UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE CAPITAL ONE TELEPHONE CONSUMER PROTECTION ACT LITIGATION	Master Docket No. 1:12-cv-10064 MDL No. 2416
This document relates to: BRIDGETT AMADECK, et al., v. CAPITAL ONE FINANCIAL CORPORATION, and CAPITAL ONE BANK (USA), N.A.	Case No. 1:12-cv-10135
This document relates to: NICHOLAS MARTIN, et al., v. LEADING EDGE RECOVERY SOLUTIONS, LLC, and CAPITAL ONE BANK (USA), N.A.	Case No. 1:11-cv-05886
This document relates to: CHARLES C. PATTERSON, v. CAPITAL MANAGEMENT, L.P., and CAPITAL ONE BANK (USA), N.A.	Case No. 1:12-cv-01061
JEFFREY T. COLLINS, Objector.	

OBJECTION TO PROPOSED SETTLEMENT

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INTRODUCTION

In this case, class counsel's proposed fee request shortchanges the class members by at least $6.3 million. *First*, class counsel seeks 30% of the $75.4 million Settlement Fund ($22.6 million), but that fund includes $4.5 million in estimated notice and administrative costs. *See* Motion for Award of Attorneys' Fees and for Service Awards to the Class Representatives ("Fee Request"), Dkt. 176 at 9; Jonathan D. Selbin Declaration ("Selbin Decl."), Dkt. 177 ¶ 30. *Redman v. RadioShack* teaches that the administrative costs should be excluded for purposes of calculating attorneys' fees. __F.3d__, 2014 U.S. App. LEXIS 18181, at *14-*16 (7th Cir. Sept. 19, 2014). *Second*, class counsel's 30% request is grossly excessive in light of the diminishing marginal rates regularly applied to funds of this size. For example, in a case involving an $88 million fund, the Seventh Circuit ordered fees of 30% for the first $10 million, 25% for the next $10 million, 22% for fees from $20 to $46 million, and 15% for the remaining funds. *In re Synthroid Marketing Litigation*, 325 F.3d 974, 980 (7th Cir. 2003) ("*Synthroid II*"). There is no evidence that this case involves greater risk than *Synthroid II*. Applying that same fee schedule, class counsel here should receive at most $14.9 million, and likely much less once empirical data about counsel's risk and opportunity cost is disclosed. The excessive and disproportionate fee request reflects self-dealing; that $6.3 million excess should be returned to the class.

Third, on information and belief, the risk faced by class counsel in this case is considerably lower than the risk faced in *Synthroid II*, and substantially overcompensates class counsel beyond the rates needed to induce class counsel to take on a case of this nature. Given that class counsel has a diversified portfolio of TCPA cases, there is empirical data available that would disclose the expected return in an attorneys' time for bringing a TCPA action, and what level of multiplier of lodestar is required to compensate attorneys for that risk *ex ante*. But the Fee Request fails to give any lodestar information and fails to describe which attorneys would be receiving what under the settlement. *See* Fee Request, Dkt. 176; Settlement Agreement, Dkt. 131-1 ¶ 5.01. This lawsuit alleges that over 16 million class members are entitled to $500 to $1500 damages per violation, but distributes an average of less than $3-$4 per class member—a nuisance settlement. *Cf. Murray v. GMAC*, 434 F.3d 948, 952

(7th Cir. 2006). Yet class counsel seeks fees as if they won the litigation, with a fee request that is perhaps as much as ten times their lodestar.

For these reasons, Collins objects to the Fee Request, and asks for the requested fee to be reduced to an amount that reflects the market rate for a nuisance settlement with relatively low risk.

I. Objector Jeffrey T. Collins is a member of the class and intends to appear through counsel at the fairness hearing.

As documented in the accompanying Declaration of Jeffrey T. Collins ("Collins Decl.", attached at Exhibit 1), Objector Collins is a member of the class. Mr. Collins' address is 9450 Live Oak Place, 104, Davie, Florida 33324 and his phone number is (954) 232-0104. *See* Collins Decl. ¶ 2. In or about September and October 2009, Collins received phone calls on his cell phone with a prerecorded message indicating that Capital One was contacting him regarding a past due account; he believes that he received three phone calls with the same prerecorded message. *See id.* ¶ 3. Objector Collins is thus a class member. Objector Collins received a notice of the class action from the claims administrator, Notice ID 44030-87892-90505. *See id.* ¶ 4; Notice (attached at Exhibit A to Collins Decl.). Objector Collins filed a claim on September 9, 2014. *See* Collins Decl. ¶ 6; Claim Receipt (attached at Exhibit B to Collins Decl.).

