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 ANDREN'S SUPPLEMENTAL OBJECTION TO END-USER CONSUMER PLAINTIFFS' (EUCP's) RENEWED MOTION FOR ATTORNEYS' FEES (Dkt. 6910) IN VIEW OF THE *EX ANTE* FEE AGREEMENT FROM *IN RE INTEREST RATES SWAPS*

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Introduction

Objector John Andren supplements his Objection (Dkt. 6990) in view of the *ex ante* fee agreement reached in *Interest Rates Swaps Antitrust Litig.* No. 1:16-md-2704 (S.D.N.Y.) ("*IRS*"), which the Objector agrees should be considered.[1] While EUCPs observe that firms rarely agree to *ex ante* fee arrangements below 30% (Dkt. 7202 ("Supp") at 1), they rarely agree to limit fees *ex ante*, period. Most named class action representatives, like the end-user plaintiffs here, lack the legal sophistication of in-house counsel, and have neither the ability, nor the interest, nor the leverage to negotiate fees from plaintiffs' counsel *ex ante*. This is exactly why the task of "market mimicking" falls to the Court. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*"). The agreement reached by the Public School Teachers' Pension and Retirement Fund of Chicago ("Chicago Teachers") is probative precisely because it's a rare window into the true competitive market.

Many arguments in EUCPs' supplemental filings repeat those in earlier filings, some of which the Objector already addressed. For the Court's convenience, Andren attaches EUCPs' memorandum in support of their renewed fee motion (Dkt. 6911), Andren's Opposition (Dkt. 6990), and EUCPs' reply (Dkt. 7032) as Exhibits 1-3 to this filing.

I. Few *Ex Ante* Fee Agreements Exist

Andren admits that few *ex ante* fee agreements exist (Supp. 1), and this is because individual class representatives have scant incentive to limit their attorneys' fees. Chicago Teachers' agreement in *IRS is* an outlier, but not because that case was a cakewalk as EUCPs insist (see next section). Vanishingly few *ex ante* fee agreements exist because the recovery achieved by any plaintiff will be distributed to the entire class, so by definition any reduction in fees will have small effects on a class representative's underlying claims.

Therefore, the Court should read very little into the fact that most class action suits do not include bids or *ex ante* fee agreement. The Court instead has a duty under controlling Seventh Circuit law to sus out what a knowledgeable fiduciary ***would have*** negotiated *ex ante*, which virtually no

[1] Objector supplements his Objection with leave of the Court, Dkt. 7193.

private clients have both the knowledge and leverage to do—except for the sole example of such agreement in an antitrust case, *IRS*, reached by Chicago Teachers, a savvy investment fund with $10 billion in assets and an institutional policy to control fees. Ex. 2 at 3 & n.2.

A. Consumer class representatives cannot practically enter into *ex ante* fee agreements, so the Court must step in to protect their interests.

Consumers in class actions rarely have more than a few tens of dollars at stake directly. This is why class actions exist, because "only a lunatic or a fanatic sues for $30." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013). Rule 23 effectively joins mass claims that no individual would otherwise have an incentive to pursue. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Similarly, only a fanatic or a lunatic would challenge their attorneys' fee request, which might result in, say, one tenth of added recovery for individual claims. (Public interest law firms like the Center for Class Action Fairness represent the unusual fanatics who care enough to object for common class benefit.)

Such fanatics—often considered "problem clients"—rarely become class representatives. Consumer class actions typically involve claims by thousands or millions of Americans, so class counsel can simply recruit different representatives if they encounter an unusual potential client who personally cares about fees that they do not pay directly. "The selection of the class representatives by class counsel inevitably dilutes their fiduciary commitment." *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014). Even when representatives later become unhappy with their representation, class counsel can "fire" them by substituting more docile representatives. "Class actions are the brainchildren of the lawyers who specialize in prosecuting such actions, and in picking class representatives they have no incentive to select persons capable or desirous of monitoring the lawyers' conduct of the litigation." *Id.* at 719-20. This is why "named plaintiffs are usually cat's paws of the class lawyers." *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744 (7th Cir. 2011). To be clear: Andren in no way denigrates class plaintiffs or their genuine attorney-client relationship. They play an indispensable role in bringing Article III claims; "someone who is not injured cannot represent those who are." *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1069 (7th Cir. 2020). Consumers simply do not have the expertise to negotiate *ex ante* fee agreements and would not have the leverage to ask for such terms even if they did.

