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: *The Direct Purchaser Plaintiff Action*	Honorable Thomas M. Durkin

AMICUS BRIEF OF HAMILTON LINCOLN LAW INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS CONCERNING DIRECT PURCHASER PLAINTIFFS' RESPONSE TO THE COURT'S ORDER REGARDING *EX ANTE* FEES (LEAVE GRANTED Dkt. 7285)

Amicus Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") offers this brief (identical with the proposed brief except this paragraph) concerning the Direct Purchaser Plaintiffs' Response to the Court's Order Regarding Their Motion for Payment of Attorneys' Fees. Dkt. 7259 ("Resp."). CCAF shares this Court's view that the Seventh Circuit opinion concerning the EUCP's fee award raises similar issues for interim fee awards in the other tracks. Dkt. 7235.

The most relevant part of DPP's filing is the disclosure that their co-lead counsel entered an *ex ante* fee agreement in the *Credit Default Swaps* litigation. Like the *IRS* fee agreement, Dkt. 6932 at 9, the *Credit Default Swaps* agreement provided smaller percentages for settlements achieved early in litigation, *and* declining percentages for larger recoveries. CCAF disputes DPP's argument that this agreement and awards in out-of-circuit cases do not suggest the fair market rate for antitrust representation. *In re Broiler Chicken Antitrust Litig. End User Consumer*, 80 F.4th 797, 804 (7th Cir. 2023).

CCAF disagrees that the retention agreement for a suit against the NFL provides a better benchmark for the fair *ex ante* rate. This *Oakland Raiders* litigation required a higher rate because of its extraordinary risk. That suit was unlikely to result in any recovery, as indeed it did not. Counsel was also on the hook to defend Oakland against countersuits, as the attached retention agreement required.

CCAF rebuts DPPs' suggestion that Direct Action Plaintiff retention agreements might support their fee request. Record evidence suggests that at least some DAP firms agreed to work for only 25%, and if the Court is inclined to use such evidence, it should request it from the DAPs.

Finally, the Court should also disclose the relevant terms of the *IRS* fee agreement so that DPPs and others can knowledgeably comment on them.

I. The *ex ante* fee agreement in Credit Default Swaps shows that rates vary based on the amount recovered *and* the stage of litigation.

DPPs disclose the fee award in *In re Credit Default Swaps Antitrust Litigation*, which was granted under the terms of an *ex parte* fee agreement between Los Angeles County Employees Retirement Association ("LACERA") and co-lead DPP Counsel Pearson Warshaw. Dkt. 7259-1, ¶ 4. While the full terms of the agreement do not appear to be public, they "called for decreases in attorneys' fee percentages when the settlement amount reached certain recovery thresholds and increases in attorneys' fee percentages as the case passed certain litigation thresholds and proceeded closer to trial." DPP Resp. at 6. The agreement apparently included rates for four periods of litigation, and the relevant percentages—covering settlements from the "commencement of fact discovery through the date of completion of all discovery" provided rates of 18% for the first $200 million, with several brackets through 12% for recovery in excess of $800 million. *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2016 WL 2731524, at *17 & n.24, 2016 U.S. Dist. LEXIS 54587, at *53 & n.24 (S.D.N.Y. Apr. 25, 2016).

Three things are worth remarking: first, the *Credit Default Swaps* fee agreement was vigorously negotiated *ex ante*. LACERA's in-house counsel reported receiving several proposals and negotiated its fees with Pearson Warshaw prior to filing suit. "[T]hat's usually how it works for us. I look at the highest, I look at the lowest, and really what I want is the best attorney for the fund and the class, and hope that I can get that attorney to the fee schedule that I want." *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), Dkt. 561 (Transcript) at 27, **attached as Exhibit 1**.

Second, while DPP Counsel appropriately notes that the "amounts at issue that were higher than those in this case," Supp. 5, the rates *did* decline for larger recoveries. Here, as with *IRS*, fees

negotiated *ex ante* included declining scales for larger recovery, contrary to DPP Counsel's expert Prof. Brian Fitzpatrick who averred that "the data from sophisticated clients . . . did not find any marginally decreasing rates." Dkt. 5048-1 at 10–11. DPPs oddly quote this remark, Resp. 14, while simultaneously disclosing their own example of a sophisticated client that *did* negotiate a marginally decreasing rate after soliciting several competitive bids.

Finally, the *Credit Default Swaps* rate depends on the size of the fund and *the stage of settlement*. Prof. Fitzpatrick agrees on this issue, recommending "a formula based on procedural maturity rather than recovery size; *e.g.*, to increase the percentage if the case goes to trial and then again if the trial verdict is appealed." *Id.* at 21. Therefore, whatever percentage would be appropriate for the current tranche of post-summary judgment settlements, it implies the earlier settlements should have been awarded a lower percentage. While the previous fee award is final, the Court may set an interim fee award to reach an appropriate cumulative total. *Cf. In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. 3:07-cv-05634-CRB, 2019 U.S. Dist. LEXIS 206431, at *29 (N.D. Cal. Nov. 26, 2019) (calculating cumulative lodestar crosscheck and fixing third interim fee award to reach overall 25% net fee award).

II. No courts mechanically employ a "megafund rule," and data from outside this circuit should not be disregarded under the *Broiler Chicken* opinion.

DPP Counsel suggests that the Court should place less weight on the *ex ante* fee agreement struck in *Credit Default Swaps*, the *ex post* award in *Freight Forwarders*, and EUCP Counsel's fee agreement in *IRS* because the Seventh Circuit rejects the "megafund rule." Supp. 6, 8, 10.

But neither the Second Circuit, nor any other circuit known to the *amicus* applies a mechanical "megafund rule" of the sort rejected by the Seventh Circuit. *See In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (reversing and remanding district court that capped fees for settlements above $75 million at 10%). The Ninth Circuit has no mechanical threshold or recipe for awarding fees in "megafunds," but instead suggests that its normal 25% benchmark "is of little assistance" in such large settlements. *See In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 933 (9th Cir. 2020). Only two Second Circuit cases appear to have mentioned "megafunds" at all, and neither categorically recommends *reducing* fee awards in those cases. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d

96, 123 (2d Cir. 2005) (affirming fee award even though "courts in megafund cases often award higher percentages of class funds"); *Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 62 F.4th 704, 724 (2d Cir. 2023) (parenthetically citing *Wal-Mart Stores* for proposition that a 3.5 lodestar multiplier is reasonable "in a megafund antitrust action").[1] The fee award in *Credit Default Swaps* itself makes no reference to a "megafund" rule. 2016 WL 2731524, 2016 U.S. Dist. LEXIS 54587. The initial *Freight Forwarders* fee award discussed the concept in terms of reasonableness. "The Second Circuit may not mandate the application of the megafund doctrine, but to the extent that the reasoning underlying such a doctrine coalesces with an evaluation of reasonableness, that doctrine provides useful guidance for considering an application for attorneys' fees." *Precision Assocs. v. Panalpina World Transp.*, Ltd., No. 08-cv-42 (JG) (VVP), 2013 WL 4525323, 2013 U.S. Dist. LEXIS 121795, at *69 (E.D.N.Y. Aug. 27, 2013).

In any event, the entire gist of *In re Broiler Chicken Antitrust Litig. End User Consumer*, is that voluntary participation of counsel in other courts reflects the *ex ante* market rate. 80 F.4th at 804. Counsel say they would have "never contemplated" the fee structure of *Credit Default Swaps* in this case (Sup. at 6), but the fact of the matter is that they agreed to work under the fee arrangement and did so successfully. For *that* case, at least, the *ex ante* market rate included a cap of 18% for the first $200 million secured prior to the conclusion of discovery.

This case may be riskier, and so the fair rates here are arguably higher, but evidence of competitively-negotiated antitrust rates should not be discarded just because the Seventh Circuit rejected a mechanical "megafund rule" that no Circuit requires anyway. If the negotiated retainer in *Credit Default Swaps* were not fair to the attorneys, they would not have taken the case.

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[1] DPPs appear to cite the mentions of "megafund" in *In re Foreign Exch. Benchmark Rates Antitrust Litig.* for the application of a "megafund rule" allegedly applied in the Second Circuit. Resp. 10-11, citing No. 13-cv-07789-LGS, 2018 WL 5839691, at *5 (S.D.N.Y. Nov. 8, 2018). But courts frequently discuss megafund settlements in a descriptive matter, as happens in this Circuit as well. "Courts often refer to class actions that involve common funds in excess of $100 million as 'megafunds.'" *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1032 (N.D. Ill. 2011) (awarding 20% rather than requested 25% not because of a "megafund rule" but because "it could not be the case that the market price for Counsel's services in conducting the instant litigation" would equal 25% of a potential $190+ million recovery).

III. The *City of Oakland* case was unusually risky.

DPP Counsel might argue that the *Credit Default Swaps* agreement was struck because of the strength of claims in that litigation. And to be fair, case-specific considerations matter.

For exactly this reason, DPP's preferred benchmark from *City of Oakland v. Oakland Raiders* is not persuasive. In that suit, Pearson Warshaw and another firm represented the city on a pure contingency basis in their suit against the then-Oakland Raiders, the NFL, and all 31 other NFL teams. The suit was regarded as extremely risky—so risky that Alameda County, co-owner of the Oakland Coliseum that allegedly suffered damages due to the Raiders' move to Las Vegas, refused to join it. *See* Matier S. Rosst, *Oakland lining up lawsuit against Raiders, so team threatens to leave town early*, SAN FRANCISCO CHRONICLE (Sep. 4, 2018), available at: https://archive.is/68NSD. Oakland's mayor of the time, ambivalent about the suit, only agreed to proceed in a closed session in view of the all-contingency arrangement. *Id.* One Oakland City Councilor remarked skeptically when pitched the idea "I don't see how you get a judge to force the NFL or the Raiders to pay off that bond indebtedness when it's our debt." *Id.* Alameda County feared the risk of countersuit, *id.*, and this concern is reflected in the retention agreement itself. **Exhibit 2** at 2 (requiring Pearson Simon to "defend the City, free of any charge, in connection with any counterclaim or action… commenced by any defendant.").[2]

Naturally, the contingency fee rate must be higher for unusually risky litigation to compensate for the risk of walking away empty-handed. The risk in *Oakland* was unusually high due to the risk of defending against a countersuit *gratis* that Alameda County found so likely it refused to join the suit. And the risk was borne out: as DPP Counsel notes, "defendants prevailed." over all claims. Resp. 7. While this chicken action arguably did not have as much *ex ante* value as *Credit Default Swaps*, it was safer than *Oakland*, so a uniform 33% rate appears excessive.

IV. Direct Action fee agreements do not support a 33% fee request.

DPPs claim that their fee request is supported by a solicitation allegedly sent by one of the Direct Action Purchaser firms, which attached a form contract for a one-third contingency fee,

[2] DPP Counsel observed the agreement was "of public record," but did not file it. The undersigned could not find it in any docket or online, so filed a public records request with Oakland to obtain it.

increasing to 38% for post-trial recovery. Resp. 14-15. Of course, the solicitation is not an actual DAP retention agreement. CCAF finds it likely that many DAPs—particularly large purchasers unencumbered by litigation financing agreements that might blunt or obliterate their incentive to maximize recovery—negotiated lower rates for themselves. CCAF draws support for its inference is from an email filed by the same DAP firm cited by DPPs, which was evidently sent to members of UniPro, a food distribution cooperative. It reads: "We [UniPro] have been successful in negotiating their contingency fee down from 33% to 25% for all UniPro Members." Dkt. 2940-1 at 3.

As CCAF's client and attorney John Andren previously observed: large class members rarely object to fees. Dkt. 7208 at 3; Dkt. 6990 at 15-16. Objections cost companies directly and may not prevail. Even if successful, fee objections result in greatly diluted *pro rata* benefit for any single objector. When class members have a large enough stake to care about the fee, they can simply opt out, which requires no court review. For this reason, the Court should not place much weight on DPP's argument that the lack of objections supports their fee request. Resp. 13-14.

To the extent the Court is inclined to rely on evidence of the rates negotiated with DAP counsel, it might consider requesting this information from DAPs *in camera*.

V. The relevant terms of the *IRS* fee agreement should be public.

Finally, DPPs fairly observes that because the *IRS* "fee arrangement is not public, [counsel] cannot speak to the specifics of the fee arrangement." Resp. 9-10. This is true, and provides a further reason to make the *IRS* agreement public in relevant part.

Conclusion

Broiler Chicken counsels that the Court should not disregard the *ex ante* fee agreement in *Credit Default Swaps* due to an alleged "megafund rule." It represents a rigorously-negotiated *ex ante* fee agreement, unlike most form letter retention agreements.[3] The *Credit Default Swaps* retention more closely resembles this class action than the risky individual action launched by Oakland.

[3] Likely including the *Liquid Aluminum Sulfate* agreements DPPs do not attach to their filing.

Dated: June 24, 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 Hamilton Lincoln Law Institute

CERTIFICATE OF SERVICE

The undersigned certifies he electronically filed the foregoing Amicus of the Hamilton Lincoln Law Institute via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing.

Dated: June 24, 2024

/s/ M. Frank Bednarz

EXHIBIT 2

CITY OF OAKLAND
SCOPE OF SERVICES/RETENTION AGREEMENT

December 12, 2018

Berg & Androphy
120 West 45th Street
Suite 3801
New York, NY 10036

Pearson, Simon & Warshaw, LLP
15165 Ventura Boulevard
Suite 400
Sherman Oaks, CA 91403

Re: Potential Litigation against the National Football League and its teams

Berg & Androphy ("B&A") and Pearson, Simon & Warshaw, LLP ("Pearson"), collectively ("Counsel") agree to represent the City of Oakland (the "City" or "you") in connection with potential litigation against the National Football League and its teams, including, but not limited to the Raiders (the "Action"), challenging the relocation of the Raiders from Oakland to Las Vegas (the "Engagement"). The Engagement will include, among other things, developing the facts and legal theories for such potential litigation, and commencing and prosecuting such potential litigation. In addition to this attachment, B&A and Pearson each, has entered into a Professional Services Agreement (collectively, the "PSAs") with the City. Counsel's staffing of this Engagement may consist of the individuals listed on this attachment.

GENERAL INSTRUCTIONS

Counsel shall prepare all documentation necessary for this matter in accordance with these instructions. Counsel also shall promptly inform the City Attorney or the Chief Assistant City Attorneys of major developments and of material legal issues that may arise while providing legal services.

The City will rely on Counsel's advice and counsel as well as any documents prepared by Counsel, to properly protect its interests and to acquire legally enforceable rights.

The City retains complete control of all decisions in the case. The City in no way assigns its prosecutorial discretion to Counsel and retains all of its inherent powers related to prosecutorial discretion, judgment, control and decision making related to the Action. Specifically: (1) decisions regarding settlement of the Action are reserved exclusively to the discretion of the City's own attorneys; (2) any defendant that is the subject of the Action may contact the lead City attorneys directly, without having to confer with Counsel; (3) City attorneys will retain complete control over the course and conduct of the Action; (4) City attorneys retain a veto power over any decisions made by Counsel; and (5) a City attorney with supervisory authority must be personally involved in overseeing the Action.

COMMUNICATION AND WORK PRODUCT

Chief Assistant City Attorney Maria Bee is the City Attorney assigned to this matter. Except as otherwise noted in this Agreement, direct questions, communications and correspondence to Ms. Bee with copies to City Attorney Barbara J. Parker and Supervising Deputy City Attorney Erin Bernstein.

SCOPE OF WORK/CONTINGENCY FEE AGREEMENT

Counsel shall: (a) engage in all efforts necessary for the commencement and prosecution of the Action on behalf of the City, including all necessary motion practice, discovery and trial preparation, the trial of the Action, and the prosecution or defense of any appeal from the Action; and (b) defend the City, free of any charge, in connection with any counterclaim or action ("Counterclaim") commenced by any defendant in the Action, or any third party or non-party (whether an individual or business entity) to the Action, which counterclaim or action arises out of the filing of, or the allegations contained in, the Action (collectively, the "Legal Services"). The Legal Services shall be deemed complete when: (a) the Action is settled, (b) the Action comes to a non-appealable conclusion by dismissal or judgment, or Client terminates Counsel; and (c) all Counterclaims are resolved by dismissal, settlement or judgment.

Counsel shall be compensated for the Legal Services solely through a contingency fee payment from any amount obtained through a successful resolution of the Action. In addition, Counsel agrees to advance disbursements related to costs and expenses (e.g., travel, postage, document management costs, court fees, expert fees and other similar expenses) incurred during the Action (the "Costs and Expenses"). The City agrees that nothing in this Scope of Services/Retention Agreement or the PSAs prevents Counsel from making separate arrangements with third-parties to assist financially in the commencement and prosecution of the Action; provided however, Counsel shall seek prior approval from the City as to the identity of any third-party financier and Counsel understands and acknowledges that the City's approval shall be based on its sole judgment and discretion. The Costs and Expenses incurred by Counsel in connection with this Agreement and the Professional Services Agreements shall, upon any settlement or judgment, be disbursed to Counsel in accordance with the provisions set forth below.

In the event there is a recovery resulting from the Action, whether by settlement or judgment, the City agrees to reimburse Counsel from the recovery for the Costs and Expenses incurred during the Action and to convey to Counsel an undivided 33 percent interest in such recovery (net of costs) (the "Contingency Interest"). The City's obligation to pay the Contingency Interest and Costs and Expenses shall be complete when such monies are transferred to the trust account of B&A and Pearson.

The City agrees that if it decides to terminate Counsel, Counsel shall retain its interest in the Contingency Interest and its right to reimbursement of the Costs and Expenses.

Under no circumstance shall the City be liable to Counsel, or any of its co-counsel, for any amount in excess of the Contingency Interest and the reimbursement of the Costs and Expenses.

If the Action is dismissed without a monetary award, or results in a judgment for the Defendants, the City shall have no obligation to pay Counsel for their time or to reimburse Counsel for their Costs and Expenses.

CONFLICT OF INTEREST

The Conflict of Interest provisions in the PSAs are expressly incorporated herein.

LIST OF COUNSEL'S STAFF WHO MAY WORK ON THE ENGAGEMENT

B&A	Hourly Rate
Jim Quinn	$1,050
David Berg	$1,250
Mike Fay	$975
Jenny Kim	$770
Chris Sprengle	$525
Chris Deubert	$475
Bronwyn James	$475
Betty Lam	$260
Lusia Lee	$225
Akima Gurley	$200

Pearson	Hourly Rate*
Clifford H. Pearson	$1,050
Bruce L. Simon	$1,050
Daniel L. Warshaw	$1,050
Melissa S. Weiner	$750
Michael H. Pearson	$500

Matthew A Pearson	$400
Benjamin E Shiftan	$900
Alexander L. Simon	$400
Neil J. Swartzberg	$900

*rates generally are adjusted at the beginning of each calendar year

This retention agreement hereby modifies and replaces the prior signed and dated Scope of Services/Retention Agreement.

APPROVAL

City of Oakland
Barbara J. Parker, City Attorney

Signature

12/10/18
Date

Pearson, Simon & Warshaw, LLP

Signature

12/12/18
Date

Berg & Androphy

Signature

12/12/18
Date

To be attached to signed Professional Services Agreement