Objector Collins intends to appear through his counsel at the final approval hearing in the above-captioned matter scheduled for December 9, 2014 at 11:00 a.m. Objector Collins wishes to discuss matters raised in this Objection and reserves the right to make use of all documents entered on to the docket by any settling party or objector. Objector Collins also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval or the Fee Request. This objection supersedes Objector Collins' previous objection filed August 25, 2014. *See* Objection, Dkt. 143.

II. A court owes a fiduciary duty to unnamed class members.

A district court must act as a "fiduciary of the class," for the rights and interests of absent class members. *Mirfasihi v. Fleet Mortg. Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) ("*Mirfasihi II*") (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). Because the relationship between

class members and counsel turns directly adversarial when awarding fees from a common fund, it is incumbent upon the Court to "carefully monitor disbursement to the attorneys by scrutinizing the fee applications." *Cook v. Niedert*, 142 F.3d 1004, 1011 (7th Cir. 1998) (internal quotation omitted); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) ("*Mirfasihi I*") (holding that district court must ensure "that class counsel are behaving as honest fiduciaries for the class as a whole").

III. The fee request is excessive and contains signs of self-dealing.

An arm's length negotiation of a class action settlement is necessary but not itself sufficient for approval. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947-48 (9th Cir. 2011) (requiring courts to be "particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations") (citing *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)). Rather than explicit collusion, there need only be acquiescence for such self-dealing to occur: "a defendant is interested only in disposing of the total claim asserted against it" and "the allocation between the class payment and the attorneys' fees is of little or no interest to the defense." *Staton*, 327 F.3d at 964 (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995)); *accord Bluetooth*, 654 F.3d at 949.

The Seventh Circuit also recognizes the concerns of self-dealing. *E.g., Mirfasihi I*, 356 F.3d at 785; *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("From the selfish standpoint of class counsel and the defendant, therefore, the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees."). Indeed, these concerns are yet heightened "when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori Learning Ctrs. v. Ashford Gear LLC,* 662 F.3d 913, 917 (7th Cir. 2011). Class counsel must demonstrate that "they would prosecute the case in the interest of the class…rather than just in their interests as lawyers who if successful will obtain a share of any judgment or settlement as compensation for their efforts." *Id.* (citations omitted).

Thus, a fee request can be unfair even when negotiated at arms' length: class counsel can achieve an impermissible self-dealing settlement simply through a defendant's and a mediator's indifference to the allocation. *Staton*, 327 F.3d at 964. As a matter of economic reality, "[t]he defendant cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class." *Eubank*, 753 F.3d at 720; *accord Goldberger v. Integrated Res.*, 209 F.3d 43, 52 (2d Cir. 2000). Thus, the relevant inquiry is whether the attorneys are unfairly attuned to their self-interest at the expense of the class. *Mirfasihi I*, 356 F.3d at 785; *Bluetooth*, 654 F.3d at 947; *cf. also* ALI Principles § 3.05, comment b at 208 (2010). This settlement contains signs of self-dealing warned of by the Seventh Circuit (and other circuits) including a disproportionate fee request, *see Bluetooth*, 654 F.3d at 947 (citing, *inter alia*, *Murray*, 434 F.3d at 952), and a clear-sailing provision, *see Redman*, 2014 U.S. App. LEXIS 18181, at *36.