Consumer class representatives have especially little incentive because their service awards—under effective control of class counsel—almost always dwarf their individual claims by orders of magnitude. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011). For example, a consumer claimant to the first wave of *Broiler Chicken* settlements might get about $80 on average from the settlement under the vacated fee award. And if the attorneys' fees were reduced to match the Chicago Teachers' *IRS* scale they'd get maybe $10 more. At the same time, every named representative stands to earn $2,000 from their incentive award. Dkt. 5855 at 3. Consumer representatives have no economically rational reason to scrutinize their attorneys' fee requests, so judges "must step in and play surrogate client." *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992).

EUCPs repeats their observation that none of the other motions for appointment—including that of direct plaintiffs—offered to limit their fees *ex ante*. Supp. 3 & n.11; Ex. 1 at 13. Andren previously addressed this (Ex. 2 at 21, 23), but recent developments illustrate why corporations have little more incentive than consumers to control fees.

In the first place, when corporations serve as class representatives, they nonetheless have diminished stakes in the ultimate fee award. Only a portion of the recovery will flow to the named representatives, and any corporations that oppose the attorneys' fees find it much more efficient to opt out (as half the volume of direct purchasers have) rather than bill time on a possibly-unsuccessful objection that would mostly benefit others. Ex. 2 at 21.

Moreover, litigation financing can blunt or entirely eliminate any interest in limiting attorneys' fees. Here, independent plaintiff Sysco Corp. sold some—and now all—of its interests in the case to entities owned by Burford Capital Ltd. *See* Dkt. 6630 (mot. to substitute). Prior to resolving their dispute, Sysco filed motions suggesting that Burford has a stake in several plaintiffs' actions before this Court and other protein antitrust actions. Sysco sought to settle cases against the will of its funder, which would harm Burford not only from the "low-ball" settlements directly, "but with other, as-yet-undisclosed financing agreements that seem to be in place in these cases." *In re Pork Antitrust Litig.*, No. 18-cv-1776 (JRT/JFD), 2024 WL 511890, 2024 U.S. Dist. LEXIS 22979, at *34 (D. Minn. Feb. 9, 2024).[2] The unusual dispute between Sysco and Burford suggests that litigation finance agreements are quite common among large corporate plaintiffs, which makes sense. These corporations have other lines of business and would often prefer to trade uncertain recovery for certain lump-sum payments. To the extent that the named direct plaintiffs or their counsel have such agreements, they may have *no* incentive to control attorneys' fees. In fact, litigation financing may take the form of no recourse loans to counsel, providing an incentive to *maximize* fees. Without prying into the existence of such relationships (which plaintiffs would reasonably protest as imperiling their ability to litigate against the remaining defendants), the Court cannot assume that the fee arrangements for large plaintiffs represent "market rates" as opposed to artifacts of unseen, but apparently quite common litigation financing.

Precisely because class representatives cannot make *ex ante* fee agreements, the Seventh Circuit requires the Court to determine the fee bargain class and counsel "would have struck" exist *if they could*. *In re Broiler Chicken Antitrust Litig. End User Consumer*, 80 F.4th 797, 802 (7th Cir. 2023). EUCPs do not approximate this rate by recounting the fact that such agreements normally don't exist. We know that already. The question is what agreements would look like if they *did*, and we have only one model for it for antitrust litigation involving these firms.

B. Likewise, class counsel rarely compete on fees because they frequently depend on the goodwill of rival plaintiffs' counsel.

One of the strangest assertions in EUCPs' supplement is that "[i]f the *IRS* schedule or other bids had been the market rate, one of the firms vying for leadership would have offered that rate in an attempt to differentiate themselves from the competition." Supp. 3. Imagine if cartel defendants

[2] The magistrate judge in *Pork* reached a different decision concerning substitution than this Court. Dkt. 7184. The Burford entities have appealed the to the district judge. Andren quotes it here only because it compiles references to documents filed in several courts into a comprehensible narrative.

responded to the argument that they charged supra-competitive prices by saying that's impossible, because if the alleged competitive price were correct, one of them would have charged the market price it to gain market share against their competitors. This isn't persuasive, of course. Why? Because the market behaves like a cartel. *See In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 808 (N.D. Ill. 2015) (citing Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, LAW360 (Feb. 12, 2014 11:30 AM), http://www.law360.com-/articles/542260/looks-like-price-fixing-among-class-action-plaintiffs-firms); *see also Alcarez v. Akorn*, 2024 WL 1617389, __F.4th__ (7th Cir. 2024) (six firms colluding to divide $322,500 in "mootness fees" for litigation that produced no benefit for the class action principal—Akorn shareholders).

In the first place, the assertion that firms regularly spontaneously bid for leadership contradicts the sworn testimony of Steve Berman who explained that the three bids discussed by Andren were the *first and only* examples of such bids among scores of cases. Ex. 5250 (attached as Exhibit 4), ¶ 19. He claimed, dubiously,[3] that the fee bids were an effort to "get our foot in the door." *Id.* As a matter of fact, plaintiffs' counsel virtually *never* offer to compete on price without a court first prompting them to do so. EUCPs do not cite a single example of other class attorneys submitting such bids—not even when firms voluntarily apply for less than 33%, and not even in financial causes with "gargantuan" potential recovery that turn into billion-dollar settlements.

The class plaintiffs' bar reflects a striking lack of competition on attorneys' fees. Unfortunately, the incentives of multi-firm class litigation discourage competition among the very firms who protect consumers from anti-competitive behavior. Andren has already briefed the bids once offered by co-lead class counsel, and won't repeat himself here. Ex. 2 at 10-19. But the *response* by other firms and courts to Hagens' bids shows why the strategy was abandoned. In *Resistors*, one firm accused Hagens of improperly submitting a bid under seal even though defendants might have gained a litigation

[3] 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.).

advantage by knowing its details. No. 3:15-cv-3820, Dkt. 74 at 2-3 (Dec. 4, 2015). None of the bids were "successful" because Hagens Berman never won the sole appointment it sought—Ninth Circuit judges being almost as unimpressed with the offers as rival plaintiffs' firms. Ex. 2 at 18. Instead, Hagens found itself forced to team up with rival firms it had sought to out-compete. In multi-firm class action litigation, it does not pay to compete on price, but it may make your future co-counsel unhappy you ever tried. *See generally* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 122 (2017) (documenting repeat players in MDL mass-tort litigation and their resemblance to cartels that "punish defectors by imposing costs on them and denying them access.").

A competitive bid filed last week by Edelson P.C. in a privacy suit confirms the touchiness and rarity of class firms competing on price. Edelson offered that, if appointed, the firm would limit fees to the lesser of 20% or the claims rate achieved by the class, and it attached polling data of putative class members showing that a plurality of them believe controlling fees to be "highly important." *In re 23andMe, Inc. Consumer Data Security Breach Litig.*, No. 24-cv-487, Dkt. 41, attached as Exhibit 5. Edelson described their bid diplomatically as "in perhaps the least-discussed item in all of plaintiffs' law—the Class cares if there's meaningful competition on price." *Id.* at 3. To be clear, Andren does not contend that Edelson's rate would be the *ex ante* rate in this case, and EUCPs will undoubtably reel off a host of reasons that antitrust litigation differs from privacy litigation. He cites it because—to his knowledge—the only class firm that has offered to compete on price in years is one that also calls itself "a leading voice of reform within the plaintiffs' bar, on everything from calling out criminality to pointing out the subtle ways in which lawyers routinely put themselves first." *Id.*

Fee bids, like *ex ante* fee agreements, are vanishingly rare. Not because knowledgeable consumers wouldn't negotiate or select them if they had leverage to do so, but because the practical realities of multi-firm litigation discourage them.

II. The *IRS* Arrangement is Probative

Andren agrees with the Court that the Chicago Teachers' *ex ante* fee agreement in the *IRS* antitrust litigation shows the sort of fee limit that a savvy and interested fiduciary for the class might have negotiated *ex ante*. As discussed in the previous section, the deck is stacked against class representatives negotiating such an agreement. Because Andren has not seen the fee terms of the Chicago Teachers' agreement, he is somewhat at the mercy of class counsel, who characterize it as providing only the *Payment Card Interchange* fee scale, without reference to the considerations for early settlement that the *Payment Card* court itself found important.[4] A mechanical application of the *Payment Card Interchange* scale here would result in a fee award of $45.85 million, or about 26.6% of the net $172.2 million fund. Dkt. 5855 at 12 (deducting expenses). Assuming this is correct, the *IRS* fee scale greatly exceeds all of Hagens' fee bids, exceeds the Ninth Circuit's 25% benchmark (where class counsel voluntarily litigates), and also exceeds the scale devised by the Seventh Circuit in *Synthroid II*. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 980 (7th Cir. 2003) ("*Synthroid II*"). The settlements here were reached prior to certification, whereas the *Synthroid II* settlements arose after voluminous antitrust litigation including contested certification. *In re Synthroid Mktg. Litig.*, 110 F. Supp. 2d 676, 683 (N.D. Ill. 2000). EUCPs argue, as they have before, that the *IRS* litigation was atypical, but the fees evidently agreed *ex ante* by Hagens and Chicago Teachers in *IRS* are atypical because they *exceed* other benchmarks of competitive market-approximating fees, and Andren stands by his recommendation that the fee award should be between $25 and $31.5 million. Ex. 2 at 25. A 26.6% award for the first wave of settlements would be the *highest* possible award supported by a competitive *ex ante* bargain.

As for EUCPs' claim that the *IRS* case was atypically "big and certain," this is belied by the history of that litigation and filings in that case. Every litigation poses unique challenges, and we *know* the rate class counsel would accept is lower than 33%, because, through "continued participation," class counsel accepts *de facto* fee limits in every Ninth Circuit action. *Broiler Chicken*, 80 F.4th at 804.

[4] The undersigned trusts the representation of counsel, and also appreciates time the Court takes to verify it, particularly whether the agreement cites the *Payment Card Interchange* order, which would suggest a smaller fee for settlements reached procedurally early in litigation, as discussed below in section II.B. To the extent any ambiguity exists, Andren reiterates his request to receive a copy of the agreement, with irrelevant terms redacted, under the protective order if necessary. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (Rule 23(h) violated when objectors do "not have all the information they needed to justify their objections.").

A. *Broiler Chicken* differs from *IRS*, just as every case differs, but the logic of Chicago Teachers' *ex ante* agreement remains persuasive.

EUCPs again argue that the potential damages in *IRS* greatly exceeded the potential damages in this cases. Supp. 4; Ex. 1 at 21; Ex. 3 at 8-9. Andren observed that the expert reports filed in the two cases reflect very similar damage estimates—$4.5 billion in *IRS* compared to $3.916 billion here, only 15% higher. Ex. 2 at 7-8. Class counsel replies that potential recovery should be assessed *ex ante* from expectations the *outset* of litigation (Supp. 4; Ex. 3 at 8-9), which is true, but they do not point to case-specific evidence from the outset of *IRS*. Andren previously flagged this failure to cite evidence (Ex. 2 at 6-7), and every public filing from *IRS* tends to confirm that counsel knew from the outset that recovery would be difficult and comparable in size to *Broiler Chicken*, not necessarily "gargantuan" (as indeed it has not been).

Instead, EUCPs repeat that other "banking" or "financial" antitrust actions resulted in very large settlements (Supp. 4; Ex. 1 at 21-22), but this is not evidence that knowledgeable plaintiffs or attorneys would assume that *every* "financial" antitrust action would result in a billion-dollar settlement. When attorneys learn that a client has claims against a well-capitalized corporations they don't pop champagne corks until ascertaining the nature and potential damages of the claim. If the claim revolves around a conspiracy between IBM and Ross Perot to use earthquake technology to reintroduce slavery, the champagne can be tucked securely away. *Tyler v. Carter*, 151 F.R.D. 537, 538 (S.D.N.Y. 1993).

The *IRS* record shows that co-lead counsel appropriately did what knowledgeable clients would do, and investigated the strength of the *IRS* claims before signing a single filing. The pre-suit investigation included "working with the leading experts in the field," retaining one expert, and engaging a firm to "demonstrate and quantify the class's damages." *IRS*, No. 16-md-2704-PAE, Dkt. 51 at 11 (S.D.N.Y. Jul. 8, 2016) (co-lead application for appointment, attached as Exhibit 6). Class counsel also hired an expert to assess potential damages from the outset of *Broiler Chicken*. Ex. 1 at 16. EUCPs do not explain why they or Chicago Teachers' would benchmark the *IRS* suit against different suits involving different instruments, different claims, and different levels of government pressure given that they already had an *actual* estimate of specific damages for *IRS* in hand. And at the time of suit, class counsel would have known that the maximum damages for end-users in *Broiler Chicken* were only slightly smaller than in *IRS*, and this small difference would have not altered the structure of the fee, as explained in the next subsection.

Class counsel next argues that the *IRS* defendants had a greater capacity to pay settlements than the defendants here. Supp. 6. Andren agrees this is probably true, but an *ability* to pay does not imply a *willingness* to pay, as *IRS* itself illustrates. It turns out that defendants can use their "virtually unlimited resources" (Supp. 1) to fight like hell. The *IRS* defendants fought for seven hard years before even one of them, Credit Suisse, would settle for a modest $25 million. They fought though "extensive discovery, reviewing millions of documents, analyzing more than 150,000 individual transactions, and completing more than 150 depositions in three countries of fact witnesses, Plaintiffs, third parties, and experts." *IRS*, No. 16-md-2704, Dkt. 978 (S.D.N.Y. Feb. 11, 2022) (mot. prelim. App.). The $25 million settlement would extrapolate to only $180-391 million in damages from all *IRS* defendants, although to be fair the first defendants often settle at a discount in exchange for their cooperation. *Id.* at 14. But even this settlement—still not preliminarily approved—may disappear. The remaining defendants defeated certification in December. If *IRS* counsel recover anything from the remaining defendants, it will require even more work. Yet Bank of America, UBS, Citigroup, Barclays, Goldman Sachs, J.P. Morgan and the rest continue to have hundreds of billions in assets and could hypothetically buy everyone reading this brief a private island.

Knowledgeable plaintiffs and attorneys, evaluating a class action engagement *ex ante*, would realize "virtually unlimited resources" is a double-edged sword. Andren admits that the *IRS* defendants are almost certainly "too big to fail"—and that's what makes that case *more* difficult than one where small chicken producers can be settled out early and act as cooperating witnesses against better-capitalized members of the cartel.

Finally, class counsel repeats their argument attempting to distinguish *IRS* because *IRS* involved direct purchasers rather indirect end-users. Supp. 7; Dkt. 1 at 19-20. Andren addressed this: every sort of action has strengths and weaknesses. Dkt. 2 at 1, 15-16. Indirect purchasers have to worry about national certification and they only get to count about half the wholesale volume of sales due to *Illinois Brick*, but they don't have to worry about passthrough or large companies opting out of settlement and reducing the size of their recovery.[5]

B. The Chicago Teachers' agreement in *IRS* is expressly meant to cover a range of recoveries, making it suitable for a range of cases.

Class counsel again argues that the sort of fee scale agreed with Chicago Teachers' would only be negotiated only for "big and certain" recovery like *IRS*. Supp. 9, Ex. 1 at 22. The table itself suggests otherwise: settlements less than $10 million are entitled to 33% attorneys' fees. *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014). Three brackets exist for settlements smaller than the ones reached to date in *Broiler Chicken*. Dkt. 2 at 7. Sure, the brackets go all the way up to $5 billion, but they are intended to cover a settlement of *any* size.

Declining scales recognize that much of the value of a settlement, particularly one achieved with very little litigation, owes more to the strength of class claims or size of the class than attorney effort. *In re Stericycle Sec. Litig.*, 35 F.4th 555, 561-62 (7th Cir. 2022); *Synthroid I*, 264 F.3d at 721. Courts ought to award declining percentages to rapidly-settled and *large* settlements. *See generally* Ex. 2 at 4-6. Sliding scales help discourage attorneys from wasting too much time redundantly jockeying for position in valuable cases. If courts award 33% or even 20% of a rapid $500 million settlement, they encourage hundreds of attorneys to pursue high-profile litigation in hopes of securing a small slice of the rich windfall. This is bad because class attorneys serve a valuable function in society by vindicating wrongs that are too small for ordinary people to rationally pursue: again, "only a lunatic or a fanatic

[5] Class counsel devote almost two pages of their supplement to rebut the spurious assertion that "Andren has implied that Class Counsel hid the truth by failing to disclose *IRS* during the first round of briefing." Supp. 7. They apparently cite the objection heading parenthetical "(undisclosed)," for this characterization. Ex. 2 at 6. Objector did not intend such implication: the objection itself says that the "renewed motion discloses for the first time" the existence of the *ex ante* agreement. *Id.* at 1. The Objector agrees that the *IRS* agreement fell just outside the date range that the Court ordered disclosed. Dkt. 5798. Andren only emphasized the *previously*-undisclosed nature of the *IRS* agreement to explain why the Seventh Circuit did not direct this Court to examine it. *Id.* at 2. Had the panel known, it certainly would have found it potentially highly relevant. Therefore, class counsel's continued emphasis on "auctions" and "out-of-circuit" fee awards (Supp. 1 n.2, 9) is too narrow a focus, as the Court recognizes.

sues for $30." *Butler*, 727 F.3d at 801. Unfortunately, courts often decline to adopt sliding scales, and so attorney stampedes occur far too often.

The *IRS ex ante* agreement recognizes that larger percentages should be accorded for the first few million dollars of recovery to encourage attorneys to pursue claims whether comparatively small or multi-billion. The *Payment Card* scale was never limited as class counsel suggests, but was crafted "for the benefit of counsel in future cases" so that they can "make reasonable decisions *ex ante* in those future cases." *Payment Card*, 991 F. Supp. 2d at 446. "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." *Id.* (citing *Synthroid I*, 264 F.3d at 721). The court admits "I have tailored it to the unique facts and circumstances of the settlement I have approved here," *Id.* at 447, but nothing *confines* the scale to "financial" cases. As Andren previously observed, and class counsel cannot contest, the scale has been applied to small settlements, and settlements concerning parking heaters and air cargo shipping. *Id.* Neither courts nor parties limit it to "financial" cases or likely blockbuster recoveries. If only intended for billion-dollar funds, why even include a bracket for under $10 million?

The *Payment Card* court also supports Andren's argument that fees ought to depend on the stage of proceedings. "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; the *Goldberger* factors also dictate a smaller fee for less work. **An earlier settlement reached through less work would surely warrant a smaller fee.**" *Id.* at 446 (emphasis added). Andren assumes in this filing that the fee agreement in *IRS* includes only a table of rates, with no discount for settlements reached before these milestones although Chicago Teachers' currently recommends limiting fees based on the stage of litigation. Ex. 2 at 3; *see also Stericycle*, 35 F.4th at 566 n.8 (discussing Chicago Teachers' agreement for 15% fee in securities case "if a settlement was reached after a ruling on a motion to dismiss and before a ruling on summary judgment"). But if, on the other hand, the *IRS* agreement instead references the *Payment Card* order itself, the Court may need to consider an appropriate discount to account for pre-certification stage of proceedings for most of the settlements reached in the first wave of EUCP settlements. This would better align the incentives of counsel with class members, who would want to reward counsel for bearing more risk, by awarding them a higher percentage of recovery for more advanced proceedings. Ex. 2 at 6.

C. Litigation in California demonstrates that class counsel in fact agree to accept cases for fees less than 33%—frequently.

In several places, class counsel asserts that they would not have agreed to work for a smaller fee award than the "median" that they define as 33%. *See* Supp. 3 ("they were not willing to [offer a lower rate] here"), 5 ("would not have offered a rate less than median"), 9 ("would not have agreed to a higher [sic] rate *ex ante*"). This is a key question on this remand: the "what levels of compensation attorneys are willing to accept in competition." *Broiler Chicken*, 80 F.4th at 802 (parenthetically quoting *Synthroid I*, 264 F.3d at 721).

Once again, class counsel cites no evidence for their claim they would refuse less than a flat 33% fee arrangement (*see* Ex. 2 at 6-7), and it is obviously false. Class counsel offers to accept less—in each and every case litigated in the Ninth Circuit, which employs a "presumptively reasonable" 25% benchmark for attorneys' fees. Class counsel's "continued participation" in there suggests that the prospect of a 25% fee award is not as "below-market" as class counsel suggested. *Broiler Chicken*, 80 F.4th at 804.

For example, when Hagens Berman and other firms represented animators alleging anticompetitive wage suppression, they neither bid nor agreed *ex ante* to any particular fee rate. They knew fees would unlikely exceed 25%, and likely less if recovery exceeded $100 million. We know this because when they moved for fees from a pair of settlements totaling $150 million, they sought only 21%—*less* than the Ninth Circuit benchmark—likely out of concern the district court would want to reduce fees from a "megafund" recovery below the benchmark. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-4062-LHK, 2017 WL 2423161, 2017 U.S. Dist. LEXIS 86124, at *24 (N.D. Cal. June 5, 2017). Counsel were right to be concerned: the district court found the requested fee would "would yield windfall profits," so elected to employ the lodestar multiplier, resulting in an overall fee award of 10.5%. *Id.* at *25, *38. Andren does not contend that *this* is the market rate; it is just one *ex post* datapoint.[6]

But examining "all of the evidence of the market rate" as class counsel correctly says the Court should do (Supp. 8), we can confidently conclude that class counsel would seldom reject *ex ante* fee limits below 33% in antitrust cases concerning myriad industries ranging from app development fess (*Cameron v. Apple, Inc.*) pharmaceutical "pay-to-delay" (*Lidoderm*), and yes, even food. *See Edwards v. Nat'l Milk Producers Fed'n*, No. 11-cv-04766-JSW, 2017 U.S. Dist. LEXIS 145214, at *34-35 (N.D. Cal. June 26, 2017) (granting only a 25% benchmark fee rather than requested 33⅓% even though $52 million settlement did not constitute a "megafund").

Every Ninth Circuit case implicitly includes such a limit, albeit a flexible one that applies most forcefully in large settlements—yet class counsel continues to file cases and seek interim appointment in the Northern District of California. EUCPs provide no evidence that class representation in the Ninth Circuit is less zealous, less thorough, or less successful. The Court should not credit class counsel's assertions that they would agree to work for fees less than 33%. They do it every day.

[6] Class counsel can undoubtably distinguish *Nitsch* (animation does not resemble chicken production, Disney isn't JBS, and their unaudited lodestar figure results in a smaller multiplier here), but Andren's point remains. Counsel volunteers to work within the Ninth Circuit with no reasonable expectation of receiving more than 25%, sometimes voluntarily requests less—and may be awarded less still—yet class counsel still seeks appointment in these cases, confirming their willingness to work for less than 33% on all sort of matters.

CONCLUSION

The Court should scale EUCP's Rule 23(h) award to approximate a market rate, as suggested by the *IRS* fee agreement, Hagens Berman's bids, and class counsel's continued practice within Ninth Circuit courts. This would result in a fee award between $25.4 million (based on the *Batteries* bid), and at the very high end, approximately $47.2 million or 26.6% of the net common fund (based on an undiscounted scale, although the *Payment Card* order itself would suggest a reduction for settlements reached prior to certification, as in this case). This range encompasses the Ninth Circuit benchmark of 25%, and the sliding scale employed by the Seventh Circuit in the heavily-litigated *Synthroid II* case, *i.e.*, $31.5 million. An award in this range comports better with this Circuit's *ex ante* approach and returns millions of dollars for distribution to the consumer class.

Dated: April 23, 2024

/s/ M. Frank Bednarz
M. Frank Bednarz
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1440 W. Taylor St # 1487
Chicago, IL 60607
Phone: (801) 706-2690
Email: frank.bednarz@hlli.org

Attorney for Objector John Andren

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Reply in Support of Objector Anden's Motion to Strike via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: April 23, 2024

/s/ M. Frank Bednarz