IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

IN RE: ADVOCATE AURORA HEALTH PIXEL LITIGATION	)	Lead Case No. 22-CV-1253-JPS
	)	
	)	(Consolidated with Case Nos. 22-CV-1278-JPS;
	)	22-CV-1305-JPS; 23-CV-0259-JPS;
	)	23-CV-0260-JPS)
	)	
	)	This Document Relates to: All Actions

THEODORE M. WYNNYCHENKO'S OBJECTION
AND NOTICE OF INTENT TO APPEAR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

INTRODUCTION

Class counsel seeks $4.28 million or 35% of the gross common fund for a settlement reached prior to formal discovery and before the defendant filed a single opposition to the plaintiffs' substantive claims. Class member Theodore Wynnychenko objects.

A 35% fee award already greatly exceeds the market-approximating rate for an early-stage settlement, but it's worse than that. Binding Seventh Circuit law requires courts to reckon percentage fee awards based on actual class recovery. *E.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). By this metric, the fee exceeds 40%—possibly more depending on the ultimate claims rate and the administrator's fee, which will be "at least $1,600,000." Dkt. 39 ("Fee Mot.") at 7 n.3.

Class counsel discloses nothing about the hours worked on this case, which suggests the fee request likely exceeds the presumptive 2.0 multiplier the Seventh Circuit prescribes as a maximum lodestar multiplier. While courts in this Circuit can exercise their discretion to not perform a lodestar crosscheck on a fee award, class counsel's complete opacity usurps the Court's exercise of informed discretion and class members' right to lodge objections. An outsized 40% fee request in a case settled prior to any substantive litigation requires a lodestar crosscheck given the likelihood of excess billing.

Neither the results nor the risk of litigation can justify such a generous fee. The $12,225,000 common fund amounts to just $4.89 per class member, before subtracting fees for attorneys and administration. This modest fund extinguishes claims that plaintiffs pleaded may be worth $100 or $1,000 under various statutory damages provisions. Dkt. 1 at 29; Dkt. 29 at 95. Of course, all settlements represent a compromise between the parties, but when counsel has compromised class claims to a small fraction of their hypothetical value, they must yield reciprocally on their own fees. Here, they seek a sizable and unknown multiple of their time. A 35% award would be appropriate for a settlement on the eve of trial, not a case settled before the defendant even moved to dismiss. As for the risk of litigation, the very existence of five separate complaints reveals that law firms did not find the case especially risky. To the contrary, the Meta Pixel has inspired a land rush of lawsuits since it was publicized by journalists in 2022.

Notice of the settlement is deficient in several respects. Counsel does not disclose any quantitative information about the work performed, which handicaps class members from objecting to the fee request. The parties do not identify the *cy pres* recipient, which will receive any residual from the settlement, so class members cannot meaningfully protect their interests in the residual fund. The *cy pres* provision may divert significant money if validated class claims turn out to be lower than they now seem. Dr. Wynnychenko lodges a contingent objection to the $50 cap on class member recovery if it results in a material diversion of class recovery to uninjured *cy pres* beneficiaries.

Objector Wynnychenko files this objection identifying the deficiencies with the fee request and respectfully asks this Court to hold the fee request in abeyance pending disclosure of a detailed lodestar summary or, at a minimum, to award substantially less than $4.28 million, which will increase the *pro rata* benefit to class claimants. Objector reserves his right to supplement his objection following any disclosure.

ARGUMENT

I. Objector Wynnychenko is a class member and intends to appear through *pro bono* counsel at the fairness hearing.

Objector Wynnychenko and his family are and have been Advocate Aurora Health customers since at least 2017. *See* Declaration of Dr. Theodore M. Wynnychenko ¶¶ 3-4. He has accessed defendants' websites between October 24, 2017 and October 22, 2022, including MyChart patient portal, which included a third Tracking Pixel without hist authorization.[1] *Id.* His access to defendant's webpages that employed a Tracking Pixel is further confirmed by the postcard notice he received identifying him as a class member. *Id.* ¶ 5 & Ex. 1. Wynnychenko is neither a corporate affiliate nor an employee of Defendant; nor a judicial officer or clerk presiding over this matter. Therefore, he is a member of the settlement class with standing to object. Fed. R. Civ. P. 23(e)(5). Objector filed a claim to the settlement online. Wynnychenko Decl. ¶ 7. Dr. Wynnychenko's address is 1086 Oak Street,

[1] Capitalized terms such as "Tracking Pixel" use the same definitions provided in the Proposed Settlement Agreement, Dkt. 35-2 at 12.

Winnetka, Illinois 60093, his telephone number is (847) 446-0072, and his email address is ted@wynnychenko.com. Wynnychenko Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents Wynnychenko *pro bono*, and CCAF attorney Adam E. Schulman or M. Frank Bednarz will appear at the fairness hearing on his behalf.[2] CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the expense of the class. CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE (Dec. 17, 2017).

Wynnychenko brings this objection through CCAF in good faith to protect the interests of the class. Wynnychenko Decl. ¶ 13. His objection applies to the entire class. Objector adopts any objections not inconsistent with this one, and he reserves the right to cross-examine any witness presented by the settling parties, but does not at this time intend to call any witness. Wynnychenko may rely on any exhibit to this objection and any supplemental objection he files.

Pursuant to Settlement ¶ 60, Wynnychenko advises that he has not objected to any other proposed class action settlements in the last three years. Wynnychenko Decl. ¶ 10. CCAF, in their role as nonprofit watchdogs, have objected to many settlements, as described in the attached Declaration of Adam Schulman.

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

A district court must act as a "fiduciary of the class," for the rights and interests of absent class members. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002). Because the relationship between class members and their counsel becomes directly adversarial when awarding fees from a common fund, it is incumbent upon the Court to "carefully monitor disbursement to the attorneys by

[2] Pursuant to Dkt. 35-2 ("Settlement") ¶ 60, Mr. Schulman's information is set forth in the signature to this objection and in his accompanying declaration. Frank Bednarz's contact information is 801-706-2690, 1440 W. Taylor St # 1487, Chicago, Illinois 60607, frank.bednarz@hlli.org. Bednarz is a member of the Illinois bar, No. 6299073. Should Bednarz appear on behalf of the Objector, he will obtain admission to this district's bar prior to the hearing.

scrutinizing the fee applications." *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998) (internal quotation omitted).