Fortunately, because the settling parties have eschewed the "defect[ive]"[1] segregated fee fund structure in favor of a pure common fund approach, this Court possesses (and should exercise) its authority to lower the fee award, thereby augmenting class members' awards. *See, e.g.*, *Redman*, 2014 U.S. App. LEXIS 18181, at *20 ("One possible solution, in a case in which the agreed-upon attorneys' fee is grossly disproportionate to the award of damages to the class, is to increase the share of the settlement received by the class, at the expense of class counsel."); *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 127 (2d Cir. 2014) (crediting the district court's "rightful[] sensitiv[ity] to the public perception of overall fairness" demonstrated by recognizing that "overcompensation of attorneys would take away money from… plaintiffs"); *Michel v. Wm Healthcare Solutions*, No. 1:10-cv-638, 2014 U.S. Dist. LEXIS 15606, at *52 (S.D. Ohio Feb. 7, 2014) ("by reducing the amount of the fund paid to Class Counsel, the Court augments the benefit to each Class Member").

A. Class counsel's fee request seeks a disproportionate share of the class benefit.

It is vital not to allow class counsel to obtain "disproportionate distribution of the settlement." *Bluetooth*, 654 F.3d at 947 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998). In

[1] *Redman*, 2014 U.S. App. LEXIS 18181, at *35.

performing the disproportionality analysis, the Seventh Circuit has set forth the following formula: "The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received." *See id.* at *16. Here, defendants will contribute a total of $75,455,098. *See* Amended Settlement Agreement and Release ("Settlement Agreement"), Dkt. 131-1 at 10. Class counsel report that as of September 26, 2014, the estimated cost of notice and claims administration was $4,628,700. *See* Jonathan D. Selbin Declaration ("Selbin Decl."), Dkt. 177 ¶ 30. When the notice and administrative costs are excluded, the total funds available are $70,826,398. Under the Settlement Agreement, the parties agreed that class counsel could seek up to 30% of the $75.4 million Settlement Fund. *See* Settlement Agreement, Dkt. 131-1 at 13. Accordingly, the ratio of the (1) agreed fee ($22,636,529) to (2) agreed fee + class recovery ($22,636,529 + $48,189,869) = 31.9%.

Redman v. RadioShack holds that notice and administration expenses should be excluded when calculating attorneys' fees. 2014 U.S. App. LEXIS 18181, at *15-*16. Class counsel wrongly argues that notice and administration costs should be included when calculating the requested fee because *Redman v. RadioShack* is distinguishable. *See* Fee Request at 11. Even if notice and administration costs are properly excluded from the denominator, however, 30% of $70.8 million[2] remains improperly disproportionate because it exceeds the market rate for fees and instead, reflects that the settlement is "driven by fees." *Hanlon*, 150 F.3d at 1021; *accord Bluetooth*, 654 F.3d at 947.

1. Class counsel's 30% fee request grossly exceeds market rate because fees for a $70 million fund should include diminishing marginal rates and because a 30% rate would substantially overcompensate class counsel for the risk and opportunity cost they faced in this case.

Class counsel's request for 30% of the $70.8 million fund ($21.2 million) grossly exceeds the market rate for common funds of that size. "The market rate for legal fees depends in part on the risk

[2] In their Fee Request, class counsel argues in the alternative that if *Redman* applies then they seek 30% of $70.8 million. *See* Fee Request at 11. Class counsel's Motion for Attorneys' Fees, however, requests 30% of the Settlement Fund (defined in the Settlement Agreement as $75.4 million, *see* Settlement Agreement, Dkt. 131-1 at 9) and does not include an alternative argument regarding exclusion of administrative expenses. *See* Motion for Fees, Dkt. 175.

of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *In re Synthroid Marketing Litigation*, 264 F.3d 712, 721 (7th Cir. 2001) ("*Synthroid I*"). Under Seventh Circuit law, diminishing marginal rates should apply to a $70 million fund to more accurately reflect the market because "negotiated fee agreements regularly provide for a recovery that increases at a decreasing rate." *See Silverman v. Motorola*, 739 F.3d 956, 959 (7th Cir. 2013); *Synthroid II*, 325 F.3d at 975 (noting that the "market rate, as a percentage of recovery, likely falls as the stakes increase"); *Synthroid I*, 264 F.3d at 721 ("Both negotiations and auctions often produce diminishing marginal fees when the recovery will not necessarily increase in proportion to the number of hours devoted to the case."). As Judge Easterbrook reasoned:

> Awarding counsel a decreasing percentage of the higher tiers of recovery enables them to recover the principal costs of litigation from the first bands of the award, while allowing the clients to reap more of the benefit at the margin (yet still preserving some incentive for lawyers to strive for these higher awards).

