UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE MYLAN, N.V. SECURITIES LITIGATION	Case No. 2:20-cv-00955-NR <u>CLASS ACTION</u> Hon. J. Nicholas Ranjan
THEODORE H. FRANK, Objector.	

OBJECTION TO FEE REQUEST

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INTRODUCTION

"In the context of class-action settlements, there are serious principal-agent concerns" that risk class counsel reaping "a large windfall" at the expense of the class. *Walker v. Marathon Petro. Corp.*, 684 F. Supp. 3d 408, 413 (W.D. Pa. 2023) (Ranjan, J.) (internal quotation omitted). The determination of attorneys' fees is especially "fraught" with such conflicts, including both the zero-sum game when fees come from the common fund, and counsel's incentive to get paid quickly at no risk. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). And modern securities' class actions are *especially* fraught with such conflicts, with scholars decrying the "price to play," noting that plaintiff's firms cozy up to institutional investors or government officials to get cases, a *quid pro quo* type arrangement that exacerbates the inherent agency problem. Stephen J. Choi et al., *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650 (2011).

Mr. Frank does not object to approval of the settlement, but he does object to the fee request. The fee request here is too high. We know this because in the retention agreement for *this case*, MissPERS and Bernstein Litowitz agreed that a reasonable fee *net of costs* in this case would be capped at $4.75 million plus 5% of any recovery above $25 million. *See* Declaration of Theodore H. Frank ¶ 23 & Ex. G. That is a fee of $6.5 million, about 11% of the $59.2 million net recovery, not the 25% that class counsel is requesting. *See* Section II.A below.

The Settlement violates Rule 23(h) by stripping this Court of the power to allocate fees among the law firms, giving it to lead counsel instead without any disclosure to, or input and supervision from, the Court. This is problematic by itself, but more so given credible allegations of wrongdoing concerning the relationship between Bernstein Litowitz and MissPERS that merit scrutiny. *See* Section II.B below.

Separately, counsel's billing records are insufficient to determine a lodestar crosscheck. They do not disclose what work was done with any specificity or whether that work was done before or after it was clear the case would settle. A third of the hours are billed by non-lawyers, without any

showing of whether the work qualified as "fees" under *Missouri v. Jenkins*. 491 U.S. 274, 288 n.10 (1989). *See* Section II.C below.

It is problematic that the class is surrendering 99% of their claims, but class counsel is seeking a multiplier on its lodestar. While Mr. Frank is not objecting to the size of the settlement, it is unreasonable for class counsel to be paid as if they achieved a great success worthy of an above-average profit. *See* Section II.D below.

Even beyond class counsel's express willingness to accept a lower fee percentage in this case, there are other reasons why a 25% fee is too high. Between piggybacking on public disclosures and government investigations, and settling before full-blown discovery, this case had much less risk and investment by class counsel than the cases class counsel cites where 25% is awarded. *See* Section III below.

For these reasons, the Court should deny the motion for attorneys' fees, Dkt.158, and order additional disclosure on the firms' fee allocations and billing records. The Court should ultimately reduce the fee award well below the request so that it better reflects class counsel's express willingness to accept less before the fact; the minimal recovery; and the early stage of the proceedings.

STATEMENT OF FACTS

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

Mr. Frank is a member of the class with standing to object: he purchased 1,000 shares in Mylan Pharmaceuticals during the class period in February 2018, held them continuously for over two years, sold the shares in March 2020, after the alleged disclosures discussed in the complaint, realizing a loss. After receiving formal notice, he has submitted a claim on the settlement website. Frank Decl. ¶¶ 5-11 & Exs. A1, A2, & B.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") represents Mr. Frank *pro bono*, and Frank intends to appear at the fairness hearing on his own behalf. CCAF represents class members *pro bono* where class counsel employs unfair procedures to benefit themselves at the

expense of the class. *See, e.g., In re All-Clad Metalcrafters, LLC,* 2023 WL 2071481, 2023 U.S. Dist. LEXIS 27868, *20 (W.D. Pa. Feb. 17, 2023) (Ranjan, J.) ("appreciat[ing] [CCAF's client's] thoughtful objection"). CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 57 & n.37 (2018). CCAF has recouped over $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See, e.g., St. Lucie Cty. Fire Dist. Firefighters Pension Trust Fund v. Stericycle*, No. 16-cv-07145 (N.D. Ill. Jan. 30, 2023) ($3.3 million fee reduction in Bernstein Litowitz/MissPERS litigation). Mr. Frank does not object to approval of the settlement, but he does object to the fee request. Mr. Frank's fee objection applies to the entire class; he adopts any other objections to fees not inconsistent with this one.

II. The Mylan settlement in this case delivers less than a penny on the dollar to class members for Defendant's alleged misrepresentations.

According to the complaint in this case, Mylan made a series of misrepresentations to shareholders and the market that, when corrective disclosures were made, resulted in stock drops of over $15/share for the 514 million shares outstanding. Dkt.39 ¶¶ 16-20, 26.

Plaintiff MissPERS, the Public Employees' Retirement System of Mississippi, owned shares in Mylan and pursued a securities class action to remedy the company's deceptive practices on behalf of the shareholder class. MissPERS was appointed Lead Plaintiff on September 14, 2020 and its chosen firms, Bernstein Litowitz Berger & Grossmann LLP and Kessler Topaz Meltzer & Check, LLP, were appointed lead counsel. Dkt. 23.

The litigation has not involved any substantive discovery. Mylan moved to dismiss in January 2021, and the Court ruled in May 2023, granting the motion in part and denying it in part. Dkts. 88, 89. After the ruling, only one alleged misrepresentation claim, plus a broader "scheme" claim, survived. Dkt.157 at 14. MissPERS's notice acknowledges that, going forward, it "faced risks that the Court might narrow or eliminate the 'scheme' claim, for example on the ground that the alleged scheme was not communicated to the market," and "would also face challenges in proving the falsity of the January 2019 alleged misstatement and in proving scienter." Dkt.150, Ex. 2 ¶ 23. The

Court directed the Parties to mediate before "commencing full-blown discovery." Dkt. 126. The Parties exchanged "pre-mediation document discovery" only, and they provide no details as to how intensive that was. Dkt.149-1 at I. They took no depositions. They litigated no pre-settlement class certification motion, no summary judgment motion, and no trial.

After December 2025 mediation, the parties settled for $60 million (which include $500,000 for notice and administration costs), what the class notice represents to be $0.11/share, or less than 1% of the originally alleged damages, claims for $5 billion that are extinguished by the release in this settlement. This Court preliminarily approved the Parties' proposed settlement with that number as the common fund on February 19, 2026. Dkt.150. Class counsel, in their May 1 filing, is requesting about 25 percent of that in fees, $14,912,511, plus costs of $336,455.69. Dkt. 159. The class would be left with just over $44 million.

While counsel has submitted the total hours and billing rates on a per-attorney/professional and per-firm basis (*see* Dkt.160-6, through 160-10), there is no included allocation for how the actual fee award will be split between the firms. And counsel provides no breakdown, even summary, of what each attorney or professional's work was for, or when that work was performed.

III. The history of MissPERS, class counsel, and the Attorney General's office.

MissPERS and Bernstein Litowitz have appeared together in dozens of securities class actions, and their relationship has been the subject of a federal whistleblower complaint and repeated judicial and national press scrutiny. Frank Decl. ¶¶ 13-25 & Ex. C-F.[1] These facts were not disclosed to the Court in the Plaintiffs' motion for appointment of lead plaintiff and counsel. *See* Dkt. 18. Nor did class counsel disclose the retainer agreements between MissPERS and Bernstein Litowitz calling for

[1] *See, e.g.*, *In re Stericycle Sec. Litig.*, 35 F.4th 555 (7th Cir. 2022); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 143 (2d Cir. 2016); *In re Amc Entm't Holdings,* 2023 WL 5165606, 2023 Del. Ch. LEXIS 329, at *78 (Del. Ch. Ct. Aug. 11, 2023); *Seb Inv. Mgmt. Ab v. Symantec Corp.*, 2021 U.S. Dist. LEXIS 77040, 2021 WL 1540996 (N.D. Cal. Apr. 20, 2021); *Cambridge Ret. Sys. v. Mednax, Inc.*, 2018 U.S. Dist. LEXIS 207064, at *39 (S.D. Fla. 2018); Editorial Board, *Pay-to-Play and the Tort Bar*, Wall St. J. (Oct. 31, 2009).

a cap on fees well below what they have requested the court, even though those retainer agreements were in the public record. Frank Decl. ¶¶ 23-26 & Ex. G.

ARGUMENT

I. The Court owes a fiduciary duty to unnamed class members, including in the determination of attorneys' fees.

This Court "acts as a fiduciary who must serve as a guardian of the rights of absent class members," especially with attorneys' fees. *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 534 (3d Cir. 2004). This is because the "determination of attorneys' fees in class action settlements is fraught with the potential for a conflict of interest between the class and class counsel," to include both the zero-sum conflict between the class recovery and counsel's fees, as well as counsel's optimal incentive to settle quickly in order to get an early guaranteed payday. *Rite Aid Corp.*, 396 F.3d at 307. Thus, "a thorough judicial review of fee applications is required in all class action settlements." *In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (Becker, J.). This is not only to make sure that counsel is fairly compensated without unjustly taking money from the class, but also to avoid "potential public misunderstandings" over the size of fee awards. *Cendant*, 264 F.3d at 272. On this account, the Court's "interest and supervisory role is pervasive and extends not only to the final fee award but also to the manner by which class counsel is selected and the manner by which attorneys fee conditions are established." *Id.* A "sharp pencil" is necessary. *United States ex rel. Palmer v. C&D Techs., Inc.*, 2017 WL 1477123, 2017 U.S. Dist. LEXIS 62932, at *10 (E.D. Pa. Apr. 25, 2017) (Pratter, J.), *rev'd in small part on other grounds* 897 F.3d 128 (3d Cir. 2018).

II. The fee request omits critical information showing that it is excessive.

A. The fee motion does not disclose the original retainer agreement capping fees far below what class counsel is currently requesting.

In 2020, MissPERS and Bernstein Litowitz signed a retainer agreement for this case capping class counsel's fees. Frank Decl. ¶¶ 23-25 & Ex. G. The fee provisions are nearly identical to those in *Stericycle*. 35 F.4th at 560. To wit, class counsel is capped at a percentage of the recovery *after*

costs: $4.75 million for the first $25 million, and 5% of the amount over $25 million.[2] Here, for a settlement of about $59.2 million after costs, the fee award would be capped at less than $6.5 million—less than half of what class counsel is currently requesting. *Cf. generally* 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, 1380 (2015) (proposing that courts return to the *ex ante* approach that the PSLRA contemplates, and finding that in such cases the average fee request is 17.93%).

B. The fee request does not disclose how the attorney fees are allocated amongst firms.

The Settlement excludes the Court from reviewing, approving, and even knowing, the allocation of attorneys' fees amongst the firms that participated in this litigation. Settlement ¶ 17 (assigning the judicial function of allocation to Lead Counsel). This is inappropriate; no "deference is due the fox who recommends how to divvy up the chickens" let alone full blown, unreviewable, delegation. *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring). Rule 23(h) imposes a non-delegable duty on the Court. But beyond the general law of Rule 23(h), the attempt to hide the fee allocation from the Court is even more concerning because of counsel's

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[2] While the last term of this fee schedule arguably only applies to fees on MissPERS's own individual recovery—an argument that Bernstein Litowitz advanced to the Seventh Circuit—*Stericycle* found that "the limitation is improbable, arbitrary, unreasonable, and not consistent with a class representative's fiduciary duty to class members." *Stericycle*, 35 F.4th at 561. "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.* at 562. Thus, the panel remanded for the district court to give the agreement "substantial weight in assessing the reasonableness of the proposed award."

After the disclosure of the fee agreement in *Stericycle* resulted in reduced fees in that case, MissPERS and Bernstein Litowitz agreed to a new fee schedule in this case. Frank Decl. ¶ 26 Ex. H. This modified agreement, without any meaningful cap, should be given no weight (except to the Rule 23(a)(4) adequacy of the class representative). *See Cendant*, 264 F.3d at 265 (holding that "courts should . . . consider . . . whether the movant has demonstrated a willingness and ability to select competent class counsel and to negotiate a reasonable retainer agreement with that counsel" in assessing whether particular lead plaintiff applicant satisfies Rule 23 adequacy requirement). Class counsel, anticipating a multi-billion dollar case, was willing to agree to a much lower percentage *ex ante*, and should be held to that agreement.

financial contributions to MissPERS and the "pay-to-play" allegations in the press. The Court should reject the fee request as written and require disclosure of the fee allocation to the Court and the class.

1. The failure to disclose and propose a fee allocation violates the Federal Rules.

To protect the class, Rule 23(h) establishes procedures by which class counsel may make an application for fees and expenses. But this Settlement instead impermissibly divests the district court of its responsibility to determine attorneys' fees and delegates it to lead counsel.

In re High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220 (5th Cir. 2008) is on point. In *High Sulfur*, the district court "appointed a five-member Fee Committee [comprised of lead counsel and four other lawyers] to allocate the fee award among approximately thirty-two law firms and seventy-nine plaintiffs' attorneys who worked on the case." *Id.* at 224. It then held an *ex parte* hearing with the fee committee and "spent at most one afternoon considering [its] proposed allocation and order before approving them." *Id.* at 228. The Fifth Circuit reversed. It held the district court must "closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards." *Id.* at 227. For a district court to allocate fees in an *ex parte* proceeding was "inconsistent with well-established class action principles and basic judicial standards of … fairness." *Id.* Under Rule 23(h), "the decision to convene an *ex parte* hearing was plainly unauthorized." *Id.* at 231. And so was the decision to delegate to "five attorneys to declare how an award will cover themselves and seventy-four other attorneys with no meaningful judicial supervision or review." *Id.* at 234. Once the Court opens the door to equitable division of fees, there must be "notice and an opportunity to be heard." *Id.* The Settlement, as currently written, does not provide that. Rather, it is even worse than what *In re High Sulfur* rejected, because the allocation is done entirely out of court. Dkt.149-1 ¶ 17. *See also In re "Agent Orange" Prods. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) (accepting private allocation "overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e).") (pre-Rule 23(h) case).

Class counsel may seek to distinguish *High Sulfur* because it involved an internal disagreement amongst plaintiffs' counsel, whereas counsel present a united front here. But this ignores the value of "the court's equitable review function" for the class's benefit. *Glaberson v. Comcast Corp.*, 2016 WL 6276233, 2016 U.S. Dist. LEXIS 148879, at * 19(E.D. Pa. Oct. 26, 2016). If the Court determines that pay-to-play conflicts, or even simply duplicative overbilling, infected certain firms in this case, the Court should, and indeed must, exercise its authority to reduce the fees allocated to those particular firms. For example, in one case, after learning that certain class counsel engaged in misconduct, including secret payments to a politically-connected firm, the court found it "appropriate to exercise its authority to allocate the fee award among counsel." *Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 512 F. Supp. 3d 196, 266 (D. Mass. 2020) (citing 5 Rubenstein, NEWBERG ON CLASS ACTIONS § 15:23). A lump sum approval and delegation of the allocation to lead counsel precludes indispensable judicial review. This backroom process also discourages counsel from policing other firms' expenditures, since the lump sum approval process only encourages larding the lodestar; *see* Stephen J. Choi, Jessica Erickson, & Adam C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, 17 J. EMPIRICAL LEGAL STUD. 438 (2020) (finding support for the idea that lodestar "make work" regularly occurs in large securities class action settlements); *see also* Section I.C below (discussing the 9018 claimed hours).

2. Possible pay-to-play and side agreements merit scrutiny.

As the Frank Declaration summarizes, there have long been credible pay-to-play allegations associated with class counsel's relationship with MissPERS, where the Mississippi Attorney General has sole authority to hire outside firms on MissPERS's behalf and direct its legal strategy. Frank Decl. ¶¶ 14-26; *Bernstein*, 814 F.3d at 143. This presents a risk "that an informal *quid pro quo* could develop in which law firms specializing in securities class actions would contribute to the campaign coffers of the elected officials who oversee those funds, and that, in exchange (and in the hopes of getting more contributions), those officials would use their control over the funds to select those firms to serve as lead counsel for cases in which the funds are the lead plaintiff." *In re Cendant Corp.*, 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); *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 307-08 (S.D.N.Y. 2015) (raising concern about Bernstein Litowitz donations but satisfying itself that the beneficiaries had not selected lead counsel). One "empirical study found that when pension funds whose managers have received campaign contributions serve as lead plaintiffs, they appear to be less vigorous in negotiating attorney fees." *In re Stericycle Sec. Litig.*, 35 F.4th at 569 (7th Cir. 2022) (citing Choi *et. al*, 8 J. EMPIRICAL LEGAL STUD. at 651). Payments are not necessarily just through donations, but can be laundered by providing makework or side payments of the total fee award to politically connected local law firms. *Bernstein*, 814 F.3d at 132, 137 & 143.

The Court should require disclosure of any 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.

C. The lodestar appears exaggerated by allocating what should be outside investigative costs as in-house profit centers, and failing to disclose how much was billed to zero-risk "confirmatory discovery."

In analyzing its lodestar, class counsel points to the 9,019 total hours spent on this case and argues the calculated "2.03 multiplier is well within the range commonly awarded in comparable cases." Dkt.159 at 16. But the true multiplier of counsel is far greater; 9,000 hours is simply not reasonable for the litigation that occurred: complaint, a couple of pre-discovery motions on the pleadings, and then mediation, confirmatory discovery, and settlement. "[S]imply doing work on behalf of the class does not create a right to compensation; the focus is on whether that work provided a benefit to the class." *In re Cendant Corp.*, 404 F.3d at 191. If the lodestar is properly reduced, the

multiplier is likely higher than this Circuit's "strongly suggest[ed]" limit of a "multiplier of 3." *Cendant PRIDES*, 243 F,3d 722, 742.

1. The fee submissions lack adequate detail for the Court to do a lodestar crosscheck.

MissPERS's fee papers, Dkt.159, 160, do not provide the Court an adequate record to do a lodestar crosscheck. MissPERS submits timesheets on a per-firm basis for all of its counsel that contains only (a) the amount of work per employee; (b) the type of employee (investigator, staff attorney, paralegal, partner, etc.); and, (c) the billable rate of that employee. Noticeably missing from any of the timesheet submissions are *what* work was done and *when*. *See In re Tremont Secs. Litig.*, 699 Fed. Appx. 8, 18 n.13 (2d Cir. 2017) (requiring "summaries that, at the very least, break down the hours worked by year and task"). Both are necessary for this Court to evaluate whether counsel's "work provided a benefit to the class," *In re Cendant Corp.*, 404 F.3d at 191, because only work that meets this burden can be billed and included in the lodestar. *Planned Parenthood of Central New Jersey v. Attorney General of State of New Jersey,* 297 F.3d 253, 266 (3d Cir. 2002). The burden is on counsel "to provide reliable evidence" so that the Court can evaluate its fee request, and here counsel has abdicated that responsibility. *Schwartz v. Arena Pharms., Inc.*, 775 Fed. Appx. 342, 343 (9th Cir. 2019) (affirming a 15% fee award reduced from 30% request) (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984)). The fee award cannot be approved without, at a minimum, further inquiry into counsel's billing records.

Gelis v. BMW of N. Am., LLC, is on point. 49 F.4th 371 (3d Cir. 2022). In that case, class counsel submitt[ed] to the Magistrate Judge three charts (one for each plaintiffs' firm) detailing at a summary level the time devoted to various categories of legal work, aggregated across the entire three-year litigation period." *Id.* at 375. The charts aggregated hours billed on a per-attorney basis across the full three years. *Id.* at 380. Counsel also "filed declarations that added more detail about the work completed while still not specifying the time spent on particular tasks, who did those tasks, or the dates they were performed, and declarations that described the experience of each lawyer who billed

for the case." *Id.* at 376. Not enough, said the Third Circuit. "That sort of aggregation, without more detail, is an insufficient basis for an attorneys' fee award," *id.* at 380, and the *Gelis* court further rejected counsel's attempt to substitute its generalized declarations in for the missing details. MissPERS's submissions are even worse than those in *Gelis*, since the *Gelis* records had a general categorization for what work was being performed and only aggregated over three years, not five.

Even if the Court chooses to limit its lodestar consideration to a crosscheck of a percentage award, summary information, with a category-by-category breakdown is still necessary to "enable the court to make a judgment as to whether the percentage appears too high or low given the time required to handle the case." *See Rite Aid*, 396 F.3d at 306 n.16 (quoting *Report of the Third Circuit Task Force, Selection of Class Counsel*, 208 F.R.D. 340, 423 (2002)). "The submissions in this case cannot be characterized as 'summaries.' They are better described as conclusory statements regarding the number of hours expended, as they provide no description whatsoever of the tasks performed, the hours spent on various types of task, or the relation of those tasks to the litigation." *Weeks v. Kellogg Co.*, 2011 U.S. Dist. LEXIS 155472, 2011 WL 6531177, at *33 (C.D. Cal. Nov. 23, 2011). "Class counsel cannot present effectively unreviewable hours in the name of convenience." *In re Citigroup Inc., Secs. Litig*, 965 F. Supp. 2d 369, 376 (S.D.N.Y. 2013).

The fee request's opacity requires that the Court, at a minimum, order additional disclosure to ensure there is no duplicative or inefficient legal work that serves no benefit to the class. For example, in *Citigroup*, class counsel had one set of attorneys who did the actual litigation work; once settlement was reached, those attorneys stopped billing, and class counsel brought in temporary attorneys were brought in to bill sixty hours a week doing the same sort of confirmatory discovery that class counsel admits to here. *In re Citigroup, Inc. Sec. Lit.*, 965 F. Supp. 2d 369 (2013); Daniel Fisher, *Corporate Lawyers Scratch Their Heads Over Citi Class-Action Fees*, Forbes.com (Mar. 20, 2013). Once a case survives a motion to dismiss, the chances of settlement go from 40% to 93.2%; the lodestar multiplier should reflect this diminishment of risk. Choi, et al., *The Business of Securities Class Action Lawyering*, 99 IND. L. J. 775, 833-34 (2024). In *Citigroup* , class counsel had tried to bill the class $550/hour (plus a multiplier)

for work that corporate clients treat as a $30/hour cost. Jennifer Smith, *Dispute Arises Over Cost of Temp-Help Lawyers*, Wall St. J. (Apr. 14, 2013).

Courts regularly reduce awards when a lodestar crosscheck reveals padding. *See*, *e.g.*, *Schoolcraft v. City of New York*, 2016 WL 4626568, 2016 U.S. Dist. LEXIS 183036, at *20-*21 & n.16 (S.D.N.Y. Sept. 1, 2016) (considering the "vast gulf" with "benchmarks of other litigation" and concluding that nearly 9000 hours over 5 years (even with 38 depositions) was excessive);; *Arkansas Teacher Ret. System v. State St. Bank and Tr. Co.*, 232 F. Supp. 3d 189 (D. Mass. 2017) (appointing special master to review questionable billing practices, including acknowledged duplicate billing)). There were three dozen attorneys that worked for MissPERS on this case, and more than half worked fewer than 100 hours on the case apiece. This invites the inference that a lot of cumulative time was spent catching up each new attorney on the case, only for that attorney to not actually commit much time to beneficial legal work. *See* Choi, et al., *Making Work*, 17 J. EMPIRICAL LEGAL STUD. 438, 456 (finding that, after controlling for other variables, having multiple lead counsel "corresponds to 3.731 more attorney hours" "consistent with the making work hypothesis"). Clients wouldn't pay for this. Moreover, if MissPERS had provided adequate billing records, then the court could also look at the specific tasks to determine if additional reductions are needed because of duplicative or non-beneficial work.

2. Nearly one third of lodestar is investigator time, which should be a cost, not a profit center, and may not comply with *Missouri v. Jenkins*.

Even setting aside the missing task-level detail, the existing records reveal a more fundamental problem: 2,942.25 hours—nearly one third of all time billed—is non-attorney investigator time billed at premium rates. This is a securities litigation case; as the Third Circuit has observed, these cases are filed with "relative ease" because attorneys "can learn of potential securities fraud" and "translate that information into a complaint" through "news reports or press releases disclosing wrongdoing," as well as piggybacking on government investigations. *In re Cendant Corp.*, 404 F.3d at 195. The investigators "contact[ed] over 1,170 potential witnesses and interview[ed] 408 of them." Dkt.160 ¶ 19. MissPERS included information from only *eight* of these witnesses in its pleadings, and the information they

allegedly provided or corroborated was readily available from other sources. Dkt.160 ¶ 19. For example, Mylan's practice of "testing into compliance," Dkt.160 ¶ 19, was revealed by Katherine Eban in her 2019 book *Bottle of Lies: The Inside Story of the Generic Drug Boom*, Bloomberg investigate reporting, and FDA Form 483 letters shared with the press—all of which MissPERS's complaint relies on. Dkt.39 ¶¶ 85-87, 144, 181. Same deal with the practice of "crashing files," Dkt.160 ¶ 19, where the *Pittsburgh Post-Gazette* reported the practice and the FDA confirmed it. Dkt.39 ¶¶ 35, 118, 228. No additional investigative work, and certainly not 3,000 hours' worth, was needed to reveal these known Mylan activities.

But more problematic is treating investigators as an in-house profit center in a law firm. The $650/hour Amy Bitkower (Dkt. 160-7 at 7) is not a licensed attorney. Investigator time only belongs in the lodestar analysis—rather than as a cost to the client—if it is actual "legal work." *Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989). Lawyers cannot enhance the rate of "investigation, clerical work, compilation of facts and statistics and other work," which is considered *non-legal*. *Id.* Class counsel's opaque fee request does not satisfy the *Jenkins* standard, and the investigative lodestar time should be excluded or counted as a cost without a multiplier.

D. Counsel's performance does not support a multiplier, because the class recovery is less than 1% of the claimed damages.

MissPERS claims that "the Settlement is a favorable result" and that it "represents a meaningful portion of the Settlement Class's potential maximum realistically achievable damages," Dkt.157 at 17-18, but that analysis ignores *its own expert's* maximum damages from its recovery analysis. Dkt.160-4 ¶ 3 ("using the full Class Period … damages could reach approximately $5.1" billion). The same damages estimate is omitted from MissPERS's fee motion during discussion of counsel's performance, Dkt.159 at 26, and it's cast aside in the motion for preliminary approval. Dkt.149 at 18 (mentioning $4.9 billion in damages without using it as a settlement denominator). (Never mind that the class notice violates the law by failing to provide the mandatory disclosure of the complaint's alleged maximum damages, though class counsel's papers calculate it elsewhere. 15 U.S.C. § 78u-4(a)(7)(B).)

MissPERS is using the wrong denominator to evaluate counsel's performance. The Settlement itself releases *all* claims for the entire class period and absolves Mylan of liability related to *all* possible damages from its wrongdoing. Dkt.149 at 11-12. Therefore, the relevant number for the purposes of evaluating attorney performance is $5.1 billion. Comparing these numbers, the actual recovery is on the order of a penny for a dollar of loss. Securities class actions generally settle for relatively low percentages, but this Settlement is far below average. *E.g.*, Dkt.160-4 at 10 (3.6% median recovery in cases worth over a billion dollars); 2025 *Review & Analysis: Securities Class Action Settlements*, CORNERSTONE RESEARCH, at 7, *available at* https://www.cornerstone.com/wp-content/uploads/2026/02/Securities-Class-Action-Settlements-2025-Review-and-Analysis.pdf (6.5% median recovery in 2025); *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *8 (D. Del. 2018) (5% median recovery in Third Circuit courts); Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1500 (1996) (average around 12%). The poor recovery in this case notwithstanding, the complete omission of the $5.1 billion dollar number from counsel's recovery analysis highlights counsel's self-interest. The fee request itself pays counsel for negotiating all of claims to these damages away, but the fee and approval motions only measure counsel's performance relative to far smaller, undefined sub-classes. Counsel cannot have it both ways.

Mr. Frank is not objecting to the settlement itself; if the case were stronger, he does not doubt Bernstein Litowitz and the mediator would have insisted on a higher payment than $60 million. But if the class is surrendering 99% of its alleged damages to settle, class counsel should not be paid as if they have won a great success.

III. The percentage fee request is also too high because of the relatively low risk and relatively early stage of settlement.

A. The *Mylan* litigation piggybacked on work already done by the FDA and Mylan whistleblowers.

The risk to litigate this securities class action case against Mylan—especially in the pre-discovery, pre-certification stage—has always been rather low. This is because counsel "can learn of potential securities fraud" and "translate that information into a complaint" with "relative ease." *In re*

Cendant Corp., 404 F.3d at 195. "Such complaints are as often spurred by news reports or press releases disclosing wrongdoing," *id.* at 196, or by preceding government investigation, as brought independently by attorneys through their own pre-suit discovery. In adjudicating fees, the Third Circuit instructs its courts to consider "the value of benefits accruing to class members attributable to the efforts of class counsel as opposed to the efforts of other groups, such as government agencies conducting investigations." *AT & T Corp.*, 455 F.3d at 165.

When counsel uses other people's work to bring a case and then settles before discovery and certification, the risk actually put on the line by the litigants is not substantial—beat the motion to dismiss and counsel has a hefty bargaining chip for settlement. That's exactly what happened here. Without FDA's investigation into Mylan for deceptive practices, investigative journalism by third parties, and the company whistleblowers who brought Mylan's unlawful actions into the public domain, this complaint does not get brought. MissPERS's complaint itself is largely just the application of securities law to a recital of the FDA's legwork and public reporting. Dkt.39 at 20-96.

It is "essential to separate out the benefits attributable to class counsel" from the work done by FDA, journalists, and the whistleblowers. *Krell v. Prudential Ins. Co. of Am.*, 148 F.3d 283, 342 (3d Cir. 1998). Here, the initial reporting and the heavy lifting of documenting Mylan's scheme was done largely by the latter. "A fee of 25% is [] on the high side of [] reasonable," but the request must be adjusted downward because of the substantial investigative and whistleblower activity that preceded this case. *E.g.*, *In re Lawnmower Engine Horsepower Mktg. & Sales Practices Litig.*, 733 F. Supp. 2d 997, 1014-15 (E.D. Wisc. 2010) ($65,000,000 settlement).

B. This is a pre-discovery, pre-certification settlement that, at its size, does not justify the percentage requested.

Two fundamental, intertwined principles weigh against a 25% fee award in this case. First, "courts typically decrease the percentage of the fee as the size of the fund increases." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 349 (S.D.N.Y. 2014); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 837-839 (2010) ("fee percentage is strongly and inversely associated with settlement size among all cases").

Second, because the "risk of nonpayment," "the amount of work necessary to resolve the litigation," and "the stakes of the case" all increase as the case matures, a higher fee is more appropriate in later-stage cases. *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001); *see also* Brian T. Fitzpatrick, *The Judicial Role in Professional Regulation*, 89 FORDHAM L. REV. 1151, 1153 (2021) (the "danger of premature settlement can be mitigated by paying a percentage that escalates as the litigation matures or the recovery increases."); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000) ("complexity and duration" as factors in fees). This is a fairly large, early-stage case; on balance, a 25% award is too high.

In a landmark study spanning fifteen years of cases from nearly 700 common fund settlements, for the value of settlements between $38.3 million and $69.6 million the median fee was 21.9% of the fund with a standard deviation of 10%. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 264-65 (2010). Another study of several hundred class settlements, limited to two years, found that in common fund settlements between $30 million and $72.5 million, the median fee percentage was 24.9% with a standard deviation of 8.4%. Fitzpatrick, 7 J. EMPIRICAL LEGAL STUD. at 837-39. Most recently, Professor Choi, Erickson and Pritchard's study found average fees of 23.7% in securities settlements in the decile with an average settlement amount of $47.18 million. Choi, et al., *The Business of Securities Class Action Lawyering*, 99 IND. L. J. 775, 827 fig.13 (2024). Between these three studies, the 25% fee request in a vacuum looks high; but, accounting for the stage of litigation—pre-certification and pre-discovery—25% is a windfall. *See In re Stericycle Sec. Litig.*, 35 F.4th 555, 566 (7th Cir. 2022) (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").

This case is relatively nascent. While a motion to dismiss and a motion on the pleadings was decided, class counsel did not have to risk engaging in discovery or litigating class certification or summary judgment; the Court recommended the parties immediately proceed to mediation and settlement. An above-median fee this early in the case for such relatively low-risk work is wrong—especially given the degree to which the class is compromising its claims. *E.g.*, *In re Stericycle Sec. Litig.*,

35 F.4th at 566 (reversing because "the court did not address whether the preliminary stage of the litigation warranted a reduction in the requested fee"); *Minor v. FedEx Office & Print Servs.*, 2013 U.S. Dist. LEXIS 106655, *7 (N.D. Cal. 2013) ("early stage" justifies reducing 25% requested fee award to roughly 17%).

MissPERS's fee motion implicitly supports Mr. Frank's point by negative implication, because most of the approved fee awards it submits to the Court for settlements this size came either *after* summary judgment was briefed or discovery was completed. Dkt.159 at 13-14. *E.g.*, *Del. Cnty. Emps. Ret. Sys. v. Adapthealth Corp.*, 739 F. Supp. 3d 270, 279 (E.D. Pa. 2024) (25% after "the parties engaged in extensive fact discovery over many months, which included various third parties"); *McDermid v. Inovio Pharms., Inc.*, 2023 U.S. Dist. LEXIS 8200, *5 (E.D. Pa. 2023) (27.5% for "extensive discovery consisting of over half a million pages of documents," nineteen depositions, experts on both sides deposed, and fully briefed certification motions); *Pelletier v. Endo Int'l PLC*, 2022 U.S. Dist. LEXIS 53887, *5 (E.D. Pa. 2022) (25% post-discovery); *In re Advanced Auto Parts, Inc. Sec. Litig.*, No. 1:18-cv-0212-RTD-SRF, slip op. at 2 (D. Del. June 13, 2022), Dkt. No. 367 (Ex. 8C) (25% after summary judgment motion decided); *Odeh v. Immunomedics, Inc.*, No. 2:18- cv-17645-ESK, slip op. at 2 (D.N.J. 2023), Dkt. No. 286 (Ex. 8B) (post-discovery); *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 142 (D.N.J. 2013) (post-discovery); *Howard v. Arconic Inc.*, 2023 U.S. Dist. LEXIS 248162 (W.D. Pa. 2023) (post-discovery); *In re U.S. Steel Consol. Cases*, 2023 U.S. Dist. LEXIS 245167 (W.D. Pa. 2023) (post-discovery); *In re Aetna Inc.*, 2001 WL 20928, at *3 (E.D. Pa. Jan. 4, 2001) (post-summary judgment).[3] The level of work and risk which went into all of these cases is simply not present in this one.

[3] The exceptions to the deep-past-discovery cases provided are rubber stamps, where the approving court did not analyze the fee issue in any detail. *Strougo v. Mallinckrodt Pub. Ltd. Co.*, 2025 U.S. Dist. LEXIS 125604 (D.N.J. 2025); *San Antonio Fire & Police Pension Fund v. Dole Food Co., Inc.*, 2017 WL 11917433, at *1 (D. Del. 2017).

C. The correct denominator is the net settlement amount, not the gross.

Finally, the fee request—at $14,912,511—deducts the litigation expenses from the settlement fund, but not the $500,000 in notice and administrative costs also set aside in the settlement. Both of these costs are "part of the settlement but not part of the value received from the settlement by the members of the class," and thus "shed no light on the fairness of the division of the settlement pie between class counsel and class members." *Redman v. Radioshack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014). The class is "not indifferent" as between money that goes to them and money that goes to third-parties. *In Baby Prods. 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).

Thus, $59,163,544.31 is the amount that's actually going to the class, and the relevant number for the Court to weigh any proposed fee percentage against. This is consistent with the plain language in the Securities Reform Act: "[t]otal 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). Taking MissPERS's 25% fee request "net expenses" at face value—and there's a whole host of reasons to reduce it further or deny it outright—the denominator of any percentage should be $59,163,544.31.

CONCLUSION

The Court should deny approval of the fee request until class counsel discloses detailed billing and the division of the fee award amongst the differing class counsel. Even if the Court were to grant fees without that information, it should scale the Rule 23(h) award to reflect an appropriate market rate for fees that are proportionate to the benefit realized by the class net costs. Bernstein Litowitz previously agreed to accept about $6.5 million for a settlement of this size, and any fee award should not be higher than that.

Dated: May 14, 2026

/s/Theodore H. Frank

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Certificate of Service

As the Preliminary Approval Order (Dkt. 150) and notice to class members require, I certify that on the 14th of May, 2026, a copy of this Objection; the accompanying Declaration of Theodore H. Frank and its exhibits; and my Notice of Appearance were served via Federal Express overnight for delivery on Friday May 15, on the following:

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Dated: May 14, 2026

/s/ Theodore H. Frank