III. Class counsel seeks grossly excessive fees in rapidly-settled litigation.

The Seventh Circuit has "held repeatedly" that in common fund cases such as this, an appropriate fee is "the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) ("*Synthroid I*"). Given the low risk of nonpayment suggested by multiple firms filing essentially identical complaints and the above-market fee request, the Court should require disclosure of the hours actually spent on this case and award a much smaller fee of perhaps 10%, which is commensurate with the fee a knowledgeable client would permit for early, lightly-litigated settlements.[3]

In this action, the first plaintiffs filed their complaint on October 24, 2022. Class counsel filed the Settlement ten months later, on August 11, 2023—before any formal discovery occurred and before the defendant filed any opposition to the complaint. Class counsel seeks 35% of the $12,225,000.00 gross settlement, or an award of around $15,000 for each day between the filing of the first complaint and the Settlement, which represents a continuous, ongoing, 24-hours-per-day-rate of over $600/hour.

While class counsel repeatedly characterizes their $4.28 million request as a "35%" percentage award, this contradicts Seventh Circuit law, which benchmarks fee awards based on the amount actually received by class members. Class counsel admits the fee will be at least 40% by that measure and may be a greater percentage given that settlement administration costs may increase beyond the $1.6 million minimum penciled in by class counsel. Fee Mot. at 7 n.3.

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[3] For example, New York State Common Retirement Fund allows only an 8% fee request for a case settled prior to resolution of the motion to dismiss. *See Orbital ATK Securities Settlement*, No. 1 :16-cv-01031-TSE-MSN, Dkt. 459-1 at 5 (E.D. Va. May 24, 2019) (objection filed by New York State Comptroller's Office). The Chicago School Teachers' Pension "entered into a retention agreement … that provided for a percentage fee of 15% if a settlement was reached after a ruling on a motion to dismiss and before a ruling on summary judgment." *In re RH, Inc. Securities Lit.*, No. 17-cv-0554, Dkt. 145-1 (N.D. Cal. Sept. 17, 2019) (Chicago Teachers' declaration in support of fee motion).

Contrary to class counsel's claim, 40% does not represent the "market rate in the Seventh Circuit." *Id.* While percentage awards this large or slightly larger might sometimes be appropriate, such awards are reserved for smaller settlements, or where counsel incurred additional risk and expense through adversarial litigation. No case stands for the blanket proposition that 35% (much less 40%) constitutes the "market rate" that should be awarded in an eight-digit settlement when the defendant settled without filing a single dispositive motion.

Finally, the Court should draw an adverse inference from class counsel's refusal to disclose anything about their hours. In doing so, they handicap objectors and attempt to force the Court's hand by refusing to provide information necessary for it to exercise its discretion about whether to crosscheck attorneys' fees with lodestar billing.

A. Class counsel inappropriately seeks over 40% of the net fund.

Counsel must not recover a disproportionate share of the settlement in fees. For this analysis, "[t]he ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

Here, the defendant will pay a total of $12,225,000, and class counsel requests 35% of that gross fund, or $4,278,750.00, plus reimbursement of a combined $23,356.02 in expenses. Fee Mot. at 1. Class counsel wrongly ask the Court to calculate their fee request based on the overall fund, before subtracting litigation expenses and the notice and administration costs, the latter of which are said to be "**at least** $1,600,000." Fee Mot. at 7 n.3 (emphasis added).

Under Circuit precedent, those costs should be excluded because they "are part of the settlement but not part of the value received from the settlement by the members of the class." *Redman*, 768 F.3d at 630. The costs "benefit class counsel and the defendant as well as the class members" and "shed no light on the fairness of the division of the settlement pie between class counsel and class members." *Id.* The fee analysis must exclude all expenses from the denominator. Even if the notice and administration expenses were *the minimum* $1,600,000, the net fee award would be 40.36%—or

even more to the extent any settlement funds are distributed to third parties through the settlement's *cy pres* provision. *See* Section V.

B. 35%—let alone 40.36%—exceeds the Seventh Circuit's market-approximating fee in a case settled before litigating a single substantive motion.

Even if the fee request were less than 40% of the fund, it greatly exceeds similar fee awards in the Seventh Circuit. Contrary to class counsel's repeated identification of 33-40% as the "market rate" (Fee Mot. 5, 6, 7 n.3) the Seventh Circuit correctly emphasizes that the market-approximating rate depends on the circumstances of settlement that would be negotiated by knowledgeable representatives *ex ante*. *See In re Stericycle Sec. Litig.*, 35 F.4th 555, 566 (7th Cir. 2022) (vacating 25% fee award where a district court failed to consider the early stage of litigation, among other things).

"A court must give counsel the market rate for legal services." *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) ("*Synthroid II*"). That market rate "depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721.

Mirroring actual *ex ante* fee agreements by knowledgeable plaintiffs, the Seventh Circuit urges district courts to consider both the size of recovery and the stage of litigation. The "market rate, as a percentage of recovery, likely falls as the stakes increase." *Synthroid II*, 325 F.3d at 975; *Stericycle Sec. Litig.*, 35 F.4th at 561 (recounting an *ex ante* fee agreement that conforms with this principle). The market rate also depends on the stage of litigation—more advanced proceedings sensibly garner larger percentage awards. "Systems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements." *Synthroid I*, 264 F.3d at 722. A district court errs when it disregards "the early stage at which the case settled." *In re Stericycle Sec. Litig.*, 35 F.4th at 566; *see also Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, 897 F.3d 825, 827 (7th Cir. 2018) (affirming reduction in fee award due to "the early stage at which this litigation was settled").

In this case class counsel did not litigate a single dispositive motion, which should warrant a far lower fees than in *Synthroid II*, where the risk was "significant" (325 F.3d at 978) and *Stericycle*, where plaintiffs filed their opposition to defendant's motion to dismiss prior to staying the case for settlement. 35 F.4th at 568.

To justify their 40%+ fee request, counsel asserts that "Courts within the Seventh Circuit consistently award attorneys' fees of 35% of the common fund in class action cases." Fee Mot. 7. But class counsel elides and misrepresents the relevant considerations that justify reasonably awarding a percentage this high.

For example, the Fee Motion quotes *Gaskill v. Gordon*, 160 F.3d 361, 362 (7th Cir. 1998), which says that "[t]he typical contingent fee is **between 33 and 40 percent…**" Fee Mot. 7 (emphasis in Fee Motion). But class counsel omits the rest of the sentence, which adds "but in recognition of the fixed-cost component in litigation, **it is usually smaller when as in this case a multimillion dollar judgment is obtained**." *Gaskill*, 160 F.3d at 362 (emphasis added). While *Gaskill* affirmed a 38% ($8 million) fee award, it was an uncontested appeal where the attorneys were seeking *even more* ($10 million) because they had racked up that amount in hourly billing. *Id.* In fact, the district court only awarded more than 33% because it considered the extensive work performed: "given the extent of the problems with the properties, these professionals should receive a share of the fund that is higher than that awarded in the typical common fund case." *Gaskill v. Gordon*, 942 F. Supp. 382, 387 (N.D. Ill. 1996). The Seventh Circuit did not disturb this order granting a higher-than-typical award due to the unusual facts of the case. None of these factors apply here. Class counsel did not incur extraordinary hours—the reverse is likely true because they decline to even disclose them.

Plaintiffs' motion ignores the reasons that relatively high percentages were granted in their other citations. For example, *Birchmeier v. Caribbean Cruise Line, Inc.* affirmed an award "bigger than some" (36% for the first $10 million and 30% for the next $10 million) because of the district court's analysis of risk borne by counsel in the litigation. 896 F.3d 792, 796 (7th Cir. 2018). The district court described a case completely unlike the quick settlement here: plaintiffs secured tens of millions of dollars for the class because "their leverage derived in large part from their pre-trial success and the

fact that they had advanced to the **eve of trial**." *Aranda v. Caribbean Cruise Line, Inc.*, No. 12 C 4069, 2017 U.S. Dist. LEXIS 54080, at *25 (N.D. Ill. Apr. 10, 2017) (emphasis added). Plaintiffs here did not bear the risk of prevailing over numerous potentially dispositive motions—they settled before facing *any* risky hurdles. Similarly, *Behrens v. Landmark Credit Union* concerned a case in which plaintiff had conducted "fairly extensive discovery." No. 17-cv-101-JDP, 2018 WL 3130629, 2018 U.S. Dist. LEXIS 106358, at *8 (W.D. Wis. June 26, 2018). *Behrens* was also a much smaller settlement fund than here—just over $1 million—and even then the district court reserved judgment on the fee award until counsel provided "information that would allow the court to calculate the lodestar as a cross-check on the reasonableness of the fees." *Id.* at *17. Plaintiffs also secured a relatively small $1.25 million fund in *In re Forefront Data Breach Litig.*, which appears to be a signed proposed order prepared by plaintiffs' counsel. No. 21-cv-887, 2023 WL 6215366, at *8 (E.D. Wis. Mar. 22, 2023). None of class counsel's citations support that proposition 35% (let alone 40%) should be awarded for a multi-million dollar settlement reached before substantive litigation.[4]

C. An unusually large 40%+ net attorneys fee cannot be granted without first verifying class counsel's lodestar.

Class counsel claims that the "time and labor required" supports their fee request, but they intentionally do not quantify the time spent. This is especially odd in view of the Declaration of Terrance Coates that says he has "reviewed my firm's detailed time entries and detailed expenses and can confirm that each are valid, incurred in the ordinary course of business" and also confirmed that plaintiffs' counsel "have detailed time entries." Dkt. 39-1 at 1. Since class counsel has in fact reviewed their hours, the Court should draw an adverse inference that the hours are relatively sparse, which would be consistent with settling prior to substantive litigation.

[4] While *Kirchoff v. Flynn* does say that 40% is the "the customary fee in tort litigation," it concerns a non-class § 1988 fee award and anyhow finds that fees in civil rights suits are not *limited* to any particular percentage, because to the extent non-monetary Constitutional rights are secured "compensation for such benefits is presumptively based on the number of hours it took to produce the benefits." 786 F.2d 320, 324, 328 (7th Cir. 1986). Class counsel refused to even disclose their hours here.

In this Circuit, the amount of work expended by class counsel bears on the market price for legal fees. *Camp Drug Store*, 897 F.3d at 833; *see also Tommey v. Computer Sciences Corp.*, No. 11-CV-02214-EFM, 2015 U.S. Dist. LEXIS 48011, at *8-*9 (D. Kan. Apr. 13, 2015) (without lodestar data "the Court cannot determine if the amount of proposed attorneys' fees is reasonable" even for a solely percentage-based request); *Behrens*, 2018 WL 3130629, 2018 U.S. Dist. LEXIS 106358 (expressly requiring "information that would allow the court to calculate the lodestar as a cross-check on the reasonableness of the fees"). Reviewing lodestar billing ensures that "attorneys' fees don't ride an escalator called risk into the financial stratosphere." *Redman*, 768 F.3d at 633. Indeed, the Circuit has suggested that a lodestar multiplier of two might be a "sensible ceiling" to avoid unwarranted attorney windfalls. *Skelton v. Gen. Motors Corp.*, 860 F. 2d 250, 258 (7th Cir. 1988); *Cook v. Niedert*, 142 F.3d at 1013 (citing *Skelton* approvingly); *Florin v. Nationsbank, N.A.*, 34 F.3d 560, 565 (7th Cir. 1994) (same).

Concealing one's bottom-line lodestar is very unusual, one recent survey finding that plaintiffs' counsel provided their lodestar in 96.8% of attorney fee motion in settled securities cases. Choi, Stephen J., Erickson, Jessica and Pritchard, Adam C., *The Business of Securities Class Action Lawyering* (May 9, 2023), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4350971. Not doing so here is a major warning signal. Objector suspects that even if class counsel were to tally the massively redundant hours from five lawsuits, the lodestar multiplier would greatly exceed the Seventh Circuit's presumptive 2.0 multiplier ceiling. If and when hours are disclosed, the Court should endeavor to discount the duplicative work caused by counsel vying for a piece of the pie, and especially time spent by counsel for the Illinois plaintiffs opposing the transfer desired by the Wisconsin plaintiffs. *See* Dkt. 16 (Joint Status Report) at 4 ("no purpose is served by having a federal court in Chicago and a federal court in Milwaukee adjudicate essentially the same class action complaints").

D. The lack of lodestar information violates Rule 23(h) because it handicaps class members from arguing for a lodestar crosscheck.

Because class counsel does not disclose their hours, the Objector (along with all other class members) is handicapped in challenging the fee motion's qualitative assertions. Class counsel claims

they "conducted substantial pre-suit investigation" (Fee Mot. 12) yet the first plaintiffs filed their complaint just four days after Advocate's Notice of Breach. Class counsel says that they spent time coordinating with attorneys "outside of the Eastern District of Wisconsin to transfer all cases to this Court." *Id.* at 13. But it was the *defendant* who moved to transfer the Illinois cases, and counsel for those plaintiffs *opposed* the motion, perhaps because firms representing these plaintiffs hoped for appointment as interim class counsel themselves. At minimum, the various plaintiffs' firms duplicated work across five distinct lawsuits, and for a time they worked at cross-purposes with respect to consolidation. *See Belleville Catering Co. v. Champaign Mkt. Place, LLC*, 350 F.3d 691, 694 (7th Cir. 2003) ("[C]lients [should] pay just once for the litigation").

In *Redman*, it was error to permit class counsel to submit "the details of class counsel's hours" after the objection deadline, unfairly handicapping the objectors. *Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014). Here, class counsel has not provided the details at all to date. "Allowing class members an opportunity to thoroughly to examine counsel's fee motion [and] inquire into the bases for various charges" "is essential" to protecting class members and ensuring the court receives "adequately-tested" information. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *cf. also Redman*, 768 F.3d at 638 (citing *Mercury* favorably).

A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (emphasis in original). Judges and commentators have remarked on utility of a lodestar crosscheck. *See*, *e.g.*, Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND. (2005), available at http://www.wlf.org/upload/0405WPGorsuch.pdf, at 23 ("important safeguard"); Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. LEGAL ETHICS 1453, 1454 (2005) ("courts making common fund fee awards are ethically bound to perform a lodestar cross-check").

While a district court has the discretion to not conduct a lodestar crosscheck, class counsel robs the court of its discretion by hiding information necessary to make an informed decision. And

without any information about the actual lodestar, the Objector cannot make his best argument that the Court *should* consider lodestar.

While the Seventh Circuit permits courts to knowledgeably decline to perform a lodestar crosscheck, class counsel's own citations confirm that the Court cannot exercise its discretion blindly. In *Williams v. Rohm & Haas Pension Plan*, the Seventh Circuit found "consideration of a lodestar check is not an issue of required methodology." 658 F.3d 629, 636 (7th Cir. 2011). But in *Rohm & Haas*, the district court ***did*** examine the lodestar. *Id.* In fact, the district court directed plaintiffs to submit lodestar information. *Meehan v. Rohm & Haas Pension Plan*, No. 4:04-CV-0078-SEB-WGH, 2010 U.S. Dist. LEXIS 39118 (S.D. Ind. Apr. 21, 2010). Plaintiffs moved to have this order reconsidered because the district court need not analyze lodestar at all, but the district court stood firm in requiring lodestar information, which it found relevant to determine market-approximating *ex ante* fee terms. *Id.* at *3. Therefore, *Rohm & Haas* did not affirm the proposition that a lodestar crosscheck could be ignored without analysis in *every* case, but simply rejected objectors' arguments that the district court "did not give **proper weight** to the lodestar cross-check." 658 F.3d at 636 (emphasis added). This Court also rejected objectors' argument that "any percentage fee award exceeding a certain lodestar multiplier is excessive," and affirmed the district court's fully-informed finding "that a pure percentage fee approach best replicated the market" in that case. *Id.*

Next, while *Bell v. Pension Comm. of Ath Holding Co.* characterized *Synthroid II* as holding that "a lodestar cross-check is no longer recommended in the Seventh Circuit," the district court there performed one anyway. No. 1:15-cv-02062-TWP-MPB, 2019 WL 314388, 2019 U.S. Dist. LEXIS 150302, at *14-15 (S.D. Ind. Sep. 4, 2019). The district court misunderstood *Synthroid II* at any rate. In *Synthroid II*, the district court awarded a higher percentage to one set of attorneys (TPP class counsel) over another (consumer class counsel) based in part on its finding that "class counsel had handled this suit inefficiently." *Synthroid II*, 325 F.3d at 977. The panel did not recommend against performing a lodestar cross-check, but simply observed that it makes no sense to penalize counsel for perceived inefficiency because a percentage award already serves that purpose. "If consumer class counsel

invested too many hours, dallied when preparing the settlement, or otherwise ran the meter, the loss falls on counsel themselves." *Id.* at 979.

Finally, in *Dairy Farmers of Am., Inc.*, the district court recited the claimed lodestar, but found it "arbitrary (and under-vetted)." 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015). That court properly looked to the *Synthroid I* considerations, including the length of proceedings with substantial discovery and risk, to yield a market-approximating rate. *Id.* at 844-48. None of these cases support the proposition that class counsel can force the district court's hand by refusing to provide lodestar.

E. Class counsel's behavior contradicts their argument that the case was unusually risky.

Class counsel argues that the case was risky (Fee Mot. 9-10), but their behavior in filing numerous overlapping Meta Pixel cases suggests otherwise.

Pixel litigation exploded after *The Markup*, a nonprofit news publication, revealed that a third of the country's largest hospital systems embedded a Meta Pixel in their websites, which the publication alleged "may violate federal law." THE MARKUP, *Facebook Is Receiving Sensitive Medical Information from Hospital Websites* (Jun. 16, 2022).[5] This piece precipitated lawsuits against Meta within days, and plaintiffs in these suits "have identified 1,844 healthcare properties from which Meta is collecting information through the Meta Collection Tools." *In re Meta Pixel Healthcare Litg.*, 22-cv-03580, Dkt. 335 (Second Amended Complaint Oct. 10, 2023), at 35. The disclosures created a cottage industry. Several firms—including class counsel's firms—have redundantly sued defendants who voluntarily disclosed arguably problematic use of the Meta Pixel. For example, the lead law firm of the first-filed complaint in this litigation has filed at least 20 other complaints concerning the Meta Pixel in the wake of THE MARKUP piece, mostly against healthcare providers.[6]

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[5] https://themarkup.org/pixel-hunt/2022/06/16/facebook-is-receiving-sensitive-medical-information-from-hospital-websites (accessed Dec. 18, 2023).

[6] *Parcell v. Paramount Global Corp.*, No. 1:22-cv-3666 (N.D. Ill. Jul. 14, 2022); *Lamb v. Forbes Media LLC*, No. 1:22cv6319 (S.D.N.Y. Jul. 25, 2022); *Johnson v. Insider Inc.*, No. 1:22-cv-6529 (Aug. 1, 2022); *Bustos v. Riverside Medical Clinic*, CVRI2203466 (Cal. Sup. Ct. Riverside Aug. 17, 2022); *Curry v. Novant Health, Inc.*, No. 1:22-cv-0697 (M.D.N.C. Aug. 23, 2022); *Ortega v. Emanate Health Med. Center*, No. 22STCV28142 (Cal. Sup. Ct. Los Angeles Aug. 30, 2023); *Gardner et al v. MeTV*, No. 1:22-cv-5963

In this litigation, plaintiffs represented by eight different law firms filed five different actions against the defendant, all within two weeks of Advocate's October 20, 2022, Notice of Data Breach. Mass interest in the case suggests that plaintiffs' firms did not regard the case as unusually risky, and the rapid settlement confirms this inference.

IV. The proposed settlement unreasonably burdens class members' rights of objection by depriving them of necessary information and imposing extraneous requirements on objectors.

Rules 23(e)(5) and (h)(2) afford class members, whose claims are at stake, or whose settlement proceeds are at stake, a nearly unqualified right of objection. Neither the settling parties, nor worse, the class members' own putative counsel, are permitted to "handicap[]" class members in the exercise of their objection rights. *Redman*, 768 F.3d at 638. Yet the settlement, notice, and objection process here does just that in several ways.

First, as discussed in the preceding section, class counsel has not disclosed even summary information about their lodestar and expenditure of time. Indeed, depriving class members of "the details of class counsel's hours and expenses" is the exact "handicap" that *Redman* denounced. *Id.* It is "precisely the detail [about counsel's time and efforts] that would make the opportunity to object meaningful." William B. Rubenstein, 3 NEWBERG ON CLASS ACTIONS § 8:24 (5th ed. 2014).

Second, compounding the problem of concealing of class counsel's lodestar, plaintiffs failed to provide their fee supporting documentation (memorandum and declarations) on the settlement website as of the objection deadline, December 19, 2023. The website publishes only the one-parge

(N.D. Ill. Oct. 28, 2022); *Elder v. Valley Health System, Inc.*, No. 2:23-cv-0408 (D.N.J. Jan. 25, 2023); *C.M. v. BetterHelp, Inc.*, No. 3:23-cv-01033 (Mar. 7, 2023); *Warren v. Pomona Valley Hosp. Med. Center*, No. 23STCV05324 (Cal. Sup. Ct. Los Angeles Mar. 9, 2023); *Doe v. Antelope Valley Med. Center*, No. 23STCV05382 (Cal. Sup. Ct. Los Angeles Mar. 9, 2023); *Magadan vs Palomar Health*, No. 202300012347 (Cal. Sup. Ct. San Diego Mar. 24, 2023); *Willett v. PIH Health, Inc.*, No. 23STCV08910 (Cal. Sup. Ct. Los Angeles Apr. 21, 2023); *Danforth v. Placentia-Linda Hosp., Inc.*, No. 30-2023-01321351-CU-PO-CXC (Cal. Sup. Ct. Orange Apr. 26, 2023); *Doe v. Davita, Inc.*, No. 37-2023-00025611-CU-PO-CTL (Cal. Sup. Ct. San Francisco Jun. 16, 2023); *Cousin v. Sharp Healthcare*, No. 3:22-cv-2040 (S.D. Cal. Aug 2, 2023); *Hodges v. GoodRX Holdings, Inc.* (S.D. Fla. Oct. 27, 2023); *Wright v. Meta Platforms, Inc.*, No. 2:23-cv-5566 (D.S.C. Nov. 2, 2023); *Mcculley v. Banner Health*, No. 2:23-cv-0985 (D. Ariz. Nov. 22, 2023); *Doe v. DLP Conemaugh Memorial Med. Center, LLC*, No. 3:23-cv-0110 (W.D. Pa. Nov. 27, 2023).

fee motion itself, a squib containing no explanation of the grounds for the request.[7] In the year 2023, the settlement website is the primary channel of directing notice of fee motions to absent class members. Class counsel know that they ought to include the fee papers, because they've done it before. *See In re Forefront Data Breach Litig.*, No. 21-cv-887, 2023 U.S. Dist. LEXIS 175848, *22 (E.D. Wis. Mar. 22, 2023) (attorneys Klinger and Ward representing the plaintiffs).[8] Inexplicably, they forsook that routine practice here.

Third, the settling parties have not notified class members of the identity of the "Charitable Healthcare Recipients" who constitute the *cy pres* recipients of residual funds under the settlement. The identity of third-party *cy pres* recipients of settlement money is a material term, and therefore must be disclosed to the class. *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012). It is no answer that "the charities will be identified at a later date and approved by the court." *Id.* The proposed process does not contemplate any notice or opportunity for absent class members to object to or opt out given the designated recipients.

In an opt-out settlement, providing the identity of potential *cy pres* recipients preserves the right of absent class members to distance themselves from causes or institutions that they would rather not support. Indeed, one court has held that the option to exclude oneself is necessary to address any First Amendment concern about compelling class members to make charitable distributions. *See In re Google Inc. Street View Elec. Comm'n Litig.*, 21 F.4th 1102, 1118 (9th Cir. 2021). *Street View* is likely incorrect: silence is not consent and a waiver of First Amendment rights "cannot be presumed." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2464 (2018). "Unless [individuals] clearly and affirmatively consent before any money is taken from them, this standard cannot be met." *Id.* But regardless, an opt out cannot be a meaningful escape hatch, when, as here, class members receive no notice of the

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[7] *See* https://www.advocateaurorasettlement.com/home/documents/ (accessed Dec. 18, 2023), archived link at https://web.archive.org/web/20231218150012/https://www.advocateaurorasettlement.com/home/documents/.

[8] Website for this case available at https://www.forefrontsettlement.com/court-documents/ (accessed Dec. 18, 2023), archived link at https://web.archive.org/web/20230304224745/https://www.forefrontsettlement.com/court-documents/.

identity of the recipients. Effectively, this settlement compelled class members to support causes before knowing what they are supporting, to speak without knowing what they are speaking.

A fully informed right of objection is equally vital to vetting *cy pres* recipients. *Cy pres* recipients could be inappropriate for any number of reasons. For example, they might have "significant prior affiliations with any party, counsel, or the court" that would disqualify them. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 331 (3d Cir. 2019) (citing American Law Institute, *Principles of the Law of Aggregation Litigation* § 3.07 Cmt. b (2010)). They might lack the necessary qualification or capability to provide any benefit. *See, e.g., In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984) (rejecting proposed Foundation that would have amounted to "carrying coals to Newcastle"). Or they might lack a geographical nexus with class members. *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). The settlement here partially allays the geographic concern with its promise that the organization would "provide health care to people in Wisconsin and/or Illinois." Dkt. 35-2 at 6. But, at the same time, that pledge raises a different concern that the nexus between the organization's mission and the class's interest would be lacking. *See Dennis*, 697 F.3d at 866 (holding that the "noble goal" of feeding the indigent had little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved") (cleaned up). The other criterion that the settlement provides—that Advocate Aurora will not "have sole control or majority ownership" of the organization—raises concerns as well, as it implies that Defendant may have partial control or minority ownership of the organization. That would be inappropriate in this self-avowed "non-reversionary" settlement. *See* Dkt. 35-2 at 15.

"Just trust us" cannot be the basis of settlement decision-making. *Id.* at 869. It's the same "short and simple" rule in this Circuit: "when in doubt, disclose." *In re Southwest Airlines Drink Voucher Litig.*, 799 F.3d 701, 716 (7th Cir. 2015); *but see Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 798 (7th Cir. 2018) (holding that the class notice was not required to identify *cy pres* recipients when the plaintiffs had not determined whether they would resort to *cy pres*, and a website promised to provide more information).

Fourth, beyond depriving class members of material information, the settlement affirmatively hinders the process of objection and exclusion. Whether class member elect to participate the settlement, object to the settlement, or exclude themselves from the settlement entirely, they ought to be able to do so on equal terms. The settlement's job is to make it "as easy as possible." *McClintic v. Lithia Motors*, No. C11-859RAJ, 2012 U.S. Dist. LEXIS 3846, at *17 (W.D. Wash. Jan. 12, 2012) (critiquing comparable opt-out and objection process and ultimately rejecting settlement). "[A] court's role is to safeguard the class's interest by ensuring that class members, most of whom are operating in good faith, receive the best opportunity possible to comprehend and respond to the proposed settlement. Courts will accordingly carefully scrutinize proposed limitations on objection formats and curtail those that over-reach." William B. Rubenstein, 4 NEWBERG ON CLASS ACTIONS § 13:30 (5th ed. 2014). "There should be no unnecessary hurdles that make it difficult for class members to exercise their rights to opt out, object, submit a claim, or make an appearance." Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, 1 (2010), *available at* https://www.consumerclassdefense.com/wp-content/uploads/sites/15/2013/06/FJC-Notice-Checklist-and-Plain-Language-Guide.pdf; *accord* Advisory Committee Notes to 2018 Amendments to Rule 23 ("Courts should take care…to avoid unduly burdening class members who wish to object.").

Here, the settlement falls short. The only electronic option that the settlement website permits is filing a claim. To exclude oneself, a class member must send a snail mail letter to the administrator. *See* Class Notice at 5. Worse yet, to object, the settlement demands class members serve four attorneys at their physical addresses even though those attorneys are presumably registered for ECF notifications of documents filed on the case docket. *See* Class Notice at 6-7. Courts nationwide have characterized procedures of this sort "unnecessarily onerous,"[9] "overly burdensome,"[10] without

[9] *Galloway v. Kan. City Landsmen*, 2012 WL 4862833, 2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012).

[10] *Cleveland v. Groceryworks.com, LLC*, 2015 WL 10911491, 2015 U.S. Dist. LEXIS 168420, at *9 (N.D. Cal. Dec. 16, 2015).

"good cause,"[11] "point[less],"[12] "unduly burdensome,"[13] "unworkable,"[14] "unnecessary,"[15] "an unnecessary burden,"[16] "serv[ing] to discourage objections,"[17] "serv[ing] to dissuade potential objectors,"[18] a "gimmick to make it onerous and burdensome to object."[19] Settlements should permit the relatively efficient (indeed, close to costless) method of transmitting objections or opt outs by a single electronic submission. *See, e.g.*, *Urena v. Cent. Cal. Almond Growers Ass'n*, 2020 WL 3483280, 2020 U.S. Dist. LEXIS 113250, *42 (E.D. Cal. Jun. 26, 2020) (ordering settling parties to allow exclusions by email).

Where electronic modes of opting-out and objecting are available, the "vast majority" of participating class members will use those avenues. *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-md-01840-KHV-JPO, 2012 U.S. Dist. LEXIS 57981, at *76 (D. Kan. Apr. 24, 2012); id. at *74 n.13 (nearly three times more people opted-out electronically than by mail); *Fraley v. Facebook, Inc.*, No. 11-cv-01726 RS (N.D. Cal. Jun. 7, 2013), Declaration of Jennifer M. Keough Regarding Settlement Administration (Dkt. 341) at ¶12 (6,884 of 6,946 opt-out requests (99.1%) were submitted

[11] *Bickley v. Schneider Nat'l, Inc.*, 2016 WL 4157355, 2016 U.S. Dist. LEXIS 54974, at * 6 (N.D. Cal. Apr. 25, 2016).

[12] *Bennett v. Boyd Biloxi, LLC*, No. 14-cv-330-WS-M, 2016 U.S. Dist. LEXIS 62217, at *24-*25 (S.D. Ala. May 11, 2016).

[13] *Bell v. Consumer Cellular, Inc.*, 2016 WL 3063870, 2016 U.S. Dist. LEXIS 71416, at *9 (D. Or. May 31, 2016); *Arena v. Intuit Inc.*, 2021 WL 834253, 2021 U.S. Dist. LEXIS 41994, at *35 (N.D. Cal. Mar. 5, 2021).

[14] *O&R Constr. v. Dun & Bradstreet Credibility Corp.*, 2017 WL 1788410, 2017 U.S. Dist. LEXIS 69331, at *14 (W.D. Wash. May 5, 2017).

[15] *Hefler v. Wells Fargo & Co.*, 2018 U.S. Dist. LEXIS 150292, 2018 WL 4207245, at *12 (N.D. Cal. Sept. 4, 2018).

[16] *Hadley v. Kellogg Sales Co.*, 2020 WL 836673, 2020 U.S. Dist. LEXIS 30193, at *18 (N.D. Cal. Feb. 20, 2020).

[17] *Cashon v. Encompass Health Rehab. Hosp. of Modesto, LLC*, 2022 WL 95274, 2022 U.S. Dist. LEXIS 4858, *27 (E.D. Cal. Jan. 9, 2022).

[18] *Jackson v. Fastenal Co.*, No. 20-cv-345-JLT-SAB, 2022 U.S. Dist. LEXIS 10190, *2 (E.D. Cal. Jan. 19, 2022).

[19] *In re Pinterest Derivative Litig.*, 2022 WL 484961, 2022 U.S. Dist. LEXIS 28366, *26 (N.D. Cal. Feb. 16, 2022).

electronically via the settlement website when that option was available). Preferring a more costly, inefficient alternative over seamless electronic processes gives rise to the inference that the parties wished to undermine the autonomous decisions of class members.

Fifth, the settlement requires objectors to list all objections that they (or their counsel) have filed in the past three years. Dkt. 35-2 at 25. This requirement is irrelevant to the matter at hand and constitutes an unreasonable burden on the Rule 23(e) right of objection. Again, courts have condemned this demand as "designed to discourage objections,"[20] "too onerous,"[21] "unnecessary,"[22] "needlessly frustra[ing] and discourag[ing] to the settlement, with no countervailing benefits to the Court or the class."[23]

Class counsel may suggest that the obstacles are necessary to deter bad-faith objectors. But that is mistaken. Since the Rules Committee introduced Rule 23(e)(5)(B) in 2018 (imposing mandatory review of objector side-settlements), and since Wynnychenko's counsel procured a pathbreaking precedent in *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020) (permitting disgorgement of extortionate objector side-settlements), bad-faith objectors have lost the power to disrupt. Even more importantly, imposing needless burdens on **all** objections throws the baby out with the bath water. It hinders those class members who wish to object to raise good faith concerns, just as much as it deters bad-faith objectors. That is itself a problem because good faith objectors like Dr. Wynnychenko "play an essential role in judicial review of proposed settlements of class actions" by "flagg[ing] fatal weaknesses" or even just reintroducing the adversarial process. *Pearson v. NBTY, Inc.*, 772 F.3d at 787; *accord Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014) (underscoring "the importance both of

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[20] *Lackawanna v. Tivity Health Support*, 2019 WL 7195309, 2019 U.S. Dist. LEXIS 148756, at *14 (W.D.N.Y. Aug. 29, 2019).

[21] *Walters v. Target Corp.*, 2019 WL 6467705, 2019 U.S. Dist. LEXIS 207489, at *23 (S.D. Cal. Dec. 2, 2019).

[22] *Allicks v. Omni Specialty Packaging*, 2020 WL 5648132, 2020 U.S. Dist. LEXIS 173964, *19 (W.D. Mo. Sept. 22, 2020).

[23] *Ark. Fed. Credit Union v. Hudson's Bay Co.*, 2021 WL 8445929, 2021 U.S. Dist. LEXIS 136943, *8 (S.D.N.Y. Jul. 22, 2021).

objectors…and of intense judicial scrutiny of proposed class action settlements."). And the Seventh Circuit itself strongly "disapprove[s]" the ad hominem inference that being repeat objectors are worthy of suspicion or disparagement. *In re Stericycle Secs. Litig.*, 35 F.4th 555, 572 (7th Cir. 2022).

"Frustrating the settlement is exactly what class members are entitled to do, if they think the settlement is not fair. The class's "frustration rights' should not themselves be frustrated." *In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 WL 4249902, at *10 (N.D. Cal. Nov. 30, 2007). But as described above, the proposed settlement intends to frustrate objections. This Court would be well within its discretion to require the parties to at least re-notice the class to cure the defects. At a minimum, this Court should weigh the lack of sufficient notice, and the inclusion of needlessly onerous burdens on objection, as factors counseling against counsel's requested award of fees. *See, e.g., Jacobson v. Persolve, LLC,* 2016 WL 7230873, at *6 (N.D. Cal. Dec. 14, 2016) (considering that counsel had included "burdensome requirements for class members to object" and violated the notice requirements of Rule 23(h) in setting fee award); *see generally Diffenderffer v. Winder*, 3 G. & J. 311, 348 (Md. 1831) ("It is the duty of a Court of Equity, in the distribution of its favors, to discriminate between those who violate their duty, and abuse their trust, and those who perform it with skill and fidelity. To the latter a full commission is cheerfully bestowed; to the former half that amount is reluctantly granted.").

V. No reasons exist for the Settlement to include an arbitrary cap on claims, and the *cy pres* provision potentially conflicts with class interests.

Courts may approve a proposed settlement only after finding that it is "fair, reasonable, and adequate." Fed R. Civ. P. 23(e)(2). As part of this analysis, the Court must consider "the effectiveness of any proposed method of distributing relief to the class" and assure itself that the class's recovery tracks "the terms of any proposed award of attorney's fees." Fed R. Civ. P. 23(e)(2)(C)(ii)-(iii). When assessing the proposed method of distributing relief, "direct distributions to the class are preferred over *cy pres* distributions." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013). As discussed above, the proposed settlement provides for the distribution of unclaimed settlement funds to an as-of-yet-unnamed *cy pres* recipient. No rational reason exists for such a provision, especially in light of

the arbitrary cap on individual claims of $50, and its inclusion must be painstakingly examined by the Court to ensure it has not created an unfair, illegal settlement. As currently structured, the proposed settlement *disincentivises* class counsel to distribute cash relief to class members and prioritize payments to an unknown, third-party organization.

The eleven-count complaint alleges many common law and statutory violations of class members' private health information, yet the proposed settlement arbitrarily restricts each claimant to the recovery of no more than $50. Dkt. 35-2 ¶ 39(c). No *cy pres* distribution should take place under any circumstance given this cap, which amounts to a small fraction of the potential statutory damages claimed. Instead, "[t]he settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair." *ALI Principles* § 3.07(b). This "last resort" rule follows from the precept that "[t]he settlement-fund proceeds, … generated by the value of the class members' claims, belong solely to the class members." *Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 474 (5th Cir. 2011). To serve the class's interests, *cy pres* can be employed only as a last resort upon a showing that further distributions are impossible. *Pearson*, 772 F.3d 778.[24] The *cy pres* provision here unlawfully gives the parties discretion to ignore the last resort rule. The Court should deny settlement approval until the parties amend the proposed settlement to conform with applicable law.

Class counsel may argue they have already received north of 160,000 claims and therefore all funds will be paid out to class members leaving no residual for *cy pres*. But the final validation of all of those claims is far from certain and the possibility exists that the *cy pres* provision will take effect. At present, class counsel has reported 163,307 submitted claims thus far, touting their "success." But raw

[24] If additional distributions would provide "a windfall to class members with liquated-damages claims that were 100 percent satisfied by the initial distribution," then a *cy pres* remedy may also be proper. *Klier*, 658 F.3d at 475. But "a vague anxiety over windfalls" cannot justify preferring *cy pres* to class redistributions. Rhonda Wasserman, *Cy Pres In Class Action Settlements*, 88 S. CAL. L. REV. 97, 160 (2014). In any event, there should be no dispute here that class members are not fully compensated. Class claims are capped at $50, and the cash component of the settlement ($12,225,000) pales in comparison to the statutory damages sought in the complaint.

claim numbers are not the end of the story. A list of representative claims-made cases—*i.e.,* the settlement structure the parties agreed to here—illustrates that a significant percentage of the submitted claims may ultimately be invalid.

Case	Submitted Claims	Invalid Claims	Invalid Claims %
Apple Device[25]	3,149,072	890,374	28.2%
Lenny & Larry's Inc.[26]	90,677	24,030	26.5%
Jones v. Monsanto[27]	285,399	43,087	15.1%
Salov N. Am. Corp.[28]	65,048	12,018	18.5%
Proctor & Gamble[29]	187,860	50,792	27.0%
United Indus. Corp.[30]	84,572	16,605	19.6%
Manna Pro Prods.[31]	3,891	3,420	87.9%
Rawa v. Monsanto Co.[32]	93,702	16,382	17.4%
Optical Disk Drive[33]	561,254	99,408	17.7%
Carrier IQ[34]	57,266	17,808	31.1%

[25] Joint Status Report ISO Final Settlement Approval, *In re Apple Inc. Device Performance Litig.*, No. 18-MD-2827, Dkt. 592 (N.D. Cal. Dec. 11, 2020). The number of claims validated was prior to deduplication, so the total number of disallowed claims was greater than 890,374. CCAF represented an objector in this case.

[26] Decl. of Cameron R. Azari, *Cowen v. Lenny & Larry's Inc.*, No. 17-CV-1530, Dkt. 110-3 (N.D. Ill. Apr. 2, 2019). CCAF represented an objector in this case.

[27] Decl. of Brandon Schwartz, *Jones v. Monsanto Co.*, No. 19-CV-0102, Dkt. 65-2 (W.D. Mo., Feb. 25, 2021). CCAF represented an objector in this case.

[28] Supp. Decl. of Jeanne C. Finegan, *Kumar v. Salov N. Am. Corp.*, No. 14-CV-2411, Dkt. 164 (N.D. Cal., May 26, 2017). CCAF represented an objector in this case.

[29] Declaration of Jonathon Shaffer, *Pettit v. Proctor & Gamble Co.*, No. 15-CV-2150, Dkt. 139 (N.D. Cal., Jul. 17, 2019).

[30] *Graves v. United Indus. Corp.*, 2020 WL 953210, 2020 U.S. Dist. LEXIS 33781 at *11 (C.D. Cal., Feb. 24, 2020).

[31] *Hale v. Manna Pro Prods., LLC*, 2021 WL 4993036, 2021 U.S. Dist. LEXIS 207828 at *7-8 (E.D. Cal., Oct. 26, 2021). The number of claims submitted was 3,891, but only 471 were validated.

[32] Mem. ISO Pls.' Mot. for Final Approval, *Rawa v. Monsanto Co.*, No. 17-CV-1252, Dkt. 42-1 (E.D. Mo., Mar. 3, 2018).

[33] Status Update Regarding Claims Distribution, *In re Optical Disk Drive Prod., Antitrust Litig.*, No. 10-MD-2143, Dkt. 3072 (N.D. Cal. Oct. 27, 2009).

[34] *In re Carrier IQ, Inc., Consumer Privacy Litig.*, 2016 WL 4474366, 2016 U.S. Dist. LEXIS 114235 at *27-28 (N.D. Cal. Aug., 25, 2016).

Case	Submitted Claims	Invalid Claims	Invalid Claims %
Marek v. Molson[35]	2,511,705	1,924,176	76.6%
Rita's Water Ice[36]	28,523	18,359	64.4%

Further, the combination of the non-reversionary, claims-made structure and the arbitrary damages cap and *cy pres* provision actually disincentivizes class counsel seeking more claiming class members. Because the claims are paid out of the settlement fund on a pro rata basis, class counsel has no incentive to seek further class claims as it would only diminish the amount each class member receives ultimately exposing the poor *per capita* recovery achieved and harming those that have already claimed. The current number of claims indicates a payout to each class member for less than $50 each.[37] Because they are already under the $50 claims cap, each additional claiming class member will reduce the pro rata share of settlement proceeds. If class counsel got full participation from the class, each class member would receive a paltry $3.15![38]

As it stands, class counsel would prefer—from a rational economic perspective—to avoid paying out any further claims to avoid diminishing the meager recovery for claimants. This is important, because as noted above, class counsel's claim numbers are only preliminary and the amount of valid claims may turn out to be much lower. In that case, per claimant payouts may eclipse the $50 number, creating residual. Or, alternatively, post-distribution, some significant number of claimants may fail to cash their claim checks. Both scenarios highlight why no claim cap should exist. There is no valid reason to truncate initial payments at $50 and divert the excess to *cy pres*.$50. And any residual

[35] Declaration of Steven Weisbrot, *Marek v. Molson*, No. 21-cv-07174, DE 70-1 at 5 (N.D. Cal. Jun. 28, 2023).

[36] *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 U.S. Dist. LEXIS 149602 at *8 (E.D. Pa. Sept. 14, 2017).

[37] ($12,225,000 settlement fund - $4,278,750 fee award - $23,356.02 litigation expenses - $35,000 service awards for 10 named plaintiffs - $1,600,000 administration expenses) / 163,307 claims = $38.70 per claim.

[38] This assumes full participation could be achieved with no further litigation costs, which would drain the settlement further. It also assumes a class size of 2,500,000, although defendants have acknowledged the class size could be even larger, perhaps as many as 3,000,000 individuals.

from unclaimed but distributed funds should also be redistributed to class members as well. No valid justification exists for paying those funds to a third-party *cy pres* recipient instead. This Court should very closely examine the inclusion of both the claims cap and *cy pres* provision and their effects on class counsel's fiduciary duty to the class to deduce how any fair and reasonable settlement could include such provisions.

CONCLUSION

The Court should require class counsel to submit detailed billing and permit Dr. Wynnychenko to supplement his objection in view of such disclosure. Alternative, the Court should award perhaps 10% of the net common fund, which better approximates the market rate of a settlement achieved without substantive litigation. to supplement their award a fee in line with the non-duplicative work actually performed on behalf of the class.

Dated: December 19, 2023

Respectfully submitted,

/s/ Adam E. Schulman

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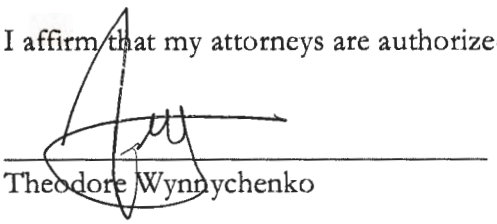
Attorney for Objector Theodore Wynnychenko

I affirm that my attorneys are authorized to bring this objection.



Theodore Wynnychenko

CERTIFICATE OF SERVICE

The undersigned certifies that, on December 19, 2023, he caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

In addition, in accordance with the Class Notice and Preliminary Approval Order he caused to be mailed via USPS first-class mail a copy of the foregoing to the following recipients:

United States District Court for the Eastern District of Wisconsin 517 East Wisconsin Avenue Milwaukee, WI 53202	Ropes & Gray LLP c/o Edward R. McNicholas and Frances Faircloth 2099 Pennsylvania Avenue NW Washington, DC 20006
Milberg Coleman Bryson Phillips Grossman, PLLC c/o Gary M. Klinger and Alexandra Honeycutt 227 W. Monroe Street, Suite 2100 Chicago, IL 60606	Quarles & Brady LLP c/o Daniel E. Conley, Kristin C. Foster, and Nathan Oesch 411 East Wisconsin Avenue, Suite 2400 Milwaukee, WI 53202
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Dated: December 19, 2023

By: /s/Adam Schulman
Adam Schulman