Silverman, 739 F.3d at 959 (observing that is just as expensive to litigate a $100 million case as a $200 million case because "costs of litigation do not depend on the outcome").

For example, in *Synthroid II*, the Seventh Circuit ordered fees for consumer class counsel of 30% of the first $10 million, 25% of the next $10 million, 22% of the band from $20 to $46 million, and 15% of everything else on a fund totaling $88 million. 325 F.3d at 980. *Synthroid II* was a fraud suit against a drug manufacturer which included two classes: a consumer class and a third-party payor class. *Id.* at 976. In applying the marginal rate in *Synthroid II*, the court took into account that the consumer class counsel in that case had assumed as great a risk as counsel for the third-party payor class in those proceedings and thus, the Seventh Circuit awarded fees that applied the same marginal rate awarded to the third-party payor class counsel. *Id.* at 980. The Seventh Circuit recognized that class counsel had assumed "a significant risk, for the consumer class did not have an easy road." *Id.* at 977.

Applying that same formula used in *Synthroid II* to this case, class counsel would receive:

Recovery Tier	Rate	Fee
$0 to $10 million	30%	$3,000,000
$10 to $20 million	25%	$2,500,000
$20 to $46 million	22%	$5,720,000
$46 to $70.8 million	15%	$3,720,000
	TOTAL	$14,940,000

It can hardly be said that class counsel here had a difficult road: the Court appointed class counsel as lead counsel and liaison counsel on February 15, 2013 (Order, Dkt. 13) and the next month on March 26, 2013, the Court stayed all proceedings pending mediation (Order, Dkt. 32). There was no motion to dismiss, much less a motion for summary judgment. *See Synthroid I*, 264 F.3d at 722 ("Systems where fees rise based on the stage of litigation rather than the calendar are more common in private agreements."). Furthermore, class counsel cannot argue that this action was so risky that no others were willing to serve as lead counsel because the court appointed two firms as lead counsel and one firm as liaison counsel. *See* Order dated February 15, 2013, Dkt. 13; *compare, e.g., Silverman*, 739 F.3d at 958 ("When this suit got under way, no other law firm was willing to serve as lead counsel … suggest[ing] that most members of the securities bar saw this litigation as too risky for their practices."). And while class counsel assumed some risk in proceeding with this case, nothing in the record demonstrates that it was as "significant" as that assumed in *Synthroid II*, which would justify higher marginal rates than awarded there: the $75 million settlement fund is less than a fraction of one percent of the possible statutory damages for a TCPA class of over 16 million members. *Cf. Murray*, 434 F.3d at 952. That sort of nuisance settlement may be a fair evaluation of the risks of continued litigation—but achieving a quick-and-dirty nuisance settlement is a low-risk affair that does not justify extraordinary attorney returns. While the Seventh Circuit in *Synthroid II* rejected the idea that an auction is required to generate market efficiencies in counsel selection, had there been competitive bidding for the fee required to produce a nuisance settlement of less than 1% of the class's alleged damages among the multiple qualified firms wishing to act in this litigation, the winning bid would have been

substantially less than the tens of millions of dollars class counsel is requesting. (Instead, the multiple class counsel appear to have reached a secret, undisclosed agreement to split fees: collusion that is the very opposite of market-setting rates, and not permitted by Rule 23(h). *See* Section III.C below.)

Indeed, Objector Collins has sought discovery regarding class counsel's risk assumed here. *See* Collins' Motion to Lift Stay for Limited Discovery, Dkt. 191 at 9. Class counsel argues that they assumed "real" risk in prosecuting this case because they lost previous TCPA cases. *See* Fee Request at 20. But the term "real" is nebulous. Is "real" more than "significant" risk assumed in *Synthroid*? And class counsel's identification of cases they have lost is not helpful when viewed in isolation. Instead, Collins seeks information regarding the lodestar class counsel has won and lost in other TCPA cases in order to quantify the risk assumed by class counsel here. *See* Collins' Motion to Lift Stay at 10.

