No. 24-2387

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: BROILER CHICKEN ANTITRUST LITIGATION

END USER CONSUMER PLAINTIFF CLASS,
Plaintiff-Appellee
v.
TYSON FOODS, INC., et al.,
Defendants.

APPEAL OF: JOHN ANDREN,
Objector-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-08637
Judge Thomas M. Durkin

Reply Brief of Appellant John Andren

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Introduction

Class counsel doubles down on the district court's flawed premise that *ex post* fee awards, not *ex ante* data, define the market rate. *Broiler I* rejected that view, mandating fees reflect "what a sophisticated client would have negotiated" in 2016, with bids and agreements taking precedence as evidence over *ex post* awards, which "should receive less weight." *In re Broiler Chicken Antitrust Litig.*, 80 F.4th 797, 801, 804 (7th Cir. 2023). Plaintiffs have no legitimate excuse for the district court's excessive reliance on cherry-picked *ex post* data, including from a disavowed expert report; ignoring *ex ante* evidence of class counsel's continued participation in Ninth Circuit litigation in contravention of the mandate; and dilution of the little *ex ante* data it considered, often omitting it for reasons it did not apply to analogous *ex post* data. SA7, SA15-16.[1] Plaintiffs misread *Broiler I* to bless this inversion, claiming discretion covers selective scrutiny and Ninth Circuit exclusions. PB19, PB30. It doesn't.

The response sidesteps the mandate's call to weigh bids as "good predictors," not zero them out, and ignores *Stericycle*'s lesson that inherited work and early settlements reduce risk, and thus market-based fees. 80 F.4th at 802; *In re Stericycle Sec. Litig.*, 35 F.4th 555, 558 (7th Cir. 2022). Plaintiffs' claim that *ex post* norms shape *ex ante* bargains (PB34-35) cuts the other way: as *Broiler I* points out, continued willingness to litigate in a jurisdiction with constrained *ex post* norms demonstrates a ceiling on market-based rates. 80 F.4th at 804. This Court should reject plaintiffs' proposal to shelter from appellate review any award lower than the highest precedent; vacate the award; and set a rate between 15% and 26.6%, saving the class at least $5.8 million.

[1] AOB and PB refer to Andren's Opening Brief and Plaintiffs' Response Brief, respectively; A and SA refer to the Addendum/Appendix and Short Appendix.

Argument

I. The district court violated the mandate by excluding *ex ante* market data in favor of cherry-picked *ex post* fee awards.

This Court remanded for the district court to determine the "appropriate weight" to give *ex ante* bids to represent antitrust class plaintiffs by co-lead Class Counsel. 80 F.4th at 803. It expressly disapproved of reliance on *ex post* awards, holding that such awards "should receive less weight" than *ex ante* evidence; "those prices are set at the end of the litigation," so they never embody *ex ante* market rates. *Id*. at 804.

The district court did the opposite. It again discounted the bids *Broiler I* discussed, and diluted *ex ante* benchmarks by drowning them in a set of skewed *ex post* awards. It ultimately gave the cherry-picked set of *ex post* awards four times as much weight in its analysis as all of the *ex ante* bids available—even though a newly disclosed *ex ante* bid was a "good comparator." SA7. The court found without evidence that the *ex ante* market is "shaped by *ex post* awards" (SA14) and therefore *ex post* awards are the "best evidence of the market rate." SA11.[2] Plaintiffs do not and cannot explain how this complies with the mandate.

Plaintiffs characterize this as discretion to examine "similarities and differences" between prior litigation, but the district court abused its discretion in applying scrutiny selectively. It scrutinized only *ex ante* evidence this way. The district court excluded all but one *ex ante* agreement because of those cases' differences, but did not similarly scrutinize *ex post* awards. And many of the latter had material differences, such as settling later procedurally—even after certification and motions for summary judgment. The selective rigor contradicts the mandate.

[2] To the extent that *ex ante* market-rate bids are theoretically "shaped" by *ex post* awards, it is because market rates are necessarily lower. AOB26.

Finally, *Broiler I* found error in "categorically assign[ing] less weight to Ninth Circuit cases" given Class Counsel's continued participation in those cases, "an economic choice that that informs the price of class counsel's legal services." 80 F.4th at 804. On remand, the district court repeated its error, egregiously misreading this Court's opinion to mean that Ninth Circuit fee awards *are* below market rates, and then omitting them as "outliers" from its fee spreadsheet for no other reason. SA10. The exclusion of "outliers" so violates the mandate that Class Counsel does not even defend the court skewing its spreadsheet this way. AOB18, AOB28. And worse, the error meant that the district court never considered that Class Counsel's willingness to initiate litigation in the Ninth Circuit was *ex ante* evidence that the market rate must generally be at or below the 25% benchmark in large settlements.

The district court's failure to properly weigh *ex ante* data—while disproportionately relying on *ex post* awards—led to a distorted fee calculation that does not reflect what rational class actors would have bargained *ex ante*.

A. *Ex ante* market data should be the primary benchmark when available.

Broiler I prioritizes *ex ante* market rates—bids and fee agreements—over *ex post* awards, which "should receive less weight." 80 F.4th at 804. Class Counsel argues that "'similar bargains' provide a 'starting point,'" implying that *ex post* awards from other cases *must* be considered. PB31. But their quote comes from *Synthroid I*, which lists only *ex ante* benchmarks (agreements, securities rates, auctions), not *ex post* awards, as evidence for market rates. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719-21 (7th Cir. 2001).

Class Counsel argues (PB38-39) that *Taubenfeld* suggests that *ex post* fee awards are appropriate stand-ins for the market rate. It does not. *Taubenfeld* simply held that the objector forfeited the dispute by failing to raise it below. *Taubenfeld v. AON Corp.*, 415 F.3d 597, 599 (7th Cir. 2005) (objector made only "conclusory allegations" without

arguing for market-mimicking). Here, Andren argued repeatedly below that *ex ante* evidence was the best evidence of *ex ante* market rates.

Class Counsel asserts that *Broiler I* remarked that *ex post* awards would be entitled to "'less weight'—not zero weight" (PB32), but respectfully neither Andren nor the panel knew of the existence of such a "good comparator"—the *ex ante* antitrust fee agreement with Class Counsel. The Chicago Teachers' fee agreement from *Interest Rate Swaps* (*IRS*) contemplates a comprehensive fee scale suitable for all sorts of litigation (AOB32),[3] with brackets as small as $0-10 million to over $4 billion. AOB31.

The district court flouted the mandate by burying the only true *ex ante* agreement beneath a mountain of *ex post* awards. But like *Synthroid*, the record includes evidence on two of the *ex ante* benchmarks: a fee agreement ***and*** bids, both in antitrust cases by the very same firms. Under these circumstances, *ex post* fee awards should have received vanishingly little, if any, weight.

The district court did not address the third *Synthroid I* benchmark—rates set in securities cases, which are often set by sophisticated plaintiffs though the control that the PSLRA provides large shareholders. The district court did not consider securities fee agreements even though Chicago Teachers is often class representative and even though Andren provided evidence that this pension fund requires *ex ante* fee scales accounting for both the size of recovery *and* stage of litigation in its retention agreements. A172, A156-57. Securities litigation is different, of course, but such agreements remain probative, as *Synthroid I* holds.

Synthroid II also demonstrates that imperfect comparators should not be ignored. There, the *ex ante* agreement with later-filing counsel was reached after risky stages of

[3] Andren cites his district court evidence to comply with Fed. R. App. Proc. 28(a)(8)(A) and to rebut arguments against forfeiture, not to evade word limits. *Contra* PB28 n.8. The small *Parking Heaters* settlement applied the *Payment Card* scale.

litigation had passed, but still sufficed to extrapolate a market-based approximation; this Court also extrapolated a fee award by reference to competitive bids in dissimilar litigation. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 979-80 (7th Cir. 2003) ("*Synthroid II*"). This does not require slavish "categorical analysis" (*contra* PB23); a court can account for legitimate and substantiated differences. AOB37. A court cannot "pretend[] there are no differences" between *ex ante* benchmarks and the present case (PB23), but by the same token it should not accord the evidence *zero* weight when it identifies a difference—especially when the court disregards differences from other comparators it does give weight to.

That's what the district court did. It "arbitrarily sidelin[ed]" evidence that was "entitled to some weight." PB33. It took out a magnifying glass to apply selective scrutiny to the antitrust bids submitted by co-lead Class Counsel, omitting them entirely. AOB28. And it consigned the Chicago Teachers' *antitrust* fee agreement to a mere 20% weight in its spreadsheet while applying no scrutiny at all to *ex post* awards.

1. Plaintiffs, like the district court, erroneously conflate *ex post* fee awards with *ex ante* market rates.

Plaintiffs (PB34-35) and the district court (SA13) wrongly equate *ex post* fee awards with *ex ante* market rates. Markets set rates at litigation's outset, reflecting risk and expected returns—not post-settlement and often uncontested judicial awards. A8. *Broiler I* vacated a fee based on *ex post* data, yet the lower court repeated its error, claiming their "sheer volume" shapes expectations and thus the market. 80 F.4th at 804; SA13. But *ex post* awards aren't a market—they're judicial artifacts, set without *ex ante* risk insight, often parroting prior awards. AOB24-AOB26. Plaintiffs echo the district court, claiming that attorneys would negotiate "against the backdrop … the award they might receive *ex post*, and that estimate is generally guided by *ex post* awards in similar cases." PB35. While attorneys might estimate their anticipated fee award this way, that's

not an *ex ante* **bargain**. Class Counsel (PB15, PB29-PB30, PB34-PB35) and the district court (SA3-SA5, SA11) err in equating *ex post* awards with the "market."

The district court ignored the fundamental characteristics of a hypothetical *ex ante* bargain—that it would be a ***bargain*** (an agreement between attorneys and indispensable clients), and is almost universally ***hypothetical*** (because dispersed class members cannot negotiate without assistance from a judicial fiduciary). Bargained rates depend not on the value that a district court might rubber-stamp *ex post*, but "in part on the risk of nonpayment a firm agrees to bear, … in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." PB32 (quoting *Synthroid I*). These elements cannot be easily discerned *ex post* because the only parties knowledgeable of the true *ex ante* risk assessment are the attorneys, who have every interest in articulating why their present case is unusually difficult. *Ex post* fee awards in other cases do not illuminate the *ex ante* bargain at all except to the extent that they suggest a ***ceiling*** on attorneys' *ex ante* expectations as continued litigation in the allegedly "fee-capped" Ninth Circuit indeed shows. AOB42-AOB43.

Class Counsel ignores, as did the district court, that *ex ante* fee agreements in consumer class actions *cannot* exist because consumer class members never have the leverage to demand such terms, even if they were sophisticated enough to recognize the possibility. If any named plaintiff feels strongly about their attorneys' fees, attorneys have thousands or millions of other potential plaintiffs they could represent instead.

Class Counsel cannot defend the district court's most illuminating pronouncement, that "it is possible that at some point there will be enough *ex ante* agreements that there will be a shift in the market. But the Court has not been presented with evidence to that effect." SA14 (discussed at AOB24, AOB29). This line encapsulates the district court's root error: mistaking *ex post* awards with "the market." But it also illustrates how the fee award consigns the market approach to the dustbin. There will *never* be many *ex ante* fee agreements because consumer clients have no means to

demand them. Thus, under the district court's reasoning, *ex ante* evidence will ***always*** be overwhelmed by *ex post* fee awards. This case is unusual because co-lead Class Counsel, to their credit, formerly attempted to bid for sole control of antitrust litigation before realizing the futility and hostility it generates from other plaintiffs' firms. AOB41. And co-lead Class Counsel was retained by a sophisticated client who requires fee agreements. Few consumer class settlements have such probative *ex ante* evidence. If bids are zeroed out and the set of *ex ante* evidence is consigned to 20% weight in *this* case, this Circuit's market-mimicking approach becomes a dead letter.

If you want a vision of the future, imagine a court rubber stamping past fee awards—forever.

Identifying past "awards '*above* the range of the court's calculation'" cannot foreclose finding an abuse of discretion (PB36 (emphasis in original, quoting SA12)). If the argument were true, *Synthroid I*, *Stericycle*, and *Broiler I* would have come out differently, because plaintiffs could identify higher percentage awards in those cases—and they ***always*** can. The highest *ex post* award ever made does not create a floor for the district court's discretion. If it did, fee awards would permanently ratchet up. This Court should reject Class Counsel's invitation to adopt such a new rule.

2. The district court erroneously discounts *Interest Rate Swaps*.

A new *ex ante* bargain in the record is the fee agreement counsel struck for *IRS*. This agreement, formed before litigation materialized, represents what an informed plaintiff negotiating at arm's length would have agreed to—precisely the kind of evidence *Synthroid I* instructs courts to prioritize. There was no DOJ inquiry before filing, and the district court agreed with Andren that expert-calculated damages—which account for relevant differences of antitrust law—were similar. SA7. It's not a *perfect* comparator: this fee request, unlike *IRS*, involved attorneys for indirect purchasers piggybacking on the research and work of class counsel representing direct

purchasers, making this case lower risk. But the district court and class counsel discount *IRS* for the wrong reasons.

Before circularly assuming its answer, the district court wondered why counsel would have accepted fee percentages lower than 30% in *IRS* given that, according to its skewed spreadsheet, this was the norm. SA8. "The simplest answer, and therefore the most likely explanation, is that while the potential damages in both *Interest Rate Swaps* and this case are comparable, the potential settlement values are not." *Id*. The court reasoned that because a fee agreement was reached for *IRS*, that litigation must have been more valuable somehow than *Broiler*. This conclusion does not follow. Again, consumer cases never have plaintiffs with the leverage to strike such agreements—unlike cases like *IRS* that require sophisticated plaintiffs to secure appointment. Although the calculated damages were similar, the court simply assumes that the *ex ante* settlement value was higher in *IRS* simply because there was an agreement. AOB30. This faulty reasoning would underweight ***every*** *ex ante* fee agreement and contradicts the mandate.

Nor does the conclusion track reality. Just as attorneys have an incentive to exaggerate the risks of any current litigation, they have an incentive to exaggerate the value of prior comparators. Class Counsel faults Andren for observing that *IRS* has, in fact, recovered much less with much less success than *Broiler*. PB27. Andren does not mention this as an *ex post* benchmark, but to question Class Counsel's present assertions that *IRS* appeared unusually valuable. If counsel struck the bargain because they found the case exceptionally juicy, they were in hindsight mistaken.

The court ignored the most likely reason the fee agreement exists. Chicago Teachers publicly ***requires*** fee agreements from its attorneys, a fact Andren highlighted but the district court never addressed. AOB35; A172.

Having reached its "simplest answer," the district court and class counsel look for ways to distinguish *IRS*, but these distinctions do not bear on *ex ante* risk or value.

Plaintiffs recount that the defendants in *IRS* had significant assets. PB22-26. But such assets are a double-edged sword: they increase the ceiling of the highest possible results, but investment banks can also use their assets to fight like hell, as they have. SA7. The district court's discussion about ability to pay and settlements in the finance industry do not prove *ex ante* value. *Contra* PB26. Difficult claims do not become categorically valuable just because the defendant is an investment bank. AOB32. Settlement value depends on the strength of claims—both damages and ability to prove the facts—and their risk due to untested legal theories or lack of evidence or the willingness of the defendant to litigate past multiple judgment points. None of these factors were probed by the district court, and Class Counsel's *ex ante* representations in *IRS* do not suggest a cakewalk. Dkt. 7208-6. Class Counsel suggests (PB25-PB26) that *IRS* looked to prior cases to assess likely settlement value, but ironically Class Counsel does not note that *Credit Default Swaps* (*CDS*) came after a DOJ investigation while *IRS* was not. Based on the district court's discounting of co-lead Class Counsel's bids, *CDS* should have received little weight *ex ante*. So Class Counsel either admits that DOJ involvement is not a categorical difference, or the *IRS* fee scale is suitable for suits with lower *ex ante* value than *CDS*. The lack of DOJ support makes Chicago Teachers' agreement a "good comparator." It should not have been relegated to a fraction of the weight of the set of a skewed sample of *ex post* awards.

Chicken consumers don't have the luxury of protecting their interests *ex ante* as Chicago Teachers does, which is why this Circuit requires courts to act as a fiduciary and approximate the same result. The district court erred by diluting probative *ex ante* evidence in favor of significantly cherry-picked *ex post* awards.

B. The district court improperly gave four times more weight to *ex post* awards, including awards cherry-picked by a supposedly excluded expert's report.

Plaintiffs do not dispute that the district court gave *ex post* fee awards four times the weight of all the *ex ante* market evidence combined. Misstating Andren's arguments,

Plaintiffs defend the district court's spreadsheet as though its mere existence legitimizes its results.

Andren does not contend that using a spreadsheet was inappropriate *per se*. Courts can use spreadsheets to find average *ex post* fee awards from representative or comprehensive data. *Contra* PB22. And if a settlement had less compelling *ex ante* evidence than exists here, a court could reasonably combine heavily weighted *ex ante* extrapolations with representative *ex post data*. *Contra* PB32.

The district court didn't do this. A spreadsheet is only as good as the data it contains, and this one was (perhaps inadvertently) gerrymandered, assigning:

- **35% weight** to a collection of fee awards of 33% or greater cited by a supposedly excluded expert's report;
- 0% weight to all class counsel's *ex ante* bids by using only figures awarded *ex post*;
- 0% weight to the *ex ante* evidence of class counsel's willingness to litigate in the benchmark-constrained Ninth Circuit;
- **20% weight** to all *ex ante* evidence—which after exclusions, was a single fee agreement; and
- **45% weight** to an incomplete set of *ex post* awards, themselves skewed because the court excluded awards it treated as "outliers" only because they were in the Ninth Circuit.

Andren does not contend that any particular mathematical tool should be employed or eschewed by district courts. The error was not using a spreadsheet, but in giving disproportionate weight to *ex post* judicial determinations and then further skewing the data. Class Counsel repeats the district court's spin that *IRS* was given "ten times" more consideration than individual *ex post* fee awards, but including dozens of such awards, including seventeen cherry-picked results does indeed "tilt the scales against the only *ex ante* fee agreement." PB24.

The effect of this selection bias was to artificially inflate the district court's calculation, and a bottom line indistinguishable from a result-driven fee determination rather than a market-mimicking one. The district court presumably did not *intend* to skew the data, but affirming this practice would make every fee award unreviewable in any case where attorneys provide a string-cite of large fee awards for the district court to aggregate. *See generally* Stephen J. Choi *et al.*, *The Business of Securities Class Action Lawyering*, 99 IND. L. J. 775, 788 (2024) ("Law firms…cherry-pick cases with high fee percentages. For example, it is common for fee motions to cite cases in which the court awarded lead counsel 30% or more of the settlement fund, even though such fees are unusual…").

1. Cherry-picked fee awards materially skewed and altered the district court's result.

Plaintiffs dance around the district court's use of skewed data without directly addressing the problem. Unfortunately, some math concepts are involved, but it's necessary to explain how the spreadsheet was fatally skewed.

The spreadsheet was constructed by considering percentage awards derived from four sources, and then limiting consideration to awards in settlements between $100 million and $1 billion. SA9.

a. The district court required Class Counsel to disclose fee awards in all of its antitrust class action litigation. This yielded "twenty-six" datapoints within its fund-size range, which have an average of 25.9% and median of 27%. (These are listed as sourced from "R.5819" and "R.5820." SA16-SA17.)[4]

[4] Arithmetic errors and inconsistencies occurred in this process, but these are not the focus of Andren's appeal. Except when quoting the district court, Andren reports the results *without* these inconsistencies, AOB28 n.6, and Class Counsel does not dispute his math. AOB28 n.6.

b. The district court added four awards cited by the parties below and related caselaw, but none of these fell within the range.

c. The sheet included ten entries to represent the 26.6% fee that would be permitted by the Chicago Teachers' agreement in *IRS* for a fund of this size—choosing to represent the number as a fixed percentage although lower percentages would be used for higher recoveries.

So far, not so bad, other than the *ex ante* evidence should collectively have more weight than *ex post* fee awards and there's no consideration of the stage of the case. Had the district court stopped with this comprehensive set of class counsel's *ex post* fee awards, it would have reckoned the average fee award to be 26.08%. AOB15. But it then distorted the set:

d. Fee awards cherry-picked by the Klonoff report (R.5050-1), uniformly listing 33% fee awards, "seventeen" of which are within the range.

This fourth source fatally skews the data. The district court characterized the awards as "fee awards from other antitrust cases" (SA9), but in fact each of them derived from the supposedly excluded Klonoff report, which only cited fee awards of 33% or more. Because "seventeen" of these datapoints fall within the considered range, meaning that these non-representative awards collectively carry more weight than the Chicago Teachers' agreement (and all bids and other *ex ante* evidence combined, as those were disregarded), and almost as much weight as the comprehensive set of Class Counsel's actual *ex post* fee awards. Including a mass of datapoints cited only because they equal or exceed 33% skews the result such that it does not even accurately reflect *ex post* fee awards, let alone the *ex ante* rate.

Class Counsel completely elides this fatal error. Plaintiffs claim harmless error (PB42), but Andren has already shown otherwise. The district court set a fee award

between the mean and median of its spreadsheet calculation (28.995% and 31%), but simply by excluding the cherry-picked awards, these figures are 26.08% and 26.6%.[5]

Their inclusion makes the data ***less*** accurate. Had the district court included a mass of fee awards no more than 15%, it would likewise be putting its thumb on the scale of a *lower* "average" *ex post* fee award. Andren suspects Class Counsel would see the problem of declaring spreadsheet calculations unreviewable if that had occurred.

Having written off the problem of skewing the data, Class Counsel challenges several strawman propositions instead. Andren could have rebutted the Klonoff datapoints had he known that the district court would stray so far from its mandate. AOB27-AOB28; *contra* PB35. Andren could have cited cases with smaller fee awards to create a more representative sample when combined with Klonoff's cherry-picked awards. These awards exist, as shown by the lower percentages published in the academic literature. AOB22.[6] And even though Andren didn't know the district court would ignore its mandate and rely on citations from a supposedly excluded expert, he cited smaller fee awards that the "comprehensive" table omitted. *E.g.* A176. Class Counsel's characterization of the list as the "comprehensive assessment of relevant data" (PB35) is thus wrong.

Andren would have observed that many of the *ex post* datapoints, including most of the "seventeen" awards included from the Klonoff report occurred in settlements that had survived the risk of certification denial, as the first tranche of Broiler

[5] AOB15. The mean would be 27.5% instead of 26.08% if the "outliers" are excluded, as they should not have been, as section I.B.2 dscusses. None of these figures account for stage of the case.

[6] Again evading its mandate, the district court dismissed the nationwide average reported in a study Andren cited, focusing instead on Seventh Circuit recoveries despite the nationwide market. SA12.

settlements had yet to do. Most important, Andren would have urged the district court not to rely on cases besides those disclosed by class counsel, because a comprehensive set of fee awards by two prolific antitrust firms should be less skewed than any assortment of cases that the parties could cite.[7]

To be clear, the district court *did* deprive Andren of this opportunity. AOB27-AOB28. Class Counsel mocks the idea that this handicapped him: "Andren cites no authority for his theory that the District Court could not rely on public information—the terms of the fee awards—simply because it also appears in someone's declaration." PB41. But this Court should not "[p]ut[] aside" the fact that the data were not "representative" (*id.*)—that's the entire problem! True, past awards are public information (even as Class Counsel demands they be sealed in this Court), as expert data often are, but a skewed sample of *ex post* fee awards necessarily skews results.

Plaintiffs egregiously misrepresent an oral argument statement to suggest that Andren somehow assented to the court's use of Klonoff's collection of fee awards of 33% or higher. PB42. Not so. On remand, Andren moved to exclude the expert declarations to the extent that the court was inclined to rely on them, as it had before. AOB13. Class counsel emphatically disclaimed reliance on the reports, and at a hearing the district court asked whether Andren still sought discovery. *Id.*; A216. Andren's counsel replied that under those circumstances there was no good argument to seek discovery from a different plaintiff's expert. A217. The district court then expressly denied Andren's motion as "moot" because the fee order was allegedly not "based on those expert opinions." SA15. But in fact, the court included and relied on "seventeen"

[7] Andren could have flagged other minor mistakes. Many awards from the Klonoff report were listed with triple their actual recovery and fee size (perhaps because of some sort of clerical mistake), leading to erroneous spreadsheet inclusions. Two datapoints—for "*Neurontin*" and *"La. Wholesale Drug*"—double-counted the same award from the same case. SA16.

fee awards in its table sourced solely and explicitly from the Klonoff report ("5050-1"). SA15-SA16.

If listing fee awards in a spreadsheet makes a fee award unreviewable, district courts can choose any selection of awards to reach any desired percentage. What happens most often, as shown by fee awards within this Circuit, is that district courts adopt a fee award, often 33%, based on counsel's unopposed (thus effectively *ex parte*) string-cite of past fee awards. "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).

Curtailing this practice is not "appellate micromanagement" (PB36), it's essential to preserve this Circuit's market approach.

2. Plaintiffs do not justify the district court's truncated consideration of voluntary Ninth Circuit litigation, which violates the *Broiler I* mandate.

After assembling its spreadsheet, the district court excluded "three" awards for the sole reason that it found "them to be outliers from the Ninth Circuit that, for the reasons discussed above, do not reflect the circumstances relevant to what *ex ante* agreement the parties would have reached here." SA10. The only apparent reason is the district courts' misreading of *Broiler I*:

> But the existence of, or need for, the Ninth Circuit's megafund rule is evidence that 25% is likely *not* the market rate. Indeed, as the Seventh Circuit noted, class counsel that "seek to represent plaintiffs in the Ninth Circuit," must "assess the risk of being awarded fees *below the market rate*." … If 25% was the market rate, there would not be a need for the Ninth Circuit to artificially control the price by setting that rate by fiat.

SA5.

Class Counsel offers not one word defending the omission of the "outliers." Nor can they. The omission runs directly against the mandate that the district court should *not* categorically discount out-of-circuit fee awards. The court did not discuss

"similarities and differences"; it simply found the rates low and so excluded them for no stated reason except that they were issued within the Ninth Circuit.

Plaintiffs, echoing the district court, misread *Broiler I* as "recognizing" that Ninth Circuit caselaw "results in awards below the market rate" (PB14), but the panel did not say that. Instead, "continued participation in litigation in the Ninth Circuit is an economic choice that informs the price of class counsel's legal services…" 80 F.4th at 804. Whereas a "limited number of representations in other markets may suggest fees below counsel's market price… continued participation in the market may reveal something about the price for class counsel's legal services … The district court should have considered where class counsel's economic behavior falls on this spectrum." *Id*.

Class Counsel responds (PB30) that "if compensation in the Ninth Circuit is below market rate, rational attorneys could (and do) still take cases there if the risks are slim enough, the potential payouts are high enough, and personal jurisdiction rules prevent counsel from filing elsewhere." PB30. But the first two reasons—risk and likely recovery—***are expressions of the market rate***. And the third, in the absence of a judicially mandated transfer, proves Andren's point. If personal jurisdiction would require a "below market" fee, why take the case instead of one with a market fee? In any event, Class Counsel submitted no record evidence that *any* of the Ninth Circuit cases were lower risk; or had unusually lucrative precedent, cheaper litigation costs, or involuntary transfer.

The district court violated its mandate by again treating Ninth Circuit awards as "second-class citizens" in its inquiry. PB14. While only "three" datapoints are involved, their omission makes a multi-million dollar difference with or without including Klonoff's cherry-picked citations. Excluding these results further undermines the representativeness of the *ex post* fee spreadsheet, which is relevant to the extent that any *ex post* awards are considered.

