UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

JULIE CAMPBELL, DIANA BICKFORD and KERRIE MULHOLLAND, on behalf of themselves and all others similarly situated,

Plaintiffs

v.

SIRIUS XM RADIO, INC.,

Defendant.

NIGEL COHEN,

Objector

Case No. 2:22-cv-02261-CSB-EIL

Hon. Colin Stirling Bruce

OBJECTION TO
REQUEST FOR ATTORNEYS' FEES

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INTRODUCTION

Class counsel seek $9.633 million or 36.14% of the $26.65 million net settlement fund for a settlement of litigation that follows on the heels of their successful litigation bringing nearly identical claims against the same defendant in *Buchanan v. Sirius XM Radio, Inc.*, No. 17-cv-00728 (N.D. Tex.).

A 36% fee award already greatly exceeds the market-approximating rate for a TCPA settlement, but it's worse than that. 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 36% fee request in a case settled on the heels of successful prior substantively-near identical 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 $26,650,000 net common fund amounts to just $2.44 per class member,[1] before subtracting fees for attorneys' fees. This modest fund extinguishes claims that Plaintiffs pleaded may be worth $1,500 under the TCPA's statutory damages provisions. 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. As for the risk of litigation, neither the general empirics of TCPA litigation, nor the specific posture of this case (following *Buchanan*) support an enhancement for risk.

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 notify class members of the allocational method used to distribute the class funds, nor of the relationship between lead class counsel's firm and the proposed

[1] This implied 10.9 million-member class size is extrapolated from the fact that at the time of class certification, the North Carolina subclass was 360,000 (Motion for Class Certification (Dkt. 41) at 11 n.5), and the fact that North Carolina makes up 3.3% of the U.S. population.

cy pres beneficiary of any residual from the settlement, so objectors cannot meaningfully exercise their decision-making rights. Moreover, the settlement erects unnecessary and thus improper burdens on the right of objection. As a result, the quality of class counsel's representation does not support Plaintiffs' fee request.

Objector Nigel Cohen, whose background is discussed at pages 1-2 of his settlement objection, files this fee objection identifying the deficiencies with the fee request and respectfully asks this Court, if it decides to approve the settlement, to hold the fee request in abeyance pending disclosure of a detailed lodestar summary or, at a minimum, to award no more than $5.5 million, which will significantly increase the *pro rata* benefit to class claimants. Cohen reserves his right to supplement his objection following such disclosure.

ARGUMENT

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

At the fee-setting stage, when the relationship between class members and their counsel becomes most acutely adversarial, it is incumbent upon the Court to "carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998) (internal quotation omitted). These concerns are yet heightened "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC,* 662 F.3d 913, 917 (7th Cir. 2011). Retainer agreements between lead plaintiff consumers and class counsel "are of little value to determining the market rate because named plaintiffs are less often sophisticated buyers of legal services and more often 'the cat's paws of the class lawyers.'" *In re Capital One TCPA Litig.*, 80 F. Supp. 3d. 781, 796 (N.D. Ill. 2015) (quoting *In re Trans Union Corp. Priv. Litig.*, 629 F.3d 741, 744 (7th Cir. 2011)); *see also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 235 (N.D. Ill. 2016) (same); *contra* Plaintiffs' Motion for Approval of Attorneys' Fees, Expenses, and Incentive Awards ("Fee Motion) (Dkt. 132) at 9-10. No individual class member has the financial incentive to object to an exorbitant fee request because

any individual "gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The Court (and good-faith public-minded objectors) serve as the last line of defense against overreaching fee requests. "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

With regard to fee methodology: this Circuit employs the market-mimicking approach: "courts must do their best to award counsel 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 Broiler Chicken Antitrust Litig.*, 80 F.4th 797, 801 (7th Cir. 2023) (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001)). A court's "task is to assign fees in accord with a hypothetical ex ante bargain, weigh the available market evidence, and assess the amount of work involved, the risks of non-payment, and the quality of representation." *Id.* at 802 (simplified); *accord In re Stericycle Sec. Litig.*, 35 F.4th 555, 560 (7th Cir. 2022) (listing same factors and also "the stakes of the case.")

II. Class counsel seek excessive fees beyond the market rate.

A. Class counsel inappropriately seek over 36% 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).

Plaintiffs' counsel, however, ask for their percentage-based fee award based on the total settlement fund ($28 million) inclusive of notice and administrative *costs* estimated at about $1.35 million. *See* Weisbrot Declaration ¶55, Dkt. 121-2 at 14. Administration costs are a prerequisite to proceeding under Rule 23, not "part of the value received by the settlement by the members of the class." *Redman*, 768 F.3d at 630. Because they "shed no light on the fairness of the division of the settlement pie," the fee analysis must exclude all expenses from the denominator. *Id.* District courts in this Circuit reject "improper" attempts to do otherwise. *In re Advocate Aurora Health Pixel Litig.*, 740

F. Supp. 3d 736, 751-52 (E.D. Wis. 2024); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 199-200 (N.D. Ill. 2018); *Capital One TCPA*, 80 F. Supp. 3d. at 795.

Thus, Plaintiffs' Rule 23(h) request actually amounts to $9.633 million or 36.14% of the $26.65 million net settlement fund. This exceeds the market rate for a TCPA class settlement of this size. Conducting a thorough and wide-ranging inquiry into existing data, *Capital One TCPA* is the leading case on market rates for TCPA litigation. 80 F. Supp. 3d at 796-808. There, class counsel sought a fee of just over 32% of a $70.3m net settlement fund. *Id.* at 795.

Empirical studies, however, reflect means and medium fee awards of roughly 25% in consumer class litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorneys Fees & Expenses in Class Action Litigation: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 262 (2010) (surveying cases and finding a mean fee in consumer cases of 25%); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 833 (2010) (analyzinsg 688 class action settlements in 2006 and 2007 and finding a mean of 25% and a median of 25.4% for the award of attorneys' fees "with almost no awards more than 35 percent"); Theodore Eisenberg, Geoffrey P. Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 952 tbl. 4 (2017) (finding that the mean and median percentage of fees awarded in consumer cases were 26 and 25% respectively). Plaintiffs invoke the "age-old assumption that tort lawyers receive a third of their clients' recovery." Fee Motion 10 (quoting 5 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 15:73 (5th ed.)). That very section of Newberg disclaims that "assumption" in the context of class actions: "25% is more accurate." *Id.* (citing § 15:83).

Studies also find "a scaling effect whereby the percentage fee decreases as the class recovery increases." *Capital One TCPA*, 80 F. Supp. 3d at 797. For cases with a total recovery between $22.8 million and $38.3 million, Eisenberg's first study found the median percentage of the fund awarded for attorneys' fees is 24.9% with a mean of 22.1%. 7 J. EMPIRICAL LEGAL STUD. 248, 265 tbl. 7. Fitzpatrick's study found a mean of 24.4% and median of 25% for fees in settlements recovery between $15.2m and $30m. 7 J. EMPIRICAL LEGAL STUD. 811, 839 tbl. 10. And Eisenberg's more

recent survey found that for cases where the recovery is between $23.5m and $67m, the mean percentage of recovery falls around 24%. 92 N.Y.U. L. REV. 937, 948 & fig. 5.

Capital One TCPA then supplemented these surveys by creating its own survey of 72 TCPA class action settlements after 2010. It found that within the range of recovery between $15.9m and $39.9m, the mean fee was 17.2% and the median fee was 17.7%. 80 F. Supp. 3d at 799. Lastly, it considered competitive fee structures negotiated in non-consumer cases; though not directly relevant to the consumer class market rate, those data points "illustrate" (1) the scaling effect and (2) that *ex ante* negotiated awards are "frequently" lower "than those suggested by [*ex post*] empirical data." *Id.* at 801. From these inputs, the court produced a modified *Synthroid II* fee structure for TCPA class actions:

Application of *Capital One*/Modified *Synthroid II* Structure for a $26.65m Settlement		
Recovery	**Fee Percentage**	**Fee**
First $10 million	30%	$3,000,000
Next $10 million	25%	$2,500,000
$20 to $26.65 million	20%	$1,330,000
$26.65 to $45 million	20%	--
Excess above $45 million	15%	--
Total Fee	**25.6%**	**$6,830,000**

Id. at 804-05. Courts in this Circuit regularly follow this scale in TCPA cases. *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 237 (N.D. Ill. 2016); *Craftwood Lumber Co. v. Interline Brands, Inc.*, No. 11-cv-4462, 2015 WL 2147679, at *4 (N.D. Ill. May 6, 2015) (St. Eve, J.); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-cv-190, 2015 WL 890566, at *11 (N.D. Ill. Feb. 27, 2015); *Wright v. Nationstar Mortgage LLC*, No. 14-cv-10457, 2016 WL 4505169, at *15 (N.D. Ill. Aug. 29, 2016); *Simms v. Exacttarget, LLC*, 2018 WL 11416085, 2018 U.S. Dist. LEXIS 245963, *25 (S.D. Ind. Oct. 2, 2018) (cataloging cases).

To be sure, some decisions then modify these baseline TCPA fee tiers to recognize that counsel may command a fee premium for "riskier undertakings." *Birchmeier v. Caribbean Cruise Line, Inc.*, 896 F.3d 792, 797 (7th Cir. 2018) (affirming 6% enhancement). But for each TCPA case that is riskier than average, one is less risky than average. As explained at more length in the next section,

this litigation falls into that less risky half after counsel had successfully prosecuted *Buchanan v. Sirius XM Radio, Inc.*, No. 17-cv-00728 (N.D. Tex.).

Plaintiffs argue (Fee Motion at 10-12) that "comparable cases" support their fee request, but of this limited four-case sampling, two do not even involve TCPA litigation. The two TCPA cases granted 1/3 fee awards from smaller $10 million settlements. *Abante Rooter & Plumbing v. Oh Ins. Agency*, No. 15-cv-9025 (N.D. Ill. Dec. 10, 2019); *Allen v. JP Morgan Chase Bank, N.A.,* No. 13-cv-8285 (N.D. Ill. Nov. 3, 2015). Both involved "auto-dialer" claims that carried "potential difficulty." *Abante Rooter*, 2019 WL 10248700, 2019 U.S. Dist. LEXIS 233196, *11. Plaintiffs do not even mention the most obvious comparator: *Buchanan*, where the same class attorneys, Daniel Hutchinson of Lieff Cabraser, Jarrett Ellzey of Hughes Ellzey, and Mason Barney of Siri & Glimstad, brought and resolved nearly identical TCPA do-not-call list claims against the same defendant, represented by the same counsel. In *Buchanan*, class counsel sought and received a fee of $6.47m (25.88%) of a gross $25 million cash settlement fund. *See* Fee Motion, *Buchanan v. Sirius XM Radio, Inc.*, No. 17-cv-00728, Dkt. 126 (N.D. Tex. Jan. 14, 2020); Final Approval Order, *Buchanan*, Dkt. 129 (N.D. Tex. Jan. 28, 2020).

B. The risk and work expended do not support the fee request.

Buchanan closely bears on both the "risks of non-payment" and the expected "work involved" in this litigation, both as measured *ex ante* at the time of filing this action in November 2022. *Broiler Chicken*, 80 F.4th at 802. When an action follows on the heels of a closely-related, or identical successful action, "it can be a useful proxy for assessing risk." *Stericycle*, 35 F.4th at 563. That "prior litigation" can "strengthen[] the…plaintiffs' case and substantially reduce lead counsel's risk of nonpayment." *Id.* at 564. Plaintiffs point (Fee Motion 13-14) to two particularly risky aspects of the litigation here: the EBR defense and discovery into consent. But these aspects are ubiquitous in TCPA class actions and so do nothing to disprove the diminution of risk after the *Buchanan* litigation. *See* Def. Sirius XM Radio's Mem. in Opp. To Pl. Mot. For Class Cert., *Buchanan*, Dkt. 70 (N.D. Tex. Jul. 30,

2018) (alleging that same EBR defense to class certification).[2] Of course, every case has its own "meaningful challenges." *Stericycle*, 35 F.4th at 565. But what matters is whether "the prior litigation gave [class counsel] excellent starting field position, strengthening the plaintiffs' case and substantially reducing class counsel's risk of receiving nothing." *Id.* "That reduced risk would have been taken into account in any *ex ante* auction or market transaction for representation" and a failure by this Court to do so would be reversible error. *Id.*

Plaintiffs imply low risk, and insist that auction "was not possible," "because other qualified attorneys were not willing or able to come forward." Fee Motion 12. But this case was not the pursuit of a single intrepid firm blazing a trail into a litigation unknown, it was the result of multiple firms together agreeing to retrace their successful steps in the *Buchanan* litigation. Nothing prevented those three firms from competing to serve the class more efficiently, but instead they served the class even less cost-effectively by adding a fourth firm, Feldman Wasser, to this litigation. *See* Dkt. 124 (responding to the Court's inquiry about the fourth counsel).

Duplicative, wasteful or redundant expenditures of effort do not benefit the class and are non-compensable. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). But class actions too often foster a "camel is a horse designed by a committee" approach in which "an excess of lawyers seeks to share the wealth" of an exorbitant fee. *In re Stericycle, Inc.*, 2013 WL 5609328, 2013 U.S. Dist. LEXIS 147718, at *3 (N.D. Ill. Oct. 11, 2013) (Shadur, J.); *see also Capital One TCPA*, 80 F. Supp. 3d at 808 (citing Joseph Ostoyich and William Lavery, *Looks Like Price-Fixing Among Class Action Plaintiffs Firms*, Law360 (Feb. 12, 2014)[3]); *see also Alcarez v. Akorn*, 99 F.4th 368 (7th Cir. 2024) (six firms colluding to divide $322,500 in "mootness fees" for litigation that produced no benefit for the class action principal—Akorn shareholders). A review of billing records is necessary to pinpoint the extent of the duplication of

[2] Nor does the "series of failed mediations before agreement" (Fee Motion 14) reflect some unusual risk *ex ante* in this case filed not long after *Buchanan* was resolved. Indeed, no one would have even anticipated that risk during a hypothetical *ex ante* negotiation before the filing of this action.

[3] *Available at* http://www.law360.com/articles/542260/looks-like-price-fixing-among-class-action-plaintiffs-firms.

effort, *see* Section II.D, *infra*, but the fact that so many cooks were in the kitchen undermines the claim that this litigation was risky.

The benefit of *Buchanan* is not limited to the risk reduction; class counsel gained efficiencies of labor. More than a third of the Complaint (Dkt. 1) is identical or nearly identical to paragraphs in the *Buchanan* Complaint (*Buchanan*, Dkt. 1). *See* Ex. 1 to Schulman Decl. Nearly a dozen paragraphs of the class certification motion (Dkt. 41) replicate or resemble those of the *Buchanan* class certification motion (*Buchanan*, Dkt. 60). *See* Ex. 1 to Schulman Decl. "None of this is to say that class counsel were wrong to rely on the prior litigation." *Stericycle*, 35 F.4th at 565. It is to say that class counsel gained efficiency from its prosecution of *Buchanan*, and those gains must be reflected in the market rate for their representation in this case. The work involved in this litigation, as anticipated from the outset and as performed in fact, does not recommend an upward adjustment from the average baseline of TCPA cases. To the contrary, the preexisting favorable landscape after *Buchanan* recommends a reduction from the *Capital One TCPA* scale:

Application of Modified *Capital One* Structure to $26.65m Settlement		
Recovery	**Fee Percentage**	**Fee Based on Total Award**
First $10 million	25%	$2,500,000
Next $10 million	20%	$2,000,000
$20 to $26.65 million	15%	$1,000,000 (rounding $.997m)
$26.65 to $45 million	15%	--
Excess above $45 million	10%	--
Total Fee	**20.6%**	**$5,500,000**

The above chart reduces each tier of recovery by 5%, and thus the total award by 5% from the *Capital One TCPA* baseline. This reflects both the lack of risk and efficiencies gained after *Buchanan*. It avoids the counterintuitive result of class counsel receiving an equivalent percentage (of a slightly larger settlement) in this case, than they did in *Buchanan*, the litigation in which class counsel was trailblazing new ground. Again, to quantify and pinpoint the extent of counsel's efficiency gains from *Buchanan*, the Court and class would need to review lodestar billing detail. *See Section* II.D, *infra*.

C. The market reality: TCPA class actions are comparatively low-risk.

Even setting aside the case-specific reduction in risk and investment owing to *Buchanan*, broader market evidence confirms that TCPA class actions are categorically less risky undertakings. This reality further undermines any claim that this case warrants a fee premium.

TCPA claims possess structural features that reduce litigation risk relative to other areas of class action practice. They tend to have a single defendant with relatively straightforward discovery. Liability frequently turns on call records and standardized policies rather than individualized conduct; statutory damages are federal, fixed and significant; and defendants face substantial aggregate exposure even where per-claim damages are modest. These features create strong incentives for defendants to settle once class-wide discovery clarifies exposure. *See Gehrich*, 316 F.R.D. at 230 (recognizing that TCPA litigation often proceeds toward settlement once liability issues crystallize).

Courts have repeatedly recognized that TCPA litigation presents a comparatively favorable risk profile for plaintiffs' counsel. In contrasting TCPA litigation with more complex forms of class litigation, courts have explained that TCPA cases often involve "settlement [that] was likely," particularly when compared to complicated multi-party antitrust conspiracy cases where liability and damages are far less certain. *In re Broiler Chicken Antitrust Litig.*, 2022 WL 6124787, 2022 U.S. Dist. LEXIS 184031, at *53 (N.D. Ill. Oct. 7, 2022), *vacated on other grounds* 80 F.4th 797, 805 (7th Cir. 2023) (remanding for district court to consider additional market evidence that would show the awarded fee excessive). As the *Broiler Chicken* court observed, quoting a respected academic who filed expert reports in that case: "In terms of risk and complexity, TCPA cases are the polar opposite of the present case, a complicated multi-party antitrust conspiracy case." 2022 U.S. Dist. LEXIS 184031, at *53 (quoting report by Professor Robert Klonoff).

Empirical evidence reinforces that conclusion. In *Capital One TCPA*, the court relied on expert analysis by University of Chicago Law School Professor Todd Henderson, who received discovery concerning *all* TCPA litigation undertaken by the plaintiffs' firms in that action (including Lieff Cabraser) and calculated that class counsel in TCPA litigation recover in approximately **43% of cases**—a success rate that reflects a materially higher likelihood of recovery than many other

categories of aggregate litigation. 80 F. Supp. 3d at 806. Although that figure reflects case-level outcomes (rather than returns per dollar invested), it remains "the best information available" for assessing *ex ante* litigation risk. *Id.* And even that 43% estimate understates the effective success rate when measured by investment-weighted outcomes, which Professor Henderson found to be approximately 64%. *Id.* n.14. This is because plaintiffs' counsel invests more in cases that have overcome preliminary hurdles like a motion to dismiss; the failures tend to arrive with relatively little work, and so more attorney time is put into cases that pay off.

Under Seventh Circuit law, such success rates translate directly into the multiplier that would be required in a hypothetical *ex ante* bargain. A 43% probability of success implies a multiplier in roughly the 2.3 range, not the higher effective multipliers that tend to accompany 33% fee awards.[4] *See Florin v. Nationsbank*, 60 F.3d 1245, 1248 (7th Cir. 1995); *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992). "Attorneys' fees don't ride an escalator called risk into the financial stratosphere." *Redman*, 768 F.3d at 633.

These dynamics make the necessity of declining-percentage fee structures especially pointed in TCPA cases. Where "settlement is a more likely outcome" and "the marginal costs of increasing the settlement recovery amount are low," a scaled fee schedule better approximates the market rate. *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 959 (7th Cir. 2013). That is precisely why courts that have considered market principles have repeatedly awarded fees in TCPA cases well below one-third of the fund, particularly at significant settlement sizes. *Capital One TCPA*, 80 F. Supp. 3d at 805; *Gehrich*, 316 F.R.D. at 236.

In short, TCPA litigation is not the kind of high-risk, uncertain enterprise that justifies a flat 33% premium fee. To the contrary, both empirical evidence and judicial experience demonstrate that

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[4] While class counsel does not disclose even the barest information about lodestar (*see* next subsection), the *Capital One TCPA* court found that the requested 33% fee award would have overcompensated plaintiffs' counsel in that case given the 43% TCPA success rate—even without considering the higher investment in successful settlement. 80 F. Supp. 3d at 807-09.

it is a comparatively favorable and repeatable. Combined with the case-specific advantages conferred by the prior *Buchanan* litigation, any argument for an above-market fee collapses entirely.

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

Review of class counsel's billing records would likely confirm the lack of risk and duplication with *Buchanan*. But class counsel does not disclose *any* billing detail whatsoever, arguing that a lodestar crosscheck is not required and indeed "truly unjustified" as a matter of market-mimicking principles. Fee Motion 16. This is incorrect; failing to provide "the details of class counsel's hours" before the objection deadline unfairly "handicap[s]" objectors and violates Rule 23(h). *Redman*, 768 F.3d at 638; *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284, 286 (7th Cir. 2002) ("paralyzes objectors"). "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); *see 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); *In re Broiler Chicken*, 80 F.4th at 801 (listing "the amount of work involved" as relevant factor). Judges and commentators have remarked on the utility, indeed necessity 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. L. ETHICS 1453, 1454 (2005) ("courts making common fund fee awards are ethically bound to perform a lodestar cross-check"); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 503 (1996) ("essential").

While a district court has the discretion to not conduct a lodestar crosscheck, class counsel robs the court of its discretion,[5] and objectors of their ability to raise colorable objections, by hiding information necessary to make an informed decision. In *Williams v. Rohm & Haas Pension Plan* (cited by Fee Motion 16), 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 *Williams*, the district court ***did*** examine the lodestar by directing plaintiffs to submit lodestar information, over their objection. *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). In *Advocate Aurora*, the court required class counsel to submit billing records over their objection, and then criticized over-redaction of those records, instructing that counsel "must do better in the future." 740 F. Supp. 3d. 736, 762. In *Capital One TCPA*, the court compelled class counsel to provide their undisclosed lodestar to an objector. 80 F. Supp. 3d. 781, 807. Even when confronting a much smaller settlement, the Western District of Wisconsin refused to award fees until counsel provided "information that would allow the court to calculate the lodestar as a cross-check on the reasonableness of the fees." *Behrens v. Landmark Credit Union*, 2018 WL 3130629, 2018 U.S. Dist. LEXIS 106358, at *17 (W.D. Wis. Jun. 26, 2018).

Nor is it correct that consideration of lodestar contradicts market-mimicking principles. Fee Motion 16. The "amount of work necessary to resolve the litigation" "affects the market rate for legal fees"; it is "common" for "private fee agreements" to "tie the incentives of lawyers to those of the class by linking increased compensation to extra work." *Stericycle*, 35 F.4th at 566 (internal quotation omitted); *see also Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.,* 897 F.3d 825, 833 (7th Cir. 2018). Applying a lodestar crosscheck does not supplant a scaled percentage approach; private arrangements consider both the size of the settlement and the amount of work necessarily expended. Both inquiries ensure that counsel doesn't receive a windfall to the detriment of their client. Indeed, the Circuit has suggested that a lodestar multiplier of two might be a "sensible ceiling" to avoid unwarranted attorney

[5] *See, e.g., Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014).

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 found that plaintiffs' counsel provided their lodestar in 96.8% of attorney fee motions in settled securities cases. Choi, Stephen J., Jessica Erickson and Adam C. Pritchard, *The Business of Securities Class Action Lawyering*, 99 IND. L. J. 775, 828 (2024). Not doing so here is a major red flag. Cohen 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 arising from the overlapping *Buchanan* litigation and from having multiple firms serve as class counsel.

E. Because class counsel has undermined class objection rights with unnecessary obstacles, the quality of their representation does not support their fee request.

Notwithstanding class counsel's natural preference for unopposed approval proceedings, their fiduciary duty includes the obligation to respect class members' Rule 23 procedural rights: notice and the opportunity to object or opt out. Failure to discharge this obligation reflects negatively on the quality of class counsel's representation. *See, e.g., In re SW Airlines Voucher Litig.*, 898 F.3d 740, 742 (7th Cir. 2018). In turn, the quality of their representation affects the fee that the class owes them. *Id.*; *Broiler Chicken*, 80 F.4th at 802. Here, class counsel has failed to respect the proper Rule 23 process in several ways.

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 objector "handicap" that *Redman* denounced. 768 F.3d at 638. 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).

As discussed in Section IV of Cohen's Settlement Objection, the notice also fails to apprise class members of the terms of the settlement, the benefits conferred on class members, and the

preexisting relationship between Class Counsel Hutchinson's firm and the proposed *cy pres* beneficiary. Cohen Settlement Obj. 6-7. Moreover, counsel's proposed settlement imposes multiple improper obstacles in the way of class members wishing to exercise the right of objection. Cohen Settlement Obj. 7-9.

"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). The 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) (Koh, J.) (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). When acting in equity, a court ought 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." *Diffenderffer v. Winder*, 3 G. & J. 311, 348 (Md. 1831). The quality of class counsel's representation, as seen through their mistreatment of objectors and opt-outs, does not support the above standard fee that counsel request.

CONCLUSION

If the Court approves the settlement, it should deny the fee motion without prejudice until Plaintiffs have submitted class counsel's lodestar for scrutiny by the class and Court. In the alternative, it should award no more than 20.6% of the settlement, in line with a modified *Capital One TCPA* scale that accounts for the *Buchanan* litigation.

Dated: March 27, 2026

/s/ Adam E. Schulman
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Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection via the ECF system for the Central District of Illinois, thus effecting service on all attorneys registered for electronic filing.

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:

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Dated: March 27, 2026

/s/ Adam E. Schulman