For example, if *ex ante*, class counsel had a very low chance of success, then a large multiplier of their lodestar would be demanded in the marketplace to compensate them for that risk. But if in reality class counsel has a greater than 50% chance of recovering fees for any given hour devoted to TCPA litigation, then a multiplier of lodestar of less than two would be all that is needed in the marketplace to induce class counsel to bring a TCPA case.

Class counsel has cited other TCPA cases[3] to justify their 30% request, but those cases are not helpful because they do not involve large funds like here:

Case	Fund or Class Recovery
Martin v. Dun & Bradstreet, Inc. et al, No. 1:12-cv-00215 (N.D. Ill.) (*See* Appendix to Fee Request, Dkt. 176-1 at 17.)	$4,500,000
Cummings v Sallie Mae, 12C-9984 (N.D. Ill. May 30, 2014) (*See* Sallie Mae Settlement Agreement, 12C-9984, Dkt. 69-1 at 5.)	$9,250,000

3 Plaintiffs also cite *Gehrich v. Chase Bank, USA, N.A.*, No. 1:12-cv-05510 (N.D. Ill.), which involves a $34,000,000 fund, but the Court has only granted preliminary approval there. *See* Appendix to Fee Request, Dkt. 176-1 at 1; *see also* Chase Bank TCPA Settlement Agreement, 1:12-cv-05510, Dkt. 107-2 at 2.

Case	Fund or Class Recovery
Hanley v. Fifth Third Bank, No. 1:12-cv-01612 (N.D. Ill. Dec. 23, 2013) (*See* Fifth Third Bank Settlement Agreement, 12-cv-1612, Dkt. 69-1 at 5.)	$4,500,000
Desai v. ADT Sec. Servs., Inc., No. 1:11-cv-01925 (N.D. Ill. June 21, 2013) (*See* Appendix to Fee Request, Dkt. 176-1 at 31.)	$15,000,000
Paldo Sign and Display Company v. Topsail Sportswear, Inc., No. 1:08-cv-05959 (N.D. Ill. Dec. 21, 2011) (*See* Appendix to Fee Request, Dkt. 176-1 at 36.)	$2,000,000
CE Design Ltd. v. Cy's Crab House N., Inc., No. 1:07-cv-05456 (N.D. Ill. Oct. 27, 2011) (*See* Appendix to Fee Request, Dkt. 176-1 at 47.)	$3,647,500
Saf-T-Gard Int'l, Inc., v. Seiko Corp. of Am., No. 1:09-cv-00776 (N.D. Ill. Jan. 14, 2011) (*See* Seiko TCPA Settlement Agreement, No. 09-cv-776, Dkt. 98-2 at 7.)	$3,500,000
G.M. Sign, Inc. v. Finish Thompson, Inc., No. 1:07-cv-05953 (N.D. Ill. Nov. 1, 2010) (*See* Appendix to Fee Request, Dkt. 176-1 at 57.)	$3,000,000
Hinman, et al., v. M & M Rental Ctr., Inc., No. 1:06-cv-01156 (N.D. Ill. Oct. 6, 2009) (*See* Appendix to Fee Request, Dkt. 176-1 at 70.)	$5,817,150
Holtzman v. CCH, No. 1:07-cv-07033 (N.D. Ill. Sept. 30, 2009) (*See* CCH TCPA Settlement Agreement, No. 07-cv-7033, Dkt. 24 at 5.)	$397,000
CE Design, Ltd. v. Exterior Sys., Inc., No. 1:07-cv-00066 (N.D. Ill. Dec. 6, 2007) (*See* Exterior Systems TCPA Settlement Agreement, No. 07-cv-66, Dkt. 32-2 at 1.)	$315,334

Moreover, the fact that class counsel regularly brings successful TCPA cases with a 30% recovery suggests that a large multiplier is not needed to compensate class counsel *ex ante* for the risk incurred in bringing TCPA cases. Furthermore, there is no evidence that the courts in those cases performed the appropriate *Synthroid* analysis to examine whether the awarded 30% fee was necessary *ex ante* to compensate class counsel for the risk assumed in a TCPA case. It is also worth noting that class counsel's list is incomplete: many courts refuse to award the 30% in TCPA cases that class counsel requests here. *E.g., Steinfeld v. Discover*, 2014 U.S. Dist. LEXIS 48540, *5 (N.D. Cal. Mar. 31, 2014) (25% of $8.7 million fund, reflecting "multiplier of approximately 3.5"). *Steinfeld* involved the

same class counsel as this case did—demonstrating only further that discovery is needed to obtain a complete record of the risk and reward to class counsel of TCPA cases. The lodestar in *Steinfeld* was $620,660.25, *see id.* at *5; even if the lodestar in this case is three times the size of the *Steinfeld* lodestar, that would reflect a multiplier of over ten. There is no evidence class counsel needs a blended rate of thousands of dollars an hour to induce firms to bring TCPA cases—and the awards listed in the cases above, while possibly excessive, likely reflect multipliers far less than ten.

Accordingly, because class counsel's fee request fails to account for diminishing marginal percentages in market-based rates for megafunds, and because class counsel has not met their burden of demonstrating their proposed fee request does not overcompensate them for the relatively low risk they incurred in this case, the requested fees are unreasonable and should be reduced to a reasonable multiplier of reasonably-incurred lodestar reflecting the *ex ante* risk of bringing a TCPA case, based on the empirical evidence in class counsel's possession. On information and belief, this would result in a fee award of less than $4 million, returning $17.2 million to the class.

At ***most***, this Court should follow the schedule set forth in *Synthroid II* and award attorneys' fees of no more than $14.9 million instead of the requested $21.2 million, returning over $6.3 million to the class.

2. Notice and administrative costs are not a class benefit and should be excluded when calculating attorneys' fees.

Class counsel concede that *Redman v. RadioShack* requires notice and administrative costs to be excluded when calculating the reasonableness of an attorneys' fees request, but argue that it is inapplicable here. *See* Fee Request at 10 (citing *Redman v. RadioShack*, 2014 U.S. App. LEXIS 18181, at *11-*17). In *Redman,* Judge Posner explained that notice and administrative costs should not be "included in calculating the division of the spoils between class counsel and class members" because "those costs are part of the settlement but not part of the value received from the settlement by the members of the class." *Redman*, 2014 U.S. App. LEXIS 18181, at *14. The costs "***benefit class counsel*** and defendant as well as the class members" and "shed no light on the fairness of the division of the settlement pie between class counsel and class members." *Id.* (emphasis added).

Class counsel argue that *Redman* is distinguishable from this case because (1) this case does not involve coupons; (2) direct notice was provided to 95% of the class; and (3) the claims process in this case was "state-of-the-art." *See* Fee Request at 10. First, *Redman* did not limit its holding to coupons cases, nor is there any reason to create such a limitation. 2014 U.S. App. LEXIS 18181 at *14-*16. Second, whether or not the notice and administration of this settlement is more efficient does not make *Redman* inapplicable because in this case (and all class actions), class counsel will enjoy the benefits of that administration regardless of efficiency, i.e., how much is actually delivered to the class. Indeed, excluding notice and administration costs from the fee calculation increases efficiency. *See id.* at *15 (explaining that inclusion of administrative costs when calculating attorneys' may "create[] a perverse incentive; for higher administrative expenses make class counsel's proposed fee appear smaller in relation to the total settlement than if those costs were lower"); *In re Wells Fargo Secs. Litig.*, 157 F.R.D. 467, 471 (N.D. Cal. 1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses."). Accordingly, for purposes of calculating attorneys' fees, administrative and notice costs should be excluded.

B. Collins further objects to the Fee Request to the extent discovery is denied.

As discussed above, under *Synthroid*, a market-based fee award requires analysis of the risk incurred by class counsel, but class counsel has unfairly resisted providing this information before the objection deadline. Class counsel's Fee Request contained no lodestar information. *See* Selbin Decl. ¶ 33. The Seventh Circuit recently explained why such information should be disclosed to objectors to comply with Rule 23(h). In *Redman v. RadioShack*, class counsel did not submit their motion for attorneys' fees until after the deadline for objections to the settlement had expired. 2014 U.S. App. LEXIS 18181, at *37-*38. Judge Posner explained that there was "no excuse" for this violation of Rule 23(h):

> From reading the proposed settlement the objectors knew that class counsel were likely to ask for $1 million in attorneys' fees, but they were handicapped in objecting because the ***details of class counsel's hours and expenses*** were submitted later, with the fee motion, and so they did not have all the information they needed to justify their objections.

Id. at *37-*38 (emphasis added); *see also* Rubenstein, 3 Newberg on Class Actions § 8:24 (5th ed. 2014) ("[C]lass members ought to have the opportunity to review the full fee motion and object to it in writing, particularly in common fund cases where they are paying the fee themselves. Knowing the level of the fee alone is a weak substitute for reviewing the full fee petition as the latter ought to provide more detail about counsel's time and efforts, precisely the detail that would make the opportunity to object meaningful."). Because the Fee Request here contained no information on class counsel's lodestar, Objector Collins, like the objectors in *Redman*, has been handicapped from fully analyzing the Fee Request. *See* Collins' Motion to Lift Stay, Dkt. 191 at 7.

"A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) ("*Mirfasihi III*"). The lodestar information Collins seeks can "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *Bluetooth*, 654 F.3d at 945. Lodestar cross-check is valuable in the Seventh Circuit *ex ante* approach because "any law firm engaged in such *ex ante* negotiations would attempt to estimate the opportunity costs of the engagement by calculating the number of hours likely required for a particular litigation compared to some other investment of their time and efforts." *Williams v. Rohm & Haas Pension Plan*, 2010 U.S. Dist. LEXIS 54414, at *2, *4-*5 (S.D. Ind. Jun. 1, 2010) (citing *In re Trans Union Corp. Privacy Litig.*, 2009 U.S. Dist. LEXIS 116934, *16-*17 (N.D. Ill. Dec. 9, 2009) (utilizing lodestar data for purposes of cross-check)).

C. The Fee Request otherwise fails to comply with Rule 23(h).

There is a second violation of Rule 23(h) in this Fee Request. Class counsel's motion and the Settlement Agreement do not identify how the attorney fee award will be allocated among the different firms serving as class counsel. *See* Fee Request, Dkt. 176; Motion for Attorneys' Fees, Dkt. 175; Settlement Agreement ¶ 5.01. Rule 23(h) authorizes the Court to award "reasonable" attorneys' fees only when notice of the fee request is "directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h), (h)(1). It is not sufficient that class members are able to make "generalized arguments about the size of the total fee"; the notice must enable them to determine *which* attorneys seek *what*

fees for *what* work. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) (noting the district court's "independent duty … to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel" which duty cannot be delegated to the parties). The Fee Request fails to provide basic information regarding who seeks what, and instead provides for a lump sum that presumably co-lead counsel will distribute as they like. This undermines Rule 23(h)'s policy of "ensur[ing] that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *In re Mercury*, 618 F.3d at 994. This violation of Rule 23(h) unfairly shields class counsel's Fee Request from scrutiny and is independent reason to reject the fee request.

In addition, this information is also helpful in determining the risk assumed by class counsel in these proceedings. Objector Collins has moved this Court to lift the discovery stay to discover from each of the class counsel firms the lodestar information in other TCPA cases. *See* Collins' Motion to Lift Stay, Dkt. 191 at 10; Proposed Interrogatories, Dkt. 191-1 at 2. Historical lodestar information for each of the class counsel firms must be analyzed against what each of those class counsel firms are being compensated in this case to calculate the risk assumed.

IV. The Settlement's *cy pres* component improperly fails to identify the recipient.

Neither the class notice nor the Settlement itself informs class members who will be the recipient of any *cy pres* funds. *See* Settlement ¶ 7.04f ("…to non-profit(s) to be determined"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867 (9th Cir. 2012) (holding that failure to identify *cy pres* recipient makes settlement "unacceptably vague").[4] "Just trust us. Uphold the settlement now, and we'll tell you what it is later" is not a permissible limiting principle; it is "not how appellate review works." *Id.* at 869.

[4] Another component which is unacceptably vague includes the "core" relief of changes to Capital One's business practices described only as "enhancements to its calling systems" to prevent further violations. *See* Settlement ¶ 4.01. Indeed, this injunctive relief does not provