicago Teachers"). Fee Mot. 21. While the panel did not know about this *ex ante* agreement, so could not remand for consideration, under Seventh Circuit law it's much more probative than *ex post* fee awards in constructing a hypothetical *ex ante* fee award. Just as Objector Andren argued from the beginning, Chicago Teachers negotiated fee brackets that decline both by the

size of the settlement *and* by the stage of settlement. The latter is as important as the former, because sophisticated plaintiffs realize that trials are expensive and risky. To align the incentives of class and counsel, attorneys need to receive a larger share of the recovery for more procedurally-advanced settlements and verdicts. This cannot occur when relatively early settlements are paid at 33%. Class counsel argues that the Chicago Teachers' fee scale was specific to that litigation, where damages in the billions were possible, but plaintiffs in both cases estimated similar potential damages.

Class action settlements require the Court to act as the fiduciary for absent class members. Dkt. 5182 ("Andren Objection") at 2-3. Because class members and nominal named plaintiffs have no ability or experience in negotiating attorneys' fees judges "must step in and play surrogate client." *Continental Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992). On behalf of absent class members, the district court should ascertain the fee schedule agreed by Chicago Teachers, and apply a similar schedule here. This will preserve millions of dollars for the benefit of class members, while providing class counsel with increasing financial incentives to pursue the remaining defendants through trial.

I. The best evidence of the hypothetical *ex ante* fee agreement is the actual *ex ante* fee agreement negotiated by Chicago Teachers' Pension Fund with Cohen Milstein.

Broiler Chicken tasks this Court with awarding "fees in accord with a hypothetical *ex ante* bargain." Slip. op. 2. The panel specifically remanded to examine the *ex ante* bids by Hagens Berman and the *ex post* fee awards from other circuits, but class counsel reveals for the first time even more probative evidence: the fees negotiated by a savvy named institutional plaintiff, Chicago Teachers.

Though it is impossible to *know* the results of an *ex ante* fee negotiation, the Seventh Circuit suggested benchmarks for estimating such attorneys' fees. The second benchmark—even before auction bids, and well before *ex post* fee awards—is "is data from securities suits where large investors have chosen to hire counsel up front." *Synthroid I*, 264 F.3d at 720. Securities plaintiffs are well-known to negotiate incrementally declining attorneys' fees based on the size of recovery and stage of litigation. *Stericycle*, 35 F.4th at 561, 566 & n.8. But neither the panel above nor Objector Andren previously knew that class counsel (specifically Cohen Milsten) struck such an *ex ante* fee agreement in another antitrust action, *In re Interest Rate Swaps Antitrust Litig*, No. 1:16-md-2704-PAE (S.D.N.Y.) Fee Mot. 21.

Class counsel says that "[i]f sophisticated parties had adopted the same scale in *Broilers*, EUCP Class Counsel would be entitled to $44 million for the $181 million settlement – approximately 26 percent of the net settlement" (*Id.*), but the actual percentage may be lower. The filing in *Interest Rate Swaps* does not actually describe the fee schedule, but says that it "specifically references the graduated scale set forth in *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437 (E.D.N.Y. 2014), which was the result of considerable empirical research and an analysis of fee awards in other cases, *id.* at 446, and has been endorsed by a number of other courts." Berman Decl. (Dkt. 6911-1), Ex. 10 at 15. But *Payment Card* acknowledges that fees in early proceedings may be lower, and specifically set the fee for the settlement after "only after many years of hard-fought litigation. Privately negotiated fees in complex cases (including PSLRA cases) often include a higher fee for cases that proceed past a motion to dismiss, discovery, summary judgment, or other benchmarks." 991 F. Supp. 2d at 446. Thus, Andren suspects that the *Interest Rate Swaps* agreement uses the *Payment Card* scale only for advanced litigation, and lower rates for earlier settlements. Andren bases his suspicion on Chicago Teachers' practice in securities actions, where maximum fees vary based on the size of the fund *and* stage of litigation Chicago Teachers' practice in securities actions, where maximum fees vary based on the size of the fund *and* stage of litigation. *See Stericycle*, 35 F.4th at 561, 566 n.8. As of 2023, Chicago Teachers requires firms that represent it—including Cohen Milstein—to limit attorneys' fees based on "a multi-tiered, multi-variable fee schedule in which litigation counsel's compensation will vary depending upon the size of the total recovery, as well as such variables as the point in the case where settlement negotiations are completed or a final judgment is obtained," or a "non-traditional contingency fee arrangement[]" to achieve the same goals. Chicago Teachers' RFP at 7-8.[2] This policy primarily contemplates PSLRA securities litigation, but also extends to "related issues such as antitrust matters." *Id.* at 3.

[2] Chicago Teachers' Pension Fund, *Request for Proposal – Securities Litigation Legal Services*, No. FY2023-0001, *available online at* https://www.ctpf.org/sites/files/2022-07/CTPF%20Securities%20Litigation%20Legal%20Services%20RFP.Final .pdf, ("Chicago Teachers' RFP"), attached to this filing as Exhibit 1.

For the avoidance of doubt, class counsel must disclose the actual fee agreement that governs *Interest Rate Swaps*, subject to protective redaction if justified. And the Court must give the agreement due weight in the fee calculus.

Whether the rate negotiated by Chicago Teachers would result in a 26% fee award or an even lower figure, the reasons for applying a declining scale are sound, and the distinctions between *Broiler Chicken* and *Interest Rate Swaps* are differences only of degree, not kind.

A. Chicago Teachers base their declining fee schedules on sound considerations: a hypothetical *ex ante* fee agreement would consider both the size of fund and stage of proceedings.

Chicago Teachers do generally limit attorneys' fees percentages based on the stage of litigation and the size of recovery, just as Andren urged the Court should do his initial objection. Andren Objection 7-9. They employ declining percentages to align the incentives of counsel with their clients.

First, sophisticated clients like Chicago Teachers would agree to fees that marginally decline as the size of the fund increases. As a matter of rational economic incentives, this phenomenon occurs because it does not take ten times as much work to resolve a $45 million litigation as a $4.5 million suit—economies of scale are possible for claims that are more intrinsically valuable to the client. *Silverman*, 739 F.3d at 959. Sophisticated private parties negotiate fees that provide declining percentages for successively larger brackets of recovery. *E.g.*, *Id.*; *Stericycle*, 35 F.4th at 562; *Synthroid I*, 264 F.3d at 718; *Synthroid II*, 325 F.3d at 975. Large settlements may reflect the strength of the claims more than the effort needed to secure settlement. *Stericycle*, 35 F.4th at 561-62.

Second, the market has shown that "[s]ystems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements." *Synthroid I*, 264 F.3d at 722. That is, fees in private fee agreements increase as the case passes key milestones and the risk to attorneys increases. The further a case proceeds, the more hours it takes to prosecute, and rational attorneys and understanding clients will bargain to allow for that expense. As the case clears each hurdle of litigation—motion to dismiss, summary judgment, certification, and trial—plaintiffs and their counsel bear more risk of complete failure. By settling *before* resolution of the certification motion, plaintiffs'

counsel reduce the chance they walk away with nothing. If plaintiffs clear these hurdles, the reward to counsel *must* be higher because in the counterfactual where the case had been dismissed, they would have earned nothing. For this reason, sophisticated private agreements, like those required by Chicago Teachers, consider both the percentage of the fund and the stage of proceeding. As an "earlier settlement" of above-average size, this case likely warrants lower fees than in *Synthroid II*, where the late-stage risk was "significant." 325 F.3d at 978.

Recovery depends on both the work necessary to secure a settlement *and* the strength of the litigation. *Stericycle*, 35 F.4th at 565-66. Settlements achieved early in litigation—before the motion for class certification is resolved, for example, require less risk of nonpayment and therefore require less of an *ex ante* multiplier to compensate attorneys for bearing that risk. *Id.* at 566. "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.

Therefore, from an *ex ante* perspective, both client and attorney would agree that early-stage settlements deserve smaller percentage fee awards, as do increasingly large settlements. The incentives of class and counsel remain aligned because larger recoveries always result in larger attorneys' fees. Higher tiers of recovery only reduce the rates of marginal fees, like income tax brackets. "A graduated schedule ensures that the greater the settlement, the greater the fee, and it therefore avoids certain incentive problems that come from simply scaling an overall percentage down as the size of the fund increases." *Payment Card Interchange*, 991 F. Supp. 2d at 446 (citing *Synthroid I*).

A knowledgeable plaintiff would reject an *ex ante* fee agreement that awards a flat 33% as class counsel proposes. If attorneys receive the same rate for an early-stage resolution, there's little incentive to incur the additional risk of going through a class certification motion, or to overcome a summary judgment motion, much less attempt trial. A flat fee percentage misaligns the incentives between class and counsel because counsel can obtain a better return on investment by settling earlier, after bearing fewer risks and advancing fewer costs, even if the expected value of further litigation is higher. The attorney's fee percentage is the same either way, so better to settle for slight effort for 50 cents on the

dollar even if trial has an expected value twice as high. Knowledgeable plaintiffs instead want to reward counsel for bearing more risk, by awarding them a higher percentage of recovery for more advanced proceedings. As Chicago Teachers explains, such fee arrangements "align the interest of litigation counsel and the class more effectively than traditional [flat] contingency fee arrangements." Chicago Teachers' RFP at 7. Notably, two of Hagen Berman's bids and all of Chicago Teachers' recent securities retentions follow this structure—permitting increasing percentages for proceedings that survive more challenges from defendants. *Id.*; Dkts. 5182-4 & 5182-5. "If plaintiffs' lawyers know in advance (that is, at the start of a case) that such a schedule will be used, it will alter their thinking for the better." *Payment Card Interchange*, 991 F. Supp. 2d at 446.

While the class hopes to recover every dollar possible, the central intuition is that the "costs of litigation do not depend on the outcome." *Silverman*, 739 F.3d at 959. "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)." *Id.* This is why "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."). Larger dollar figures therefore reflect the strength of the underlying claims. Plaintiffs with stronger claims ought to enjoy proportionally larger recoveries as compared to more marginal settlements, which arise out of counsel encountering unexpected difficulties.

B. The (undisclosed) *Interest Rate Swaps* fee agreement suggests what an *ex ante* fee agreement would look like in this case.

Class counsel argues that the *Interest Rate Swaps* (*IRS*) fee provision has no bearing on fee award here because "*Broilers* did not involve a trillion-dollar financial market" and so "the parties in *Broilers* would have negotiated a higher rate." Fee Mot. 21. Class counsel produces no evidence in support of

this claim, and it's belied by the little we know about Chicago Teachers' *IRS* agreement and the market size of each case.

The *IRS* fee schedule "specifically references the graduated scale set forth in *In re Payment Card Interchange Fee*." Dkt. 6911-1, Ex. 10 at 15. Class counsel implies that the schedule is identical to *Payment Card Interchange*—contrary to Chicago Teachers' practice of adding brackets for stage of litigation. As explained below, Andren suspects the relevant rates for earlier-stage litigation are *lower*, but even the single-column fee schedule from *Payment Card* contemplates fees for small and large settlements alike. The table includes three entire brackets for settlements smaller than those reached by EUCP's so far in *Broiler Chicken. Payment Card Interchange*, 991 F. Supp. 2d at 445

The existence of multiple small brackets would be superfluous if the parties only anticipated a settlement over $1 billion as class counsel asserts. In fact, the judge setting the table included these brackets "for the benefit of counsel in future cases." 991 F. Supp. 2d at 446. Cohen Milstein correctly advised the *IRS* court that this scale based on "considerable empirical research . . . [and] has been endorsed by a number of other courts." Dkt. 6911-1, Ex. 10 at 15. Courts have credited *Payment Card Interchange* in setting attorneys' fee awards in both small *and* very large settlements. *See In re Parking Heaters Antitrust Litig.*, No. 15-MC-0940 (DLI) (JO), 2019 U.S. Dist. LEXIS 139321, at *25 (E.D.N.Y. Aug. 15, 2019) (awarding two sets of counsel one third for respective settlements of $7.7 million and $12.2 million); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 436 (S.D.N.Y. 2016) (awarding 20% of $244 million fund rather than requested 30%); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. MDL No. 1775, 2015 U.S. Dist. LEXIS 138479, at *146 (E.D.N.Y. Oct. 9, 2015) (awarding 22% of $332 million settlement); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2018 U.S. Dist. LEXIS 191373, at *21 (S.D.N.Y. Nov. 8, 2018) (awarding 13% of $2.3 billion fund rather than requested 16.51%).

Courts do not only cite the persuasive logic of declining percentages in "banking" antitrust actions either, as the awards in *Parking Heaters* and *Air Cargo Shipping* demonstrate.

As for the suggestion that *IRS* offers vastly more potential damages, plaintiffs' own experts have estimated comparable damages in each case. In *IRS*, plaintiffs' expert reckoned the total damages

to approximately $4.5 billion. No. 16-md-2704, Dkt. 725-1 (Expert Report of Prof. Grinblatt), at iii[3] (S.D.N.Y. Feb. 11, 2022). Here, EUCP's expert produced a "provisional estimate of damages suffered by class members [as] $3.916 billion." Dk.t 4127-1 (Expert Declaration of Dr. Sunding) at 11. The *IRS* damages are only 15% higher! To be fair, these experts did not reach their conclusions *ex ante*, and attorneys must sometimes shoot from the hip. However, class counsel must have had some idea how large *Broiler Chicken* damages might be because they "retained an expert economist to assess market power with a focus on the retail channel – well before it was certain that *any* law firm would be appointed to represent consumers." Fee Mot. 16. At minimum, record evidence from class counsel's expert in *IRS* undermines class counsel's current assertion that *Broiler Chicken* "is not in the same ballpark." Fee Mot. 21.

Even if the Court could rely on class counsel's unsworn assertion that they would have hypothetically sought higher rates from Chicago Teachers to undertake *Broiler Chicken*, "higher rates" do not mean 33%. In the first place, the assertion isn't *obviously* correct: class counsel admits that *Broiler Chicken* resembles *IRS* in terms of risk insofar that "both cases . . . did not follow on the heels of a government investigation." *Id.* at 21. But even if counsel would have negotiated higher rates or thresholds for particular brackets, the conceptual design of the *ex ante* fee agreement would remain the same per Chicago Teachers' policy. Successively smaller fees would be awarded for the creation of larger funds, and for the settlement of cases prior to motions for summary judgement, like the first wave of EUCP settlements here. Awarding the top 33% fee for every settlement, no matter how quickly achieved, breaks with Chicago Teachers' practice, and would not be the hypothetical *ex ante* fee schedule agreed by knowledgeable a representative charged with protecting class interests.

II. Competitive bids by Hagens Berman provide additional support for a scaled fee award.

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). A bid represents

[3] Figures in the report are redacted, but the table of contents divulges the heading: "Preliminary Calculations Show that Class Members Suffered Approximately $4.5 Billion from Excessive Spreads…"

at least one side of that bargain: the offer. A "court can examine the bids and the results to see what levels of compensation attorneys are willing to accept in competition." *Synthroid I*, 264 F.3d at 721. The Seventh Circuit remanded this case to consider these bids, because it is inappropriate to categorically be give little weight to fee scales that employ declining scales. Slip op. 7-9.

Hagens Berman's bids, past auctions, and private fee agreements all confirm that an unvaried 33⅓% fee dwarfs the market rate. Neither the Chicago Teachers' fee schedule, nor any of the three bids approached 33⅓% for a $181 million fund. The fee schedule and two bids with detailed scales reserved the highest rates for circumstances that do not apply here: modest recoveries obtained after a trial on the merits. Additionally, the bids for *Batteries* and *Resistors* likely *overestimate* true market rates because Hagens Berman submitted those bids without facing concrete competing bids.[4] Ordinarily, in a competitive market—where a judge solicits competing bids—a firm proposing a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until competition bid away all above-market rents. Hagens Berman faced no price competition except in *Optical Disk Drive Products* (*ODD*), where the district court had ordered the submission of leadership proposals including fee terms. *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-2143, 2010 U.S. Dist. LEXIS 146768, at *27 (N.D. Cal. June 4, 2010). The fee scale in *ODD* is perhaps not coincidentally the thriftiest of the three, topping out at only 14%, less than half of the 33⅓% the district court found to be the global market rate. In the other two cases Hagens Berman submitted bids unsolicited, and opposing firms refused to make a counteroffer, so Hagens could be certain *any* bid would likely be the lowest. In fact, a rival plaintiffs' firm argued that Hagens Berman inappropriately submitted its *Resistors* fee proposal *ex parte*, which supposedly would require the court to disregard it. No. 3:15-cv-03820, Dkt. 74 at 2-3 (Dec. 4, 2015).

A. Consistent with Chicago Teachers' requirements, Hagens Berman's bids limit fees based on the size of recovery and stage of litigation.

[4] The district court solicited bids in the *Optical Disk Drive* litigation and Hagen Berman submitted unsolicited bids in *Lithium Batteries* and *Resistors*, neither of which were successful and the latter of which was withdrawn.

Class counsel dissects the circumstances of all three bid cases—*Resistors*, *Batteries*, and *ODD*—but they do not discuss specifically discuss the terms of the bids. These matter because the Corut should "examine the bids and the results to see what levels of compensation attorneys are willing to accept in competition." Slip op. 7 (quoting *Synthroid I*). The actual bids submitted by class counsel in "similar litigation" is the most more reliable way to "mimic [the] bargain between the class and its attorneys." *Williams*, 658 F.3d at 635. 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 (N.D. Ill. 2001) ("any sensible lawyer will have pegged his or her proposal high enough to take into account the possibility of ending up with no recovery").

Class counsel argues that *Resistors*, *Batteries*, and *ODD* are too dissimilar to be useful, but if the *Broiler Chicken* mandate stands for anything, courts should not discount rare examples of skilled parties assessing *ex ante* attorneys' fees. Moreover, class counsel argued the point in defense of this Court's first award. *See* Br. of Plaintiff-Appellee, *In re Broiler Chicken Antitrust Litig.*, No. 22-2889 (7th Cir. Feb. 1, 2023) at 25 (noting the "different factual circumstances" of the bid litigations). But *Broiler Chicken* didn't credit it. Andren addresses class counsel's distinctions in the next subsection, but *Resistors*, *Batteries*, and *ODD* are closer to the mark than any auction data the Seventh Circuit has endorsed considering. As here, those cases involved multiple defendants, complex legal and factual issues. Each set of plaintiffs brought multi-million dollar antitrust claims against well-capitalized firms who retained experienced, sophisticated opposing counsel. In basic terms, these bids are much more probative than the securities auctions that the Seventh Circuit suggested for determining the "levels of compensation attorneys are willing to accept" in pharmaceutical antitrust actions. *Synthroid I*, 264 F.3d at 721.

To recap, Hagens Berman, one of the two primary class counsel firms for EUCPs, submitted fee structure bids as part of a motion seeking appointment as lead counsel. These bids are often sealed, but twice, a Ninth Circuit decision required Hagens Berman to disclose the bid, and counsel disclosed a third case in response to the district court's discovery order. In all three cases, Hagens committed to receive no more than 20% of any portion of class recovery, and often much less. In two 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, just as Chicago Teachers requires from their outside law firms.

Resistors: In 2015, eleven months before the first Broiler Chicken complaint, Hagens Berman agreed to limit its fees in the *Resistors* antitrust matter to 20% of recovery although the amount would "depend on the timing, amount, and nature of any settlement or judgment." Dkt. 5821 at 3. The firm later requested and received a 20% fee award of $10.05 million, which represented a 1.21 multiplier of its lodestar. *In re Resistors Antitrust Litig.*, No. 3:15-cv-03820, 2020 U.S. Dist. LEXIS 86492 (N.D. Cal. Mar. 24, 2020).

Batteries: In 2013, Hagens Berman proposed a declining scale for appointment in *Batteries* that would awarded lower percentages for earlier stages of litigation and larger recoveries, with the largest fee bracket assigned to post-trial recoveries below $75 million topping out at 14%. Dkt. 5182-5 at 6. The bid also capped costs at $3.5 million. Plaintiffs were eventually awarded 30% of the fund, or $41.79 million, having incurred a significant lodestar dwarfing the fee award for a 0.58 fractional multiplier. The Ninth Circuit affirmed this award, because the district court did not select the Hagens Berman bid for appointment as sole interim counsel. *In re Lithium Ion Batteries Antitrust Litig.*, Nos. 21-15120, 21-15200, 2022 U.S. App. LEXIS 31616, at *6 (9th Cir. Nov. 16, 2022) (unpublished).

ODD: In 2010, Hagens Berman proposed for *ODD* a similar declining scale topping out at 14%. Dkt. 5182-4 at 10. Moreover, the bid required that attorneys' fees in *ODD* should be inclusive of costs such that the sliding scale percentages would cover both attorney fees *and* all out-of-pocket expenses. The fee award in *ODD* was the subject of significant litigation, and the Ninth Circuit determined that "when class counsel secures appointment as interim lead counsel by proposing a fee

structure in a competitive bidding process, that bid becomes the starting point for determining a reasonable fee." *In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 934 (9th Cir. 2020).

The Court could set attorneys' fees based on *ex ante* market evidence by applying the fee schedule Hagens Berman submitted in *Batteries* (the higher of the two scaled bids), which would result in a $25.4 million fee award, providing $30 million to the class. Andren Objection at 10.

B. The peculiarities of each case do not preclude consideration of the bids.

Andren acknowledges that each case is unique and presents unique challenges, but the issues in this case that counsel highlights were not so extraordinary, unique or unexpected as compared to the cases in which Hagens Berman submitted fee bids, nor to the Chicago Teachers' *IRS* litigation. The Seventh Circuit has repeatedly considered fee arrangements from different individual cases to evaluate the potential *ex ante* market rate. *Synthroid I*, 264 F.3d at 718; *Synthroid II*, 325 F.3d at 975; *Silverman*, 739 F.3d at 959 ("articles we have cited reinforce the observation in the *Synthroid* opinions that negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate"). Whether the appropriate top-level fee should be 14% or 25% can be sorted out based on the facts as a knowledgeable plaintiff would negotiate *ex ante*. But these *ex ante* proposals cannot be dismissed categorically. "[N]o two cases present identical facts." *Commonwealth Plaza Condo. Ass'n v. City of Chi.*, 693 F.3d 743, 747 (7th Cir. 2012).

1. Class counsel overstates the different levels of government involvement between *Broiler Chicken* and past cases.

Andren agrees that class counsel has not simply ridden the coattails of government investigation, but neither did all of the prior cases with *ex ante* fee agreements.

Chicago Teachers' fee schedule in *IRS* comes from perfectly comparable litigation. Class counsel admits that neither case "followed on the heels of a government investigation." Fee Mot. 21. Just as in *IRS*, the government only acted against the rate-setting cartel after private plaintiffs' suits. Approximately two years after initiating the lawsuit, class counsel learned that the DOJ initiated a criminal investigation of the defendants, which led to indictments against several and a guilty plea from Pilgrim's Pride. *United States v. Pilgrim's Pride Corp.*, 20-CR-0330-RM (D. Colo.).

More generally, knowledgeable plaintiffs and counsel know that mere government investigation does not necessarily mean much for class members. Many investigations lead nowhere. For example, in *Resistors*, one a defendant applied for leniency by cooperating with the government through ACPERA. Class counsel characterizes it as having "***admitted to criminal wrongdoing before the civil complaint was filed***." Fee Mot. 15 (emphasis in original). But it turns out cooperation is not bankable proof of wrongdoing. When class counsel sought fees in *Resistors*, they sang a different tune: "courts have held there proving liability in cases like this one, where the Department of Justice ended its investigation prior to the start of discovery and without issuing any indictments, would be more challenging than in other cases where defendants have been found criminally liable, such as the *Capacitors* case before this Court." *Resistors*, No. 15-cv-3820, Dkt. 543 (N.D. Cal. Jun. 10, 2019), at 14. For this proposition, class counsel cited *In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 344-45 (E.D. Pa. 2007). The fact that "the Department of Justice terminated its investigation without issuing any indictments against these Defendants. ... demonstrates that … establishing liability would not be a foregone conclusion." *Id.* In contrast, the government proceeded here with not only indictments, but a criminal conviction against Pilgrim's Pride.

Class attorneys also know *ex ante* from hard experience that government investigations don't always pan out. When requesting fees in *ODD*, Hagens Berman lamented the "unpredictable force" that the Department of Justice exerted on their case. No. 10-md-2143, Dkt. 2942 at 14 (N.D. Cal. Sep. 28, 2020). It turned out that the government focused on only three defendants and a narrow time period, which backfired on plaintiffs who pleaded a longer industry-wide cartel. "The narrow focus of the criminal proceedings[] requir[ed] enormous effort by indirect purchasers to overcome the perception of this Court that the conspiracy was so limited in scope, was also unforeseen at the time of the leadership application in May 2010." *Id.* at 16. To be sure, the *ODD* fee application says that Hagens Berman's leadership application was shaped by the government's investigation. Presumably it made attorneys more optimistic *ex ante* about recovery, but the uneven results of government investigations must temper the optimism of knowledgeable attorneys.

The government obtained pleas in the third case, *Batteries*, but Berman answered objectors to explain why the government investigation did not meaningfully help plaintiffs. "While the complaint does make reference to the existence of an ongoing criminal investigation … such references account for only 6 paragraphs in a 189 paragraph complaint. Thus, the allegations … are proprietary and the result of hard work and original analysis conducted by Hagens Berman." No. 13-md-2420, Dkt. 2630-2 (N.D. Cal. May 22, 2020), Berman Decl. ¶ 8. The *Batteries* plaintiffs, represented in part by Hagens Berman, also complained that the pleas obtained by the government covered "only two Defendants" and "a much narrower time period and class of products." No. 13-md-2420, Dkt. 2487 (N.D. Cal. Apr. 23, 2019). Andren suspects that Hagens Berman might have undersold the value of corporate admissions of a criminal conspiracy, but this illustrates an underlying problem with all of class counsel's distinctions. Attorneys can easily create arguments that make any fee request more meritorious, but the arguments do not prove risk; they're argued opportunistically to fit the facts. This causes the Lake Wobegon paradox: every fee application presented to a judge—like every child in the fictional NPR town—is above average.

Andren admits that a government investigation may raise the possibility that defendants face concurrent criminal indictments helpful to private plaintiffs. But investigations sometimes come to nought (as in *Resistors*), and sometimes go sideways, making plaintiffs' task more difficult (as in *ODD*). Among Hagens Bermans three bids in the wake of government investigation, it essentially swung on three wild pitches. Knowledgeable counsel might correctly believe it's worth taking a harder swing at cases preceded by investigation, but as Berman knows, not every investigation turns into a home run for plaintiffs' counsel.

Thus, the difference increased *ex ante* expected value of bids for conspiracies investigated by the government is much more modest than the night-and-day distinction presented by class counsel.

1. Other suggested distinctions do not make *Broiler Chicken* extraordinarily more risky than cases where counsel committed to an *ex ante* fee agreement.

None of the other suggested distinctions prove that Hagens Berman's bids and Chicago Teachers' fee schedule are so dissimilar as to be useless to the court.

Complexity of passthrough and legal hurdles for indirect purchasers: In two sections class counsel argues that their burden to prove the passthrough of supercompetitive prices distinguishes *Broiler Chicken*. From *IRS*, the difference is that direct purchasers face the challenges of indirect purchasers laboring under *Illinois Brick* at all. Fee Mot. 22-23. From the bid cases, the distinction is supposed to be that proving passthrough is allegedly tricker with chickens than batteries, disk drives, or resistors. Fee Mot. 19-20.

Indirect purchasers do not categorically face increased risks. While it's true that "[i]ndirect purchasers face defendant attacks that direct purchasers do not" (Fee Mot. 22), direct purchasers also face unique attacks. While indirect purchasers must prove that anticompetitive price premiums passed through to end users (Fee Mot. 19), as class counsel explained in this case seven years ago, resellers must prove the mirror image: that "they were not able to pass through the overcharges to End Users." Dkt. 218 at 12. Resellers and end-users both face risks and the burden of showing they absorbed some of the supra-competitive cartel pricing. Indirect and direct plaintiffs alike must engage experts to prove damages, often using third-party discovery. The Court has already observed that indirect plaintiffs' in this case could easily establish passthrough "because representatives of the direct purchasers testified that they always pass on costs." *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2022 U.S. Dist. LEXIS 95525, at *104 (N.D. Ill. May 27, 2022). On this issue, *ODD* was much riskier. *See In re Optical Disk Drive Prods. Antitrust Litig.*, 785 F. App'x 406 (9th Cir. 2019) (affirming summary judgment to remaining defendants due to ambiguity in expert's passthrough evidence).

Class counsel also points to state-by-state nature of indirect purchaser antitrust claims, but these don't speak to the underlying risk of litigation. Fee Mot. 23. While addressing *Illinois Brick* in every jurisdiction admittedly requires additional pleadings and legal arguments, these tend to boil down to a few states where the scope of unfair competition laws remains ambiguous. Whether counsel can recovery from *any* state depends on proving damages from anticompetitive behavior; the same operative kernel of facts compelling courts to consolidate direct and indirect proceedings in one venue. Meanwhile, direct purchasers bear unique risks themselves, as illustrated in this case. More than 100 large corporations have opted out of the CIIPP and especially the DPP classes. Direct purchasers'

attorneys face real risk that the settlement value of their case could opt out of the class after counsel performed the heavy lifting in establishing liability.

Class counsel suggests that indirect classes are somehow riskier because settlements with direct purchasers recovered "almost four times as much" as indirect purchasers. Fee Mot. 23. But this premise does not follow from the datapoint: many direct purchaser cases simply don't have significant reseller components. For example, the largest antitrust settlements 2009-2022 listed by the *2022 Annual Antitrust Report* include settlements for FOREX rates, credit default swaps, air cargo shipping, leveraged buyouts, and electronic books. Dkt. 6911-1, Ex. 4 at 25-26. These five settlements alone recovered about as much money as all indirect antitrust settlements over the period combined, and they inflate the dominance of direct purchaser settlements. Direct sales simply dominate many markets. It doesn't tell us anything about the relative risks of direct and indirect purchasers in the *Broiler Chicken* market, where almost all products ultimately gets consumed (eaten!) by end-users. The relative value of indirect and direct claims depends on myriad facts: passthrough, market distribution, expert testimony, and specific factors unique to each market. End user claims are often more valuable. For example, the *2022 report* shows that end users in *Automotive Parts Antitrust Litig.* recovered a total of $1.2 billion, compared to only $626 million for direct purchasers. *Id.* Class counsel cites no case finding indirect purchaser antitrust actions categorically riskier, let alone authority supporting the categorical discounting of *ex ante* fee agreements and competitive bids by class counsel from direct purchaser class actions.

Number of defendants: Class counsel cites the number of defendants in this case (Fee Mot. 17-18), but here again, this is a difference of degree, not kind. The existence of small producers makes it easier for plaintiffs to pick off a cooperating defendant without forfeiting significant damages in an early settlement. In this case, class counsel spoke early with Fieldale, one of the smaller producers, and were able to secure its cooperation in pursuing the remaining defendants. Fieldale file a sealed declaration in support of class certification. Dkt. 4377 at 3.

Live animal production: Class counsel suggests added complexity from the fact of "live animal production" (in chicken) rather than "a factory product" (in batteries). Fee Motion 20. We

could just as easily contrive a list of "levers" at the disposal of factory-owning batteries defendants. Every case features unique facts, but the existence of such facts does not prove inordinate risk. For example, when applying for fees in *Batteries*, Hagens Berman argued passthrough in *that* case was unusually difficult because "the value of the component was of much smaller value relative to the finished good than, for example, CRT tubes or LCD screens in televisions." No. 13-md-2420, Dkt. 2588 at 16 (N.D. Cal. Mar. 9, 2020). Chicken doesn't have this problem—it tends to be literally the entire product. The commercial differences between chicken and batteries might cause an expert to devote several pages to discussing market idiosyncrasies, but these facts don't make a case unusually risky.

Pilgrim's Pride bankruptcy: Finally, class counsel cites the bankruptcy of Pilgrim's Pride at the beginning for the conspiracy period. They observe that defendants might use the bankruptcy to "argue that reductions in supply followed independent action, not coordination." Fee Mot. 20. But this problem is just the fact-bound version of a question that every antitrust plaintiff must prove: when did the conspiracy begin, and who committed anticompetitive acts. DPP counsel, the pioneers of these claims, knew from that outset that it could be ambiguous whether Pilgrim's Pride was part of the conspiracy before, during, or after it emerged from bankruptcy, so pleaded in the alternative in their original complaint seven years ago. Dkt. 1 at 9-10. Every antitrust plaintiff must prove that apparent production decreases are not caused by global recession, pandemic, logistics snafus, component supply shocks, or a million other potential innocent explanations for apparent collusion. That class counsel can name an unusual excuse defendants might proffer in this case does not demonstrate unusual risk in the underlying claims.

In short, different elements must be proved plaintiffs in every case. It turns out that appointed attorneys can always articulate peculiarities of their case. But distinctions without a difference do not prove extraordinary risk. "Since no two cases of this sort are ever identical, distinctions may be drawn that are more facile than they are fundamental." *Okonite Co. v. Commissioner*, 155 F.2d 248, 252 (3d Cir. 1946) (tax case).

2. Class counsel omits the most glaring difference between *Resistors*, *Batteries*, *ODD* and *Broiler Chicken*: international defendants.

Unlike *Resistors*, *Batteries*, and *ODD*, the *Broiler Chicken* defendants produce and sell in America. This simple difference enormously streamlines litigation for both practical and legal reasons. With American defendants, plaintiffs need not worry about the availability of robust American-style discovery, obtaining the special deposition visas that bilateral consular conventions sometimes require, the burden of translation, and whether plaintiffs can hale into court foreign defendants with small or nonexistent American footprints.

When seeking fees in each of the three bid cases, Hagens Berman pointed out the added cost and risk litigating against Asian defendants posed for attorneys. In *Batteries*, counsel had to move to compel discovery that would come automatically for American companies: defendants that denied their parent corporations were within American jurisdiction, and former corporate officers who claimed Korean law shields them from deposition. No. 13-md-2420, Dkt. 2588 at 6 (N.D. Cal. Mar. 9, 2020). Counsel advanced hundreds of thousands of dollars in expenses just to translate documents. *Id.* at 5. In *ODD*, Hagens Berman likewise had to outmaneuver corporate parents who used a "John Doe" employee in an attempt to quash discovery of DOJ recordings. No. 10-md-2143, Dkt. 2942 at 14 (N.D. Cal. Sep. 28, 2020). Finally, in *Resistors*, plaintiffs had difficulty "alleging sufficient facts plausibly showing that the U.S. subsidiaries participated in the conspiracy." No. 3:15-cv-03820, Dkt. 74 at 2-3 (Dec. 4, 2015). This risk occurs in all antitrust actions where key acts of the conspiracy occur overseas. *Resistors* plaintiffs were simply unable to get key former employees to testify, and one non-party deposition had to occur at a U.S. consulate in Japan. *Id.*

Cherry picking factors that arguably make other cases less risky, while completely neglecting their risky elements does not prove that the Court should discount the *ex ante* arrangements offered in *IRS*, *ODD*, *Batteries*, or *Resistors*. "Antitrust litigation in general, and class action litigation in particular, is unpredictable" so "there is always the risk of non-payment." *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 460 (D.P.R. 2011) (cleaned up). For any case, different factors could arguably increase or decrease risk, but class counsel has not proven unprecedented risk. They

carry the burden, and the evidence is in their hands. *Fessler v. Porcelana Corona De Mex., S.A.*, 23 F.4th 408, 416 (5th Cir. 2022) (fee applicant bears burden).

C. Class counsel previously explained why it stopped submitting unsolicited bids.

Class counsel suggests Hagens Berman's reluctance to submit unsolicited bids suggests that fees under 33% rarely approximate the market rate. Fee Mot. 24, But Steve Berman explained his discontinuation of bids differently in his 2021 declaration. Berman declared the *ODD* bid was "was our firm's first foray into low bidding in a complex antitrust case in an attempt to compete with other firms and get our foot in the door." Dkt. 5250 ¶ 19.[5] But unsolicited the bids were not successful. In *Batteries*, rival attorneys "joined together to propose a leadership structure that excluded us," even though "Hagens Berman developed and filed the case." *Id.* ¶ 20. Yet the district court pressured Hagens Berman to work with its johnny-come-lately rivals, and Berman withdrew its competitive bid. Dkt. 5294-9 at 78-79 (*In re Lithium Ion Batteries Antitrust Litig.*, No. 13-md-02420, Dkt. 148 (N.D. Cal. Apr. 16, 2013)).

From this episode, Berman supposedly learned that competitive bids "are not reflective of what the market will bear." Dkt. 5250 ¶ 20. But the "market" does not award attorneys' fees at the end of litigation. Courts do. And courts regrettably often approve lead counsel based on popularity contests won by firms that logroll and spread supracompetitive rates among friends. That unfortunate collusion doesn't change the fact that, as a matter of economics and Seventh Circuit fee jurisprudence, what a market "will bear" is defined by the outcome of competition, hypothetical or not.

These admitted rare examples of *ex ante* fee bids remain useful signposts of how expert class attorneys' themselves would design a fee schedule in order to align the incentives of attorneys and benefit the class. The answer, which Chicago Teachers independently arrived at, is a fee schedule with declining rates for large recoveries and early settlement.

[5] By this, Berman presumably meant it was his firm's first attempt to *compete on price* for leadership—the firm did not need to get its "foot in the door" to antitrust litigation. Over a decade earlier it co-led the mammoth antitrust action in *In re Visa Check/Mastermoney Antitrust Litigation*, No. 96-cv-05238 (E.D.N.Y.).

D. Class counsel's behavior in this case confirms that it presented a good investment opportunity *ex ante*.

Attorneys clamored for appointment in all these cases, revealing their own beliefs about the value of each litigation. When multiple firms file separate but nearly verbatim complaints within days of the first action brought by the DPP's attorneys, that looks more like a feeding frenzy for a lucrative assignment. *See Silverman*, 739 F.3d at 958. Both class counsel firms have handled vast antitrust cases alone, and both firms found it attractive to cooperate in appointment in this case. Had only one of these firms filed a complaint, that would have been enough. And other firms *did* seek appointment as class counsel—first the group of firms that became the CIIPP counsel (Dkt. 116), and then Wolf Haldenstein (Dkt. 246).

Andren does not suggest that any complex litigation comes without risk, but numerous attorneys did not chicken out from taking this case. Firms instead vied for appointment, so this litigation could not be unusually risky. In October 2016, Hagens Berman aggressively sought appointment as 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 they equated 33% of a common fund with the *ex ante* value of the litigation and what class counsel would be seeking as a fee. While Andren agrees that EUCPs have a serious conflict of interest with CIIPPs, class counsel's persistence in winning appointment for EUCPs does not suggest that they found the case less attractive other litigation.

Class counsel describes their pre-appointment investment in the case, but this simply confirms that from their perspective *Broiler Chicken* presented a good opportunity. Knowledgeable attorneys who find a case unusually risky wouldn't retain "an expert economist … well before it was certain that *any* law firm would be appointed to represent consumers." Fee Mot. 16. Likewise, the fact that "[d]iscovery proceeded while the motions to dismiss were brief and decided, so Appointed Counsel was immediately incurring costs of time and money without any assurance of a fee award" (A10), but that procedural posture cuts against finding case risk. The district court "neither stayed discovery completely nor allowed full discovery to proceed," but prioritized certain categories of discovery ***at plaintiffs' urging***. *In re Broiler Chicken Antitrust Litig.*, 2017 WL 4417447, 2017 U.S. Dist. LEXIS 160411, at *33 (N.D. Ill. Sep. 28, 2017). Class Counsel *opposed* defendants' arguments to stay discovery because they calculated discovery would favor plaintiffs. Discovery stays benefit defendants by alleviating litigation costs that might otherwise increase settlement's attractiveness. *Cf.* Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635 (1989). While discovery costs advanced by Class Counsel are not guaranteed to be recouped, the behavior of plaintiffs demonstrates that the attorneys early in the litigation believed the discovery would return dividends that justified the investment.

Finally, the extraordinary number of opt-outs by sophisticated corporate plaintiffs in the DPP and CIIPP classes supports Andren's argument 33% exceeds the market rate for attorneys' fees. By February 2021, direct purchasers representing about ***61% of direct sales*** from Pilgrim's Pride Corp. and Tyson Foods, Inc.—by far the largest two chicken producers—had filed their own individual opt-out actions against these defendants. Dkt. 4387 at 10.

Only large plaintiffs have the luxury of shopping with their feet in this way. Why should Kroger invest in objecting to fees, and possibly have its objection overruled as Andren's was, when it can economically sue defendants itself? Consumers, with small stakes, don't have the ability to oversee litigation as Direct Purchaser opt-outs like. Because no general counsel watches out for ordinary consumers, district courts must act as their fiduciary. *Creative Montessori,* 662 F.3d at 917.

III. *Ex post* fee awards provide vastly inferior evidence of the hypothetical *ex ante* market rate, but these awards confirm that 33% is high for settlements of this size.

As *Broiler Chicken* explains, its market-mimicking approach is meant to capture the actual *nationwide* market, not a mimeograph of fee awards from courts in this Circuit, because the large plaintiffs firms operate nationwide. Slip op. 11. Class counsel's litigation illustrates the national market: these firms continually seek appointment in venues that Berman averred award "below market" fees. Dkt. 5294-1 at 5. While courts in the Ninth Circuit do not award fees using this Circuit's market-mimicking methodology, EUCP counsel are rational actors participating in a nationwide market. Thus, "class counsel assess the risk of being awarded fees below the market rate of their legal services when they seek to represent plaintiffs in the Ninth Circuit." Slip op. 11.

However, *ex post* fee awards are the least informative benchmarks of the *ex ante* market rate. Slip op. 12. This is because fees set at the close of litigation cannot capture what parties would have negotiated at the beginning. "It 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.)). That said, *ex post* antitrust fee awards tend to confirm that a flat 33% fee award is excessive under Seventh Circuit methodology. *See* Andren Objection at 14, Dkt. 5182 (discussing empirical survey evidence of fees in large settlements). One respected treatise compiles the mean percentage for antitrust fee awards found in three empirical studies: 22%, 25.4%, and 25.2%—percentages that would have declined had they isolated large recovery settlements. 5 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15:83, tbl. 3 (2018).

A. *Ex post* awards usually overshoot the market-approximating rate.

Putative lead counsel assess their risk and price their services accordingly based on their time investment 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. Ill. 1996). It turns out that counsel seek work in in spite of the uncertainty of *ex post* fee awards. Unsurprisingly then, on the rare occasions non-securities attorneys negotiate price *ex ante*, they agree to fees less than 33% and less than average fee

awards. "[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*." *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).

Ex post awards overshoot the market partially because no one contests most fee requests. Neither the DPP nor CIIPP fee requests attracted objection—nor would they, because large corporations can simply opt out if dissatisfied. Before judges less proactive than this Court, class attorneys frequently get to write their own fee orders, citing whatever factors they wish to rationalize attorneys' fees. "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." *Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). The major force that exerts downward pressure *ex ante*—the threat of losing the representation to another firm—dissipates long before settlement.

B. Class counsel's own history shows that 25% is the median fee for settlement funds between $100 and $500 million.

Class counsel asserts that their "median percent awarded between 2016 and 2022 was 30 percent" (Fee Mot. 28), but most of these awards are for settlement funds a fraction the size of *Broiler Chicken*, where the hypothetical *ex ante* bargain should permit larger fee percentages. Of the 91 fee awards listed by class counsel, more than half—46—resulted from settlements less than $50 million, and three are awards compensate strictly injunctive relief (certain *NCAA Grant-in-Aid Cap Antitrust Litig.* awards). These entries for comparatively small fee awards obscure comparable settlements and skew the median fee upwards.[6]

[6] Class counsel's sealed exhibit is squirrely in several respects. *First*, some of the reported lodestar figures appear to be cumulative whereas the listed fee award is interim; this makes some fee awards look fractional even when the multiplier over the course of the litigation should be positive. While Andren could not check class counsel's entire table, it does appear that five of the nine awards of about 30% or more were fractional recoveries. *Second*, while class counsel reports that they "were awarded fees 107 times during this period" (Fee Mot. 28), the sealed exhibit lists only 91 fee awards. *Third*, of the 91 listed fee awards, fully 23 of them are from a single MDL: *Automotive Parts Antitrust Litig.* In this MDL, class counsel was awarded 30% or

Considering only the settlement awards for funds between $100 and $500 million, class counsel's sealed exhibit lists twenty-one such fee awards, which range from 9.2% to an outlier of 40%, with a median of 25% and mode of 20%.[7] The average of these awards calculated from total settlement recovery is 23%. In seven of the twenty-one awards, district courts awarded at least 5% less than class counsel requested. None of the fee awards of 30% and above received such scrutiny.

The larger percentage awards in this group are dominated by cases where class counsel invested unusual amounts of attorney time. The outlying 40% award, a $66 million fee in *Capacitors*, involved a lodestar greatly exceeding the requested fee (a multiplier of only 0.64, *i.e.* a recovery of only 64% of counsel's regular billing rates). In contrast, the attorneys' fees necessary to achieve the first round *Broiler Chicken* settlements would be 1.8x under class counsel's fee request—so 180% of the *unaudited* hourly rates. Dkt. 5161 at 9. In the nine cases where class counsel received about 30% or more from settlements between $100 and $500 million, all but one had multipliers lower than the 1.8 multiplier counsel seeks here. (*Steel Antitrust*, 1.95.) In fact, class counsel received a sub 1.0 multiplier in five of these nine awards. Among the entire set of twenty-one fee awards, the median multiplier appears to be only 1.05 (for the 27.5% award in *Lidoderm*).[8]

33% twenty-one times for smaller funds covering specific types of parts, but when it came to the largest fee requests, they were disappointed. Class counsel sought 30% of a $224 million fund settling claims against eleven defendants, but the district court awarded just 10%. Sealed Ex. 9 at 6; No. 13-cv-703, Dkt. 133 (E.D. Mich. Dec. 5, 2016). Then for round 2 settlements, counsel sought 27.5%, but was awarded 20%. Sealed Ex. 9 at 6; No. 16-cv-3903, Dkt. 50 (E.D. Mich. Jul. 10, 2017). The bottom line is that the 23 automotive parts fee awards show a median and mode of 30%, mostly for small settlement funds less than $10 million, but in fact their overall fee award from the litigation is 22.06%. *In re Auto. Parts Antitrust Litig.*, No. 12-md-02311, 2018 U.S. Dist. LEXIS 242164, at *230 (E.D. Mich. Nov. 7, 2018).

[7] In ascending percentage, these are: Animation Workers (DreamWorks & Disney), 9.2%; Automotive Parts, 10%; Glumetza, 11%; Cameron v. Apple, 19.2%; Optical Disk Drive, 20%; Aggrenox, 20%; NCAA Grant-in-Aid Cap Antitrust Litig., 20%; Automotive Parts, 20%, Capacitors, 25%; LIBOR-Based Financial Instruments, 25%; Air Cargo Shipping, 25%; Lidoderm, 27.5%; Lithium Ion Batteries, just under 30%; Cathode Ray Tube, 30%; Capacitors, 30%; Loestrin 24 Fe, 30.57%; Municipal Derivatives, 32.83% Steel, 33%; Lidoderm, 33.33%; Domestic Drywall, 33.33%; and Capacitors, 40%.

[8] With the caveat mentioned in fn.8, that the squirrely nature of the table makes Andren unsure whether lodestar multipliers can be accurately calculated from the data.

While the *ex post* lodestar multiplier does not directly speak to the expected *ex ante* fee award, the distended multiplier class counsel seeks in this case suggests that as of 2021 *Broiler Chicken* was not remarkably more costly and difficult than settlements of similar size—so far. Andren knows that class EUCPs must prepare for trial, so subsequent rounds of settlement will have higher lodestar billing. And the market-approximating *ex ante* fee schedule appropriately takes this into account. Settlements reached after class certification was granted on May 27, 2022 (Dkt. 5644), should receive a higher percentage than the early-stage settlements due to the additional risk borne by counsel. And should class counsel succeed in establishing liability at trial, the Chicago Teachers approach might afford an entire third of the post-judgement kitty—at least for the first brackets of recovery.

But class counsel's *ex ante* fee arrangements with Chicago Teachers, and its bids in other litigation show that the market rationally awarded declining percentages for early stages of litigation, and for large recoveries like the first wave of *Broiler Chicken* settlements, and *ex post* fee awards to counsel corroborate this intuition.

While fee awards of 30-33% are not rare, the lower median award actually received by class counsel tends to confirm that a flat 33% fee exceeds the rate that knowledgeable parties would negotiate *ex ante* for large recoveries.[9]

CONCLUSION

The Court should require class counsel to disclose the precise fee terms Chicago Teachers reached *ex ante* in *Interest Rate Swaps*, and use this fee schedule to set an appropriate fee award in this case. In lieu of this information, the Court 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 comports better with this Circuit's *ex ante* approach to attorneys' fees, and returns millions of dollars to the consumer class.

[9] To the extent the Court seeks equity between the firms representing various classes, future fee awards provide the court an opportunity to adjust the overall fee award for all plaintiffs.

Dated: October 20, 2023

/s/ M. Frank Bednarz

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CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Opposition to End-User Consumer Plaintiffs' Renewed Motion for Attorneys' Fees via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: October 20, 2023

/s/ M. Frank Bednarz