

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE  
MYLAN, N.V. SECURITIES LITIGATION

Case No. 2:20-cv-00955-NR

CLASS ACTION

Hon. J. Nicholas Ranjan

---

THEODORE H. FRANK,

Objector.

---

**REPLY IN SUPPORT OF THEODORE H. FRANK'S OBJECTION TO FEE REQUEST**

---

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... ii

Introduction..... 1

I. The Court should hold Class Counsel to the 2020 Agreement’s fee ceiling. .... 3

    A. After-the-fact approval does not substitute for judicial review. .... 9

    B. Attorneys’ fee should be net of administration expenses. .... 10

    C. The un rebutted market evidence suggests an award of approximately 11%. .... 11

II. The history of apparent pay-to-play demands scrutiny for this fee request. .... 12

    A. The Court should exercise authority to allocate attorneys’ fees between firms. .... 16

    B. Lodestar cross-check remains impossible. .... 17

III. The minimal result at an early stage of litigation does not justify a premium fee award. .... 17

Conclusion ..... 20

Certificate of Service..... 21

### Introduction

Frank objected to a \$14.9 million fee request as excessive for a \$60 million settlement reached at an early stage in litigation. *See* Dkt. 165 (“Objection”). Among other things, the requested percentage exceeds the amount allowed under the 2020 retention agreement previously undisclosed to the Court and class. Objection at 6 & n.2; *see* Dkt. 165-2 (“Original Agreement” or “2020 Agreement”). That agreement—reached before the outcome was known and when risk was at its highest—would yield a fee less than half of what Class Counsel now seek, less than \$6.5 million.

Class Counsel’s response fails to grapple with the central defects identified in the Objection. Plaintiff argues the agreement permits a higher request because MissPERS individually did not stand to gain \$10 million from the settlement. Dkt. 169 (“Pl. Rep.”), at 5-6. This argument has two problems. *First*, it simply ignores the Seventh Circuit’s discussion of the nearly verbatim MissPERS retention in that case. The panel found Plaintiff’s same proposed interpretation “improbable, arbitrary, unreasonable, and not consistent with a class representative’s fiduciary duty to class members.” *In re Stericycle Sec. Litig.*, 35 F.4th 555, 561 (7th Cir. 2022). Frank specifically identified this issue (Objection 6 n.2), yet Class Counsel does not explain how their previously-rejected interpretation squares with MissPERS’s fiduciary duty. Indeed, by Class Counsel’s own account, their interpretation of the 2020 Agreement that they failed to disclose to the Court renders the fee schedule entirely superfluous—a sure sign under Third Circuit law that their interpretation is wrong.

*Second*, MissPERS *admits* (Pl. Rep. 7) that the retention agreement was modified in response to *Stericycle*, but does not attempt to rationalize how this giveaway serves the fiduciary interests of class members. Plaintiff claims the revision is merely a “clarification” effectively declaring that it seeks the very terms that *Stericycle* found arbitrary, unreasonable and unethical even after being told as much. Assistant Attorney General Ryals does not attempt to explain how this amendment served the interests of MissPERS’s fiduciary, the unnamed class members. Dkt. 169-2 (“Ryals Decl.”), ¶ 5.

MISS. CODE § 7-5-8 counsels against, rather than for, Class Counsel’s interpretation of the 2020 Agreement. The Mississippi legislature considered *and removed* explicit language that would have

given the Code the meaning Class Counsel claims now. The Court should decline Class Counsel's invitation to amend the statute so that "any recovery" means something other than "any recovery."

Class Counsel does not meaningfully engage with the undisputed facts about this litigation: it settled before full discovery, without depositions, without class certification proceedings, and for a recovery representing less than one percent of the damages originally alleged. Yet counsel seeks a premium fee as if this were a high-risk, hard-fought, or exceptional result. The response offers conclusions about risk and effort, but it does not reconcile those conclusions with the actual procedural history or the outcome achieved. If this poor result at an early stage is worth the 25% Class Counsel concedes is the maximum they could ask for, what incentive is there ever to engage in the additional risk of taking a case to trial?

Finally, Mr. Frank raised concern about indicia of pay-to-play: are there undisclosed side payments to third parties to earn the favor of political actors with control over MissPERS? *See, e.g., E.g., Ark. Teachers Ret. Sys. v. State St. Bank*, 512 F. Supp. 3d 196, 215-17, 230-32 (D. Mass. 2020) (investigation into undisclosed \$4.1M payment of fee request to unrelated politically-connected law firm who had done no legal work on case for "favors" and "political activity"). Class Counsel and MissPERS fervently deny that there is any agreement to benefit MissPERS itself, but that is not a concern Frank raised—leading to a remarkable negative pregnant. It is akin to a Lance Armstrong responding to allegations of doping by indignantly denying having ever stolen a bicycle. If there was reasonable cause for court scrutiny into pre-existing side deals when Mr. Frank first objected, it now arrives at this Court with a blaring alarm bell.

In short, the core arguments of the Objection remain unanswered. Where the only contemporaneous market evidence, the structure of the settlement, and the record of the litigation all point in the same direction, the Court's fiduciary duty requires more than deference to counsel's request. It requires careful scrutiny—and a fee award that reflects the reality of what was achieved and how it was obtained.