More importantly, had the district court obeyed the mandate, it would have observed that a quarter of Class Counsel's antitrust fee awards come from courts in the Ninth Circuit, more than any other. The market rate must be at or below the Ninth Circuit's flexible 25% benchmark or rational Class Counsel would not be regularly voluntarily initiating cases in the Ninth Circuit. Class Counsel never contests Andren's observation (AOB26) that *ex post* fees must on average equal or ***exceed*** the *ex ante* market rate. The court's omission is reversible error.

II. The district court erred by failing to evaluate of the stage of litigation.

A. Market evidence shows that fees depend on the stage of litigation, so should have been considered by the district court.

Class Counsel can identify nothing in the district court's analysis that considered the stage when the case settled—because it didn't. Nor do they identify any precedent that overrides the requirement that district courts must consider the stage of litigation to set a market-based fee.

Nor do they dispute that *market evidence shows* that fees depend on the stage of litigation because it aligns the incentives of lawyers with those of the class and compensates for the increased risk that each hurdle of litigation presents to plaintiffs' attorneys recovering nothing. *Synthroid I*, 296 F.3d at 722; AOB34-AOB35. Class Counsel similarly cannot show that the district court considered that plaintiffs filed their complaint as a follow-on action after other plaintiffs had investigated and filed their own complaint involving the same alleged wrongdoing.

Class Counsel thus resort to claiming that the district court "recited those background facts [regarding the stage of the case] in its first fee ruling" and, on remand, "the basic background facts bearing on Class Counsel's performance cannot be revisited." PB44, PB38. They oddly claim that the scope of remand was limited so as to not disturb the district court's previous findings on "the caliber of Class Counsel's

work" and "the risk assumed." PB39. This misses the point. Andren's argument has nothing to do with the "caliber" of work. *Broiler I* remanded for the district court to conduct "another evaluation of the bargain the parties would have struck *ex ante*." 80 F.4th at 805. Evaluation of the bargain—*i.e.*, the market rate—requires consideration of the stage of the litigation, including the follow-on nature of the case. *Synthroid I*, 264 F.3d at 722; *Stericycle*, 35 F.4th at 560. The district court did not hint at doing so; it's certainly absent from its spreadsheet.

Class Counsel falsely assert (PB44) that Andren "waived" his argument about the district court's error finding *ex ante* bids in cases involving government investigations set a "floor" in the market price range. In his opening brief, Andren fairly described the problem of how government investigations affect risk assessment and how the district court erred by affording bids no weight and disregarding the structure of the bids. *See* AOB37-AOB38. The economic argument, including reference to analysis in Seventh Circuit precedent the court disregarded below, is not "little developed." Preservation doctrines are "not meant as an overly technical appellate hurdle." *Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010).

B. The district court violated the mandate in zeroing out class counsel's bids rather than applying them to the circumstances of this case.

Broiler I remanded, among other reasons, because the district court's analysis "fell short" in "the consideration of bids made by class counsel in auctions." 80 F.4th at 802. Class Counsel seeks to parse the Court's later comment that the district court erred by "categorically" giving "little weight" to "bids with declining fee structures." PB18 (quoting *Broiler I*, 80 F.4th at 804). They note that "categorical" means "without exception," while the proper approach is to use a "fine-point pen" to exam the degree of similarity. PB19.

Andren agrees, but that's not what the district court did. Instead, it once again treated Class Counsel's bids categorically and gave no weight to *any bid* when the

government signaled a criminal investigation. That constitutes error even under Class Counsel's unduly narrow interpretation. Consistent with existing precedent, *Broiler I* explained that "[b]ids that class counsel made in auctions around the time this litigation began in September 2016 would ordinarily be good predictors of what ex ante bargain would have been negotiated," and thus "[o]n remand, the district court may accord appropriate weight" to all relevant bids. 80 F.4th at 802, 804. The district court did not consider whether the follow-on nature of Class Counsel's complaints here similarly indicated that the "amount of work necessary" would be less than in a case in which none of the initial legwork was done by third parties—whether the government or other enterprising attorneys.

The parties agree that risk is a spectrum and no two cases will be exactly alike. AOB38; PB19-20. That is why the court must analyze the similarities and differences. PB19. Andren recognized that the district court could have acknowledged a difference in bids in cases with a government investigation versus the follow-on nature of the lawsuit here, although both scenarios indicate that prior investigations by third parties decreased the amount of work necessary to litigate the case and increased the chance of success. *See* SA3; PB20-21. But the district court categorically disregarded the bids, rather than analyzing the bids and their relevance on the risk spectrum. Rather than taking into account the difference in degree, which Andren agrees reasonable, the district court found the *bids*—but not the *ex post* fee awards in such cases—completely inapplicable.

This approach diverges from *Broiler I* as well as the legal standards for determining a market rate more broadly. Just as in cases with a government investigation, cases in which other attorneys have analyzed the case, completed a pre-litigation investigation, and invested the time and resources to draft and file a complaint strongly signals that the case is worthwhile and likely to be successful. In this situation, competitive bids are highly probative of the *ex ante* market rates because they

show what an attorney would accept as compensation. *Synthroid I*, 264 F.3d at 720; *see also In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 934-35 (9th Cir. 2020). Whether that proves to be true for a particular case, as represented in *ex post* fee awards, is far less relevant to the *ex ante* bargain that is the focus of the inquiry.

Class Counsel tries to leverage Andren's good-faith argument that the district court could have determined that the market rate for their follow-on work would have been higher than for work following a Department of Justice criminal investigation by arguing that the district court acted within its discretion to disregard those bids. But the district didn't exercise its discretion to make that determination; it *categorically* excluded those bids without assessing their resemblance. This error mirrors the reason for *Stericycle*'s reversal: the "district court did not give sufficient weight to evidence of *ex ante* fee agreements, all the work that class counsel inherited from earlier litigation against *Stericycle*, and the early stage at which the settlement was reached." 35 F.4th at 558. Class Counsel do not discuss *Stericycle* in this context. While the district court had some discretion as to how to compare the bids and the weight to accord the resemblances, wholesale exclusion was legal error.

The bids confirmed that a 30% award far exceeded the market rate, as none of them approached 30% for the settlements here. The district court should have considered the bids—the best indicator of the market rate—and lowered the fee award accordingly.

C. The follow-on nature of the action is market data confirming relatively low risk, rather than an argument about class counsel's performance.

Class Counsel seek to distract from the market rate question by suggesting that Andren impugned their performance. PB39. He did not. Andren focused on the relevant legal issues—in particular, "what bargain would have been struck *ex ante* as to attorneys' fees." *See Broiler I*, 80 F.4th at 802. Class Counsel's performance during the litigation in hindsight very well may have been "exemplary" and "unblemished," but

that is simply not a factor relevant to market-mimicking. Nothing about that issue needs to be "reexamined." *See* PB39-40.

Finally, if Andren's opening brief can be read to "hint" at "an argument based on a lodestar cross-check," he clarifies now that no such argument was intended. PB36. Market analysis alone resolves this appeal under *Broiler I*, *Synthroid*, and *Stericycle*.

III. Judicial economy is best served by this panel setting a fee between 15% and 26.6%, resulting in at least $5.8 million additional benefit to class members.

Class Counsel says that "there is less to his appeal than meets the eye" because Andren suggests that this Court can conserve judicial resources and set a fee award no higher than 26.6%. PB13. But simultaneously, they recount the 3.3% reduction by the district court as significant. *Id.* It was; so is 3.4%.

Even a 26.6% fee award represents $5.8 million extra recovery for the class—*just for the first tranche* of settlements. The district court's fee cherry-picking approach entails a 30% fee award recovery below $1 billion, while the *IRS* fee scale apparently recommends a marginal rate of 20% for additional funds up to $500 million.[8]

If the district court had heavily weighed the Chicago Teachers' agreement, or even if it had relied on class counsel's comprehensive *ex post* awards without skewing the data, it would have calculated a fee award of 25.8-26.6% (AOB10), which is higher than any of the allegedly dissimilar bids, higher than the Ninth Circuit benchmark, higher than the percentage implied by the scale from the heavily litigated *Synthroid*

[8] Contrary to Class Counsel (PB23 n.7), the fee order does not expressly confirm the fee terms of the agreement provided in-*camera*. Andren assumes it to match *Payment Card Interchange*, though *without* consideration for stage of settlement, which that court found relevant. AOB29 n.7. The district court erroneously found (SA2) that Andren "agree[s]" with the 26.6% rate from *IRS*, when he asked that the court confirm this. A214-A215.

action, and equal to or higher than class counsel's average fee award in settlements of this size. If it had given appropriate weight to bids, the number drops further.

Upholding the market-mimicking approach represents hundreds of millions of dollars to class members of litigation settled in this Circuit, while the district court's too-common copy machine approach has tended to ossify fee awards at 33% with little respect to the size of recovery or stage of litigation.

Conclusion

The Court must vacate the district court's fee award to Class Counsel and, rather than remand for a third attempt at setting fees by the district court, award Class Counsel fees of a figure between $25.4 million (15%) and $47.2 million (26.6%). This would be consistent with the market rate evidenced by Class Counsel's past fee bids, *ex ante* fee agreement, and continued litigation in a jurisdiction with a 25% *ex post* benchmark.

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Respectfully submitted,

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Executed on February 20, 2025.

/s/ Theodore H. Frank

Proof of Service

I hereby certify that on February 20, 2025, I caused to be electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system pursuant to Cir. R. 25(a), thereby effecting service on all counsel of record, who are registered for electronic filing.

/s/ Theodore H. Frank
Theodore H. Frank