**I. The Court should hold Class Counsel to the 2020 Agreement’s fee ceiling.**

Class Counsel engages in the same contract parsing that the Seventh Circuit rejected in *Stericycle* without meaningfully engaging with the Objection’s central premise: that a fee agreement negotiated at the outset of the litigation provides the most reliable benchmark of a reasonable fee. *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreement is most reliable for “aligning the interests of the class and its lawyers during the pendency of the litigation”); Obj. 6 (citing Perino, *et al., Is the Price Right*). Class Counsel contends, despite *Stericycle* finding otherwise, that the Original Agreement only required smaller fee percentages when recovery to MissPERS individually exceeds \$10 million.

Regardless of the subjective intent of the initial agreement, the Seventh Circuit observed that a faithful fiduciary would insist that all class members enjoy the protection from excessive fees. Reading the agreement otherwise leads to absurd results. For example, Class Counsel argues (Pl. Rep. 6 n.3) that if the settlement fund had been \$5.1 **billion** that MissPERS *still* would not have a recovery in excess of \$10 million, and therefore the fee could remain 25% under the Original Agreement. There are two problems with this. *First*, it would mean that the parties negotiated complicated terms of a fee agreement that Class Counsel now claims were always intended to be superfluous. This is not just absurd, but violates the basic law of contract interpretation. “Contract provisions are to be interpreted so as to give each provision meaning, rather than rendering some provisions superfluous.” *Carter v. Exxon Co. USA*, 177 F.3d 197, 206 (3d Cir. 1999); *accord Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 167 (3d Cir. 2011). Only the *Stericycle* reading prevents violation of this interpretive canon. *Second*, this hypothetical \$1.275 billion fee request would be jaw-dropping and audacious, “well above fees awarded for such large funds,” which is one reason *Stericycle* discounted this interpretation as “improbable.” 35 F.4th at 561.

Beyond these basic problems, *Stericycle* found Class Counsel’s interpretation inconsistent with the duties of class representatives. As written, the term only considers recovery to MissPERS, implying that other class members can be charged full price with only the fee attributable to MissPERS discounted. “[B]ut the award affects the fortunes of the entire class” because compensation reduces

the distributable common fund, and “representatives owe fiduciary duties to class members.” *Stericycle*, 35 F.4th at 562. Class Counsel’s interpretation would lead to arbitrary, paradoxical, and conflicted outcomes, where class members would be better off if MissPERS individually was entitled to a disproportionate share of the fund. “It is hard to see how those class members would be well served by an agreement where they recover less if the Mississippi fund’s share of the losses is, for example, 20 percent rather than 50 percent.” *Id.* In other words, an named plaintiff must consider the *class’s* interest in restraining fees, not only its own individual interest. For this reason, *Stericycle* vacated and remanded the 25% fee award for the (smaller) \$45 million settlement, instructing the district court to “give that evidence [the nearly-verbatim fee retention agreement] substantial weight in assessing the reasonableness of the proposed award.” *Id.* at 563. The 2020 Agreement reflects an *ex ante* fee agreement that a fiduciary would construe for the benefit of all class members, not merely a flat 25% limit as Class Counsel proposes.

The abdication of fiduciary duty is even more pronounced here where Plaintiff **admits that the Original Agreement was replaced in view of *Stericycle***. Pl. Rep. 7. From the face of the agreements and Plaintiff’s admission it was made “in part” in response to *Stericycle*, this amendment only serves to permit Class Counsel to evade *Stericycle’s* class-favorable reading of Bernstein Litowitz’s retention agreement and seek a higher fee percentage. Attorney Ryals’s declaration is conspicuously silent about why MissPERS, a fiduciary for the class tasked with stewarding the class’s interest against the any encroaching interests of the class’s attorneys,<sup>1</sup> would impose millions of dollars more fees upon the class relative to the Original Agreement as interpreted by *Stericycle*.

Attorney Ryals purports to opine on the intended interpretation of the Original Agreement and characterizes the Superseding Agreement as “to further clarify—but not alter—the intent of the provision” (Ryals Decl. ¶¶ 6-7), but provides no foundation for her “personal knowledge” of the original intent and 2020 negotiations beyond her *ipse dixit* assertion. It appears Ms. Ryals was a law

---

<sup>1</sup> *E.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 265-267 (3d Cir. 2001).

student at the time the agreement was entered.<sup>2</sup> Whatever the original intent, MissPERS was certainly aware of *Stericycle's* interpretation at the time of the amendment. Ms. Ryals's declaration is conspicuously silent about why MissPERS decided to chart a course that the *Stericycle* panel found "improbable, arbitrary, unreasonable, and not consistent with a class representative's fiduciary duty to class members." *Stericycle*, 35 F.4th at 561. Attorney Ryals does not explain why MissPERS would discard a provision favorable to the class. Class Counsel certainly contends that they never believed they were obliged to request a fee percentage (Dkt. 169-3, ¶ 4), and presumably counsel regard *Stericycle* as mistaken. But as a fiduciary for the class, supposedly acting to control costs and "yield the best possible result for...the class" (Ryals Decl. ¶¶ 16-17), MissPERS does not explain why it "amended" an agreement that had been given a pro-class interpretation by *Stericycle* as part of a "clarification" that benefits only their retained counsel. Whether or not MissPERS originally intended to provide the class with favorable fee provisions or just negotiated a complicated superfluous clause for no reason, its 2023 decision to discard these clauses for no apparent consideration whatsoever puts their Rule 23(a)(4) adequacy in question. Class counsel should not be allowed to "replay [their] hand." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (district court's fiduciary duty to class members did not permit defendant to withdraw from settlement after change in the law).

Ms. Ryals's and Class Counsel's claims would render clauses of the agreement superfluous. It does not substitute for legal interpretation. Adopting the *Stericycle* interpretation not only provides cross-circuit consistency, but (1) conforms with binding Third Circuit precedent; and (2) avoids Rule 23(a)(4) problems with MissPERS's expressed willingness to shortchange the class's recovery.

Class Counsel argues that their reading of the Original Agreement is required by MISS. CODE § 7-5-8, but no such limitation appears in the code, and, in fact, the legislature expressly rejected it. The statute says in relevant part:

---

<sup>2</sup> TENN. BD. OF PROFESSIONAL RESPONSIBILITY, Attorney Details for Ryals, Laken Hanna, [www.tbpr.org/attorneys/040204](http://www.tbpr.org/attorneys/040204). Attorney Ryals appears to have graduated law school on May 14, 2021, based on a social media post that appears consistent with her background. *See* [archive.ph/w7zRM](https://archive.ph/w7zRM) (archived from Instagram).

(a) The state, an arm or agency of the state, or a statewide elected officer acting in his official capacity may not enter into a contingency fee contract that provides for the outside attorney to receive a contingency fee, exclusive of reasonable costs and expenses incurred in connection with the case, which is in excess of the following:

(i) Twenty-five percent (25%) of any recovery of up to Ten Million Dollars (\$10,000,000.00); plus

....

(v) Five percent (5%) of any portion of such recovery exceeding Twenty-five Million Dollars (\$25,000,000.00).

(b) Except as provided in subsection (3) of this section, a contingency fee shall not exceed an aggregate of Fifty Million Dollars (\$50,000,000.00), exclusive of reasonable costs and expenses incurred in connection with the case, and irrespective of the number of lawsuits filed or the number of attorneys retained to achieve the recovery.

MISS. CODE § 7-5-8(2)(a) & (b). “Recovery” is not defined here or elsewhere as recovery to a Mississippi entity—it is simply “recovery,” as it says. The quoted text supports *Stericycle*’s interpretation that “any recovery” means precisely what it says because otherwise the aggregate fee limit would not be intelligible. It does not define an aggregate contingency fee for only MissPERS recovery, but instead requires a hard limit for any sort of contingency fee whatsoever.

Plaintiff says (Pl. Rep. 7) that “[t]his Mississippi statute is modeled on a provision that has been adopted by several other states,” but this very fact militates *against* reading in such a limitation. The model statutes both contain express limitations capping contingency fees solely for “state’s portion of the recovery” (ARIZ. REV. STAT. § 41-4803(A)) and “only with respect to the state’s share of any judgment, settlement amount, or common fund.” UTAH CODE § 67-5-33(2)(c)(i). That Plaintiff admits that Mississippi modelled its statute on these laws yet did *not* include a similar provision confirms it was intended to cap attorneys’ fee requests for “any recovery,” exactly as *Stericycle* found. Mississippi legislators saw these laws and deliberately chose not to imitate them in this respect. “[A] material variation of terms suggests a variation in meaning.” Antonin Scalia & Bryan A. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012).

Indeed an earlier version of the bill, passed by the Mississippi state senate on April 30, 2012 was similar to the statues of Arizona and Utah. It applied limits based only on “Recovery *by the state of Mississippi*.”<sup>3</sup> The Conference report, issued the next day and adopted by both chambers by May 2, 2012 changed this phrase to “any recovery,” and MISS. CODE § 7-5-8 passed into law substantially unchanged from this version.<sup>4</sup> “Few principles of statutory construction are more compelling than the proposition that [a legislature] does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (internal quotation marks omitted).

This language makes sense in the context of the enacting legislation, 2012 Miss. H.B. No. 211, called the “Sunshine Act.” The Republican-majority legislature sought to rein in activities of the Democratic Attorney General Jim Hood in the wake of coverage concerning attorney Dickie Scruggs’s bribery conviction and his contingency work for Mississippi in the tobacco settlements, which netted his firm roughly \$1.5 billion, along with substantial windfalls for a former attorney general friendly with Mr. Hood. *See* Maggie Haberman, *Mississippi winds down as trial lawyer haven with sunshine law*, POLITICO (May 23, 2012). The legislature was evidently concerned that plum state contracts were being exchanged for political favors as allegedly occurred in the tobacco litigation. Therefore, the limit would have obvious perverse incentives if it only applied to “Recovery by the State of Mississippi” as the rejected version of H.B. 211 would have done. Outside the highly formalized confines of Private Securities Litigation Reform Act litigation, attorneys can easily gerrymander recovery by giving the state less and diverting funds to class members or other third parties, which would entirely evade statutory limits premised on recovery to Mississippi alone. Had the tobacco settlements been structured under Class Counsel’s proposed interpretation, someone like Dickie Scruggs would simply

---

<sup>3</sup> Mississippi State Senate, Senate Amendments to House Bill No. 211 (Apr. 30, 2012), [https://billstatus.ls.state.ms.us/documents/2012/pdf/sam/Amendment\\_Report\\_for\\_HB0211.pdf](https://billstatus.ls.state.ms.us/documents/2012/pdf/sam/Amendment_Report_for_HB0211.pdf). Earlier versions of the bill available on the legislature’s website did not include limits on contracted contingency fees.

<sup>4</sup> Mississippi Legislature, Report of the Conference Committee (May 1, 2012), [re: HB 211] <https://billstatus.ls.state.ms.us/documents/2012/pdf/cr/HB0211CR.pdf>.

steer the proceeds exclusively to future claimants or charitable organizations, cutting Mississippi out of the windfall, and so allegedly escaping contingency fee limits. Writing the statutory limit instead based on “any recovery” avoids such gamesmanship by applying to any contract for any recovery—whether direct, class, or *parens patriae*—and regardless of beneficiary.

MissPERS says that the Attorney General has the prerogative to interpret statutes (Pl. Rep. 7), but courts “typically refrain from reading into statutes words that plainly aren’t there.” *Gov’t Employees Ret. Sys of the Virgin Islands v. Virgin Islands* (3d Cir. 2021) (citing *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020)). “The statute says what it says—or perhaps better put here, does not say what it does not say.” *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. 416, 426 (2018). This is especially true here, where the legislature considered, the state senate actually passed, and then the body discarded a version of the bill that only limited fees for direct Mississippi recovery. “Atextual judicial supplementation is particularly inappropriate when, as here [the legislature] has shown that it knows how to adopt the omitted language or provision.” *Rotkiske v. Klemm*, 589 U. S. 8, 14 (2019).

This Court should give no deference to the attorney general’s putative interpretation of Miss. Code § 7-5-8. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). Whether Mississippi courts would follow *Chevron* or *Loper Bright* is an open question, but there is no reason to think they would defer to the executive where the interpretation came not as the considered judgment of an agency rulemaking under a statute but as an *ad hoc* decision as the object of the regulation that is bound by the statute. *United States v. Mead Corp.*, 533 U.S. 218, 233-34 (2001); *Refrigeration Sales Co. v. State ex rel. Segrest*, 645 So. 2d 1351, 1355 (Miss. 1994) (refusing deference to informal policy as agency interpretation of government contracting statute). Nor would Mississippi courts defer to an agency’s interpretation that contradicts the “best reading” of the statute. *Dean v. Public Emples. Retirement Sys.*, 797 So. 2d 830, 835 (Miss. 2000) (citing cases). Deference should not be accorded even when the statute is ambiguous, much less when the legislature considered and rejected Plaintiff’s proposed interpretation. *Cardoza-Fonseca*, 480 U.S. at 442-43.

Of course, neither Mr. Hood nor Ms. Fitch have ever interpreted MISS. CODE § 7-5-8 this way, but given the strength of the statutory argument, it does not speak well of MissPERS’ discharge of its

fiduciary responsibilities. The Court should follow the much more persuasive Seventh Circuit interpretation and view MissPERS's current position with at least skepticism, especially in view of its history. *See* Section II, below.

One additional reason to reject Class Counsel's interpretation of the 2020 Agreement and the 2023 modification: if the contracts are so clear-cut and favorable to Class Counsel, why hide them from the Court and the class instead of including them in the original motion for fees, and then only argue for this interpretation after an objector raises their existence to the Court?

In sum, Class Counsel's arguments about alleged intent and Mississippi law elide Mr. Frank's argument based on *Stericycle*. The Original Agreement fee provisions, as interpreted under *Stericycle*, represent those that a responsible fiduciary would impose *ex ante* from the outset of the case. For this reason alone, they should carry significant weight. *Cendant*, 264 F.3d at 282-83. Even if the Mississippi Attorney General has unilateral authority to rewrite provisions rejected by the legislature, *Stericycle*'s persuasive logic holds and is almost entirely unrebutted by Class Counsel.

**A. After-the-fact approval does not substitute for judicial review.**

Class counsel's reliance on the Mississippi Attorney General's after-the-fact approval of the fee request fares no better. *E.g.* Ryals Decl. ¶ 8. Approval obtained after the settlement amount is known does not replicate the conditions of an arm's-length negotiation *ex ante*. It is necessarily informed by hindsight and subject to the same structural concerns that animate judicial scrutiny of class action fees.

The Third Circuit has emphasized that the Court's Rule 23(h) role is independent and non-delegable. *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022) (*quoting Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (2001)); Obj. 5. That duty cannot be satisfied by deferring to a lead plaintiff's *post hoc* endorsement—particularly where, as here, the contemporaneous agreement between the same parties reflects a substantially lower valuation of counsel's services. This is before considering that the Attorney General may have conflicted interests, discussed below in Section II.

Nor does the response explain why the original agreement was superseded only after—and in partial response to—the *Stericycle* opinion. The timing of that change underscores why the Court should give greater weight to the Original Agreement, which was agreed *ex ante*.

**B. Attorneys’ fee should be net of administration expenses.**

Class Counsel argues (Pl. Rep. 22-24) that administration costs should not be deducted from the gross fee fund prior to calculating attorneys’ fees, but the Original and Superseding Agreement define relevant “expenses” broadly, as does the Private Securities Litigation Reform Act. “Total attorneys’ fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount ... *actually paid to the class.*” 15 U.S.C. § 78u-4(a)(6) (emphasis added). Both versions of the retention agreement specify a percentage recovery “net of expenses” where “costs and expensive” are defined without limitation as all manner of “costs and expenses incurred” to secure the award and that counsel “ may seek reimbursement from the Court from any gross recoveries secured through pursuit of the Claims.” Original and Superseding Agreements, ¶ 5.B & Exhibit B. Class Counsel distinguishes *Redman* as a coupon settlement (Pl. Rep. 24), but they do not cite or even mention that the text of the Private Securities Litigation Reform Act demands percentage awards be based on actual (i.e. net) shareholder recovery.<sup>5</sup> In any event, the *Redman* principle is broad: class members do not enjoy money consumed in the administration process, and they are “not indifferent” between money that goes to them and money that goes to third-parties. *In Baby Prods.*

---

<sup>5</sup> Class Counsel cites *Lan v. Ludrof*, which fixed a 25% fee award from a \$5.2 million gross fund and concluded that the settlement was not governed by the PSLRA and that in any event the 25% fee request was lower than the 30% maximum fee request noticed to the class. No. 1:06cv114-SJM, 2008 WL 763763, 2008 U.S. Dist. LEXIS 22574, at \*67 (W.D. Pa. Mar. 21, 2008). Obviously, a \$60 million common fund is much larger than \$5.2 million, and Class Counsel makes no argument that this settlement should not be governed by the PSLRA.

The issue was not presented to the Third Circuit in *In re AT&T Corp.*, and all of Class Counsel’s other citations appear to be adopted proposed orders with no meaningful objection. Pl. Rep. 23. See *Sakiko Fujimara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014) (“By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that ‘caselaw’ is so generous to plaintiffs’ attorneys.”)

*Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013); *Lachance v. Harrington*, 965 F. Supp. 630, 648 (E.D. Pa. 1997) (importance of incentivizing counsel to maximize class’s recovery) (both cited at Objection 18, but not by Plaintiff).

Class Counsel quibbles that the administration expenses were not finalized and that \$500,000 is only a ballpark estimate for the settlement agreement because the ultimate cost will “depend on the number of claims received.” Pl. Rep. 23-24. This is unremarkable and simply puts Class Counsel in the same boat as class members, who cannot be paid *pro rata* until the number of claims and administration costs are accurately known. When the administrator can provide a firm estimate for resolving the claims, this amount should be deducted from the gross common fund. There is no rule that Class Counsel must be paid months or even years before class members can be. *See, e.g., In re All-Clad Metalcrafters, LLC*, 2023 WL 2071481, 2023 U.S. Dist. LEXIS 27868, \*37 (W.D. Pa. Feb. 17, 2023) (Ranjan, J.) (deferring a portion of attorneys’ fee award pending claims administration).

**C. The unrebutted market evidence suggests an award of approximately 11%.**

In sum, Class Counsel does not dispute Frank’s calculation that the only contemporaneously negotiated fee structure (as interpreted by *Stericycle*) yields a fee of roughly 11%, or slightly less than \$6.5 million factoring in expenses. Obj. 1, 6. This structure represented the parties’ assessment of risk and importantly class counsel’s willingness to work on the matter. No competing market evidence supports the substantially higher percentage now sought. Class Counsel cites *ex post* fee awards from other cases—some with dramatically different fact patterns—but these are less reliable than *ex ante* agreement in this case secured by the parties. (Such anecdotal examples are also less reliable than the empirical surveys discussed in Frank’s objection. Obj. 16.). Where the only reliable evidence of market pricing points in one direction, and class counsel offers no reason to disregard it, the Court should give that evidence substantial weight in determining a reasonable fee.

At a minimum, the existence of the Original Agreement, although it was subsequently superseded, demonstrates that the requested 25% fee is not anchored in the market for legal services

but instead reflects a *post hoc* effort to capture a larger share of the common fund. The Court's fiduciary duty to the class requires that the fee award be reduced accordingly.

## II. The history of apparent pay-to-play demands scrutiny for this fee request.

Class Counsel argues against the Court allocating attorneys' fees between firms and against providing detailed billing because courts often dispense with such transparency. Pl. Rep. 17, 21. True enough they often do, but few class-action settlements are reached by representatives that have the history of MissPERS and Class Counsel.

To be clear, Frank's Objection does not ask the Court to presume misconduct. It asks the Court to recognize that this litigation arises against a backdrop of longstanding and well-documented concerns regarding the relationship between MissPERS, the Mississippi Attorney General's Office, and the law firms appearing before the Court. Those concerns have been discussed by courts, academics, journalists, and even former attorneys associated with Class Counsel. *See* Obj. 4-9. The prospect of pay-to-play has trailed Bernstein Litowitz since the very first case that this Circuit even addressed the phenomenon. *Cendant*, 264 F.3d at 280. Whether those concerns ultimately prove well-founded in any particular case is beside the point. Their existence is precisely why ordinary assurances of propriety are insufficient here—and, as discussed below, the assurances here are far short of even full denials.

The Third Circuit has specifically identified the risk that campaign contributions and repeat relationships between public pension funds and securities class action firms can undermine the Private Securities Litigation Reform Act's expectation that lead plaintiffs will vigorously negotiate and supervise attorneys' fees. *See Cendant*, 264 F.3d at 270 n.49. "In such a situation, there would also be reason to fear that the lead plaintiff would be complacent and unwilling to object to an excessive fee request, thus defeating the Reform Act's goal of lead plaintiff-controlled, rather than lead counsel-controlled, litigation." *Id.* Such "pay-to-play arrangements" are "problematic." *In re AT&T Corp. Secs. Litig.*, 455 F.3d 160, 168 (3d Cir. 2006). The concern is not that *every* contribution is corrupt or *every* repeat relationship improper; it is that courts cannot simply assume arm's-length bargaining where

structural incentives point in the opposite direction. MissPERS and the Attorney General’s Office have submitted briefs and declarations assuring the Court that the fee request was independently reviewed and approved. But Rule 23(h) exists because courts do not merely ratify the conclusions of lead plaintiffs and class counsel. The Court owes an independent fiduciary duty to absent class members. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (3d Cir. 2001).

MissPERS’s cavalier interpretation of MISS. CODE § 7-5-8, raised by Plaintiff in effort to justify giving away the pro-class fee terms of the Original Agreement, provides another reason to suspect some level of political influence. Given the statutory history—where the legislature rejected the precise interpretation offered by Class Counsel—it does not make sense that a fiduciary would insist that only recoveries to Mississippi itself trigger an obligation to limit fees. It makes even less sense that MissPERS would itself “request” (Pl. Rep. 7) the amendment to the fee agreement, against the class’s interest. But it might make sense given that MissPERS is under the sole control of an Attorney General who has received at least \$315,000 in campaign contributions from Class Counsel and its partners since 2019, which is a considerable sum given that it only cost Ms. Fitch \$535,325.88 to conduct her 2023 reelection campaign. Dkt. 165-1 (“Frank Decl.”), ¶¶ 17, 20.<sup>6</sup>

Under ordinary circumstances, a court might reasonably accept less detail concerning fee allocations or billing records. But where Class Counsel asks the Court simultaneously to approve a substantial fee award, to forego scrutiny of how that award will be distributed among firms, and to accept “block billing” summaries that prevent meaningful review, the history discussed in the Objection and Frank Declaration become highly relevant. Transparency is one mechanism by which those concerns are addressed.

---

<sup>6</sup> The comparatively low outlays for Ms. Fitch to secure reelection mean that her campaign fund has amassed \$3,553,260 as of the end of 2025. *See* Dkt. 165-8 at F-80. This is not just enough to run for reelection several times over, but enough to create a substantial deterrence against primary challenges or even serious general-election opposition. This money is also useful to any future political ambitions because it can be rolled over into a campaign with higher costs. For example, Mr. Hood used his campaign funds to run for governor in his much more costly (if unsuccessful) 2019 election attempt.

MissPERS and Class Counsel purport to address Frank’s argument by denying propositions that Frank never made. It’s good that “MissPERS will receive no [undisclosed] benefit from Lead Counsel or any other person in connection with this litigation” (Ryals Decl. ¶ 9), but this was not Mr. Frank’s concern. Likewise, Frank “offered no evidence” of “side agreements” (Pl. Rep. 9) between MissPERS and Class Counsel because he never suggested any such agreements exist. Imagine if Lance Armstrong responded to claims of doping by asserting that he had never stolen a bicycle. This may be true, but it is also conspicuously non-responsive. The negative pregnant requires scrutiny.

The issue Frank raises pertains to possible “pay-to-play.” *E.g.*, *Ark. Teachers Ret. Sys. v. State St. Bank*, 512 F. Supp. 3d 196, 215-17, 230-32 (D. Mass. 2020) (investigation into undisclosed \$4.1M payment of fee request to unrelated politically-connected law firm who had done no legal work on case for “favors” and “political activity”). Specifically, (1) every qualified monitoring counsel donates liberally to the Attorney General, who has absolute statutory authority over MissPERS, and (2) co-lead counsel Bernstein Litowitz allegedly previously diverted “work” to unnecessary but politically-connected Mississippi attorneys, both of which give the appearance of *quid pro quo*. *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016); Frank Decl., ¶¶ 13-55 & Exhs. C-F.

MissPERS gets closer to the issue when it assures there is a non-political process for selecting firms to litigate potential cases flagged by monitoring or “panel” law firms. Ryals Decl. ¶ 12-14. But the problem here is that *every* monitoring firm appears to be a significant donor to the Attorney General (regardless of that person’s political party!).<sup>7</sup> It may be well that the Assistant Attorney Generals are perfectly apolitical when deciding who should represent MissPERS and other Mississippi entities, but the entire menu of approved monitoring firms are composed from firms who act as if they need to pay in order to play. These are the “panel of approved firms” who present potential cases and who

---

<sup>7</sup> Attorney Ryals also explains purported reasons that the Office of Attorney General decided to “recommend” seeking appointment with Bernstein Litowitz as class counsel (Ryals Decl. ¶ 15), but as discussed above (at p.4 & n.2), the foundation for this testimony is unclear because Ryals was not an attorney at the time.

ultimately secure appointment. Ryals Decl. ¶ 18. *See generally* Choi, et al., *The Business of Securities Class Action Lanyering*, 99 IND. L. J. 775, 785 (2024) (noting that many institutional investors are more concerned with portfolio monitoring rather than litigation success). If, as in *State Street*, there is an undisclosed “arrangement” for a politically-connected law firm to have a disproportionate share in an oversized attorney fee in exchange for the attorney general’s favor, then the class is paying for shenanigans instead of real legal work. Thus, the policy does *not* prove that “political contributions played no role” in the selection of counsel for the litigation as claimed. Pl. Rep. 9 n.4. It simply relocates *when* political favoritism manifests. How does a firm get to be on the panel of qualified monitoring firms? How does a panel firm remain there? MissPERS says that “[c]ampaign contributions have no consideration in the selection process” (Ryal Decl. ¶ 12), but Class Counsel’s undisputed history of political donations is suggestive. In February 2006, Hood retained Bernstein Litowitz for the first time as lead counsel for MissPERS in the Delphi Corporation securities class action “just days after receiving \$25,000 in donations” from the firm’s attorneys.” *Pay-to-Play and the Tort Bar*, WALL ST. J. (Oct. 31, 2009)).

Class Counsel seek refuge in their constitutional right to make political donations (Pl. Rep. 8), but the Objection takes no issue with expressive donations.<sup>8</sup> It may be that Class Counsel and its partners formerly supported Democrat Jim Hood’s fight for the “ordinary Mississippians” left behind, and then precisely in 2019 when Republican Lynn Fitch ran to replace Hood became enamored with her fight to criminalize abortion, and assist in the deportation of illegal immigrants. Frank takes no position on the existence or sincerity of Class Counsel’s political views, but modestly observes that there might be a more straightforward explanation for donating tens of thousands of dollars year-after-year to the individual who has sole control over MissPERS’s litigation.

---

<sup>8</sup> *Quid pro quo* corruption is of course not protected by the First Amendment, and the potential for it is why federal campaign contributions—as opposed to direct speech—are limited per donor and campaign cycle without running afoul of the First Amendment. Mississippi does not have similar limits which is how, for example, Class Counsel firms have contributed \$30-\$50,000 chunks that exceed annual federal limits.

**A. The Court should exercise authority to allocate attorneys' fees between firms.**

Class Counsel cites a number of cases where courts declined to allocate the attorneys' fee award (Pl. Rep. 21), and indeed it rarely occurs, but the facts here bear more scrutiny. In addition to the interim co-lead counsel, two other Mississippi firms have submitted a small number of hours. Class Counsel argues that the mere disclosure distinguishes the case from the situation described by the whistleblower in *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132 (2d Cir. 2016), but the essentially allegation there is that the retention of politically-connected Mississippi attorneys by lead counsel was a means to funnel *quid pro quo*. The failure to disclose the firms to the Court was simply an aggravating circumstance. The Court should require the disclosure of retention agreements with these firms and fix the fee awards for all of them itself.

Class Counsel argues that *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, is inapposite because that case involved multiple billing firms with no clear chain of command (Pl. Rep. 22), but this is not the only reason for the Court to investigate and set the distribution of an attorneys' fee award. Frank predicted this argument. Objection 8 (explaining that dismissing *High Sulfur* as an internal disagreement among plaintiff counsel "ignores the value of 'the court's equitable review function' for the class's benefit"). Courts seldom scrutinize such distributions precisely because a clear chain of command normally does exist, and firms submitting a fee request work together. Yes, the *High Sulfur* opinion only exists because dissident law firms objected to the process. Here, the past use of unnecessary counsel as an apparent means to funnel funds to those connected to politicians is reason enough. Frank does not have a smoking gun as of the date of this filing, but, in the absence of a whistleblower, ordinary class members cannot obtain such a smoking gun without a diligent Court helping. Transparency on the issue, as happened in *State Street*, is sometimes surprisingly revealing.

The Court should require disclosure of any fee allocation (including pre-objection agreements about fee allocation) and investigate whether side agreements or pay-to-play dynamics affected the fee request. From the perspective of class welfare, "publicizing the process leading to attorneys' fee allocation may discourage favoritism and unsavory dealings among attorneys even as it enables the court better to conduct oversight of the fees." *High Sulfur*, 517 F.3d at 230. Transparency is a win-win.

Given the non-denial denials, the Court should exercise its discretion here for transparency.

**B. Lodestar cross-check remains impossible.**

Class Counsel provides a new breakdown of hours that appears to show few hours were billed after an agreement-in-principle was struck, but this does not resolve the Objection that review of hours regularly reveals padding, duplications, unnecessary work, and ministerial tasks that should be considered overtime. Objection 12-13.

MISS. CODE § 7-5-5 requires that outside counsel maintain and submit detailed contemporaneous billing the Attorney General upon conclusion of a matter, and Frank simply asks for this to be made available to class members. The billing itself would clarify the large number of hours billed by non-attorneys, and also the work performed by Mississippi “liaison counsel.”

**III. The minimal result at an early stage of litigation does not justify a premium fee award.**

Class Counsel disagrees that nearly \$15 million is an excessive fee award in a settlement resolved prior to any substantive discovery for a settlement fund representing less than 1% of the damages sought. In fact, they emphasize that not even so-called “confirmatory discovery” occurred in response to Frank’s concern that the hours were padded. Pl. Rep. 2, 16-17.

Class Counsel argues that the \$5.1 billion estimated damages were not realistic because most of their claims were dismissed, but this argument is peculiar. Pl. Rep. 11. The settlement is, as Frank argued, “less than one penny on the dollar,” a largely unsuccessful litigation, but which Class Counsel propose to pay themselves as if it were a litigated success. Moreover, the original claims were not entirely extinguished; Class Counsel acknowledges that they “salvaged” a theory that the Court retained jurisdiction over. *Id.* An unresolved claim provides a plaintiff settlement leverage, but her it translated into a pittance. This is Frank’s entire point—the award is not justified by outstanding results.<sup>9</sup> “The class is being asked to ‘settle,’ yet Class Counsel has applied for fees as if it had won

---

<sup>9</sup> Class Counsel faults Frank for not grappling with their expert report prepared in support of settlement (Pl. Rep. 10), but the Declaration states just as Frank said that maximum damages were “\$5.1 billion based on the standard Out-of-Pocket damages methodology applied and in accordance with the plan described herein.” Dkt. 160-4, ¶ 1. The lower estimate of \$86 million only applies if Plaintiff utterly failed to establish liability under its “salvaged” legal theory. *Id.* ¶ 47.

the case outright.” *Sobel v. Hertz Corp.*, 2011 WL 2559565, 2011 U.S. Dist. LEXIS 68984, \*44 (D. Nev. Jun. 27, 2011).

Class Counsel argues that their 25% request is only a slightly higher than studies of *ex post* fee awards (Pl. Rep. 12-13), but these studies group all stages of litigation, including those that survived summary judgment. Accounting for the stage of litigation—pre-certification and pre-discovery—25% is a windfall. *See Stericycle*, 35 F.4th at 566 (fees at the “motion-to-dismiss stage, for instance, would be expected to result in a lower fee than a case that proceeded all the way to trial or beyond”).

Class Counsel argues that the case was risky because no other representative sought appointment (Pl. Rep. 13), but this is misleading in two ways. First, the Private Securities Litigation Reform Act gives almost determinative appointment to the investor that suffered the greatest loss, so when Bernstein Litowitz filed on behalf of MissPERS, no other investor or firm would bother seeking appointment unless they could rival MissPERS’s hundreds of thousands of shares. Dkt. 1 at 26-28. (The extensive holdings of MissPERS under the sole control of Mississippi’s attorney general are useful to plaintiffs firms precisely because of the presumptive control these holdings provide.) Second, Bernstein Litowitz filed the complaint by itself, but when it came time for appointment, another major firm (Kessler Topaz) joined. Dkt. 18. Bernstein Litowitz did not represent that it was incapable of handling the case alone, so the best inference is that Kessler Topaz (which Attorney Ryals notes was also an approved monitoring firm for MissPERS, Ryals Decl. ¶ 18), affirmatively wanted to join the litigation because they found it an attractive opportunity. In other words, not especially risky, and lucrative enough to share between multiple firms.

Class Counsel argues that the low number of objections speaks in favor of approving the fee request (Pl. Rep. 4), but this does not support the fee request. While many objections may signal a

---

Class Counsel also argues that disaggregating the confounding disclosures would result in at most \$1.55 billion in liability and so the settlement represents 4% of the maximum recovery. Pl. Rep. 12. The source of this figure is unclear, and appears second-hand in the Coffman Declaration. *See* Dkt. 160-4, ¶ 68-69 (attributing the disaggregation estimates to Class Counsel’s “understanding,” apparently obtained from consultation with an unnamed damages expert). Even if this were the correct maximum, Frank’s point stands—less than a nickel on the dollar is not an outstanding result either. Obj. 14 (citing surveys).

glaring problem, most class action settlements attract no objections because it is not economically rational for any shareholder—let alone an institutional investor who would have to hire counsel for highly speculative benefit—to file an objection. *See generally* Debra Lyn Bassett, *Class Action Silence*, 94 BOSTON U. L. REV. 1781, 1799 (2014). (Mr. Frank, who lost over \$27,000 on his Mylan investment, is due to receive a check for less than \$100 from this settlement (11 cents/share minus fees and costs), with Class Counsel proposing to collect a hair under \$27.50. Even if Mr. Frank were a billionaire with a million shares at stake instead of a thousand, an objection for solely his private benefit (rather than the public interest at large) would not be worth the dozens of hours of his public-interest firm’s time investigating the matter and researching and writing an objection and reply brief and traveling to Pittsburgh for the hearing—even though that that burden was substantially eased by the experience of the firm’s successful objection to Bernstein Litowitz’s *Stericycle* fee request.) It is the cogency of the objections that matters, not the quantity. *In re GMC Pick-Up Trucks Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995) (finding that “class reaction factor” does not weigh in favor of approval, even when low number of objectors in large class, when “those who did object did so quite vociferously”). Indeed, specifically in the context of securities class actions, the Third Circuit has recognized that “many shareholders” “have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's pro rata benefit.” *Id.* at 812. Institutional investors rarely step forward either; there are only objectors to fee requests in 23% of class action settlements. Lynn A. Baker, Michael Perino & Charles Silver, *Is The Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371, 1389 (2015). “In most cases no objections are lodged, and the absence of objections is not properly interpreted as a signal of approval.” Amanda Rose, *Cutting Class Action Agency Costs: Lessons from the Public Company*, 54 U.C. DAVIS L. REV. 337, 386 (2020). Moreover, the failure of the notice in this case to disclose either the preexisting relationship between MissPERS and Bernstein Litowitz, or the existence of the 2020 Agreement and the mid-litigation amendment of it (to the class’s detriment) “largely defeat[ed] the potential for objection.” *GM Trucks*, 55 F.3d at 813.

### Conclusion

The Court should award approximately 11% of the settlement fund net final administrative expenses, in line with the *ex ante* Original Retention Agreement and Mississippi state law. It should further deny approval of the fee request until class counsel discloses detailed billing and the division of the fee award amongst the differing class counsel.

Dated: June 11, 2026

/s/Theodore H. Frank

Theodore H. Frank  
HAMILTON LINCOLN LAW INSTITUTE  
CENTER FOR CLASS ACTION FAIRNESS  
1629 K Street NW, Suite 300  
Washington, DC 20006  
Email: ted.frank@hlli.org

*In pro. per.*

**Certificate of Service**

I certify that on June 11, 2026, I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to counsel of record by operation of the Court's CM/ECF automated filing system.

Dated: June 11, 2026

/s/ Theodore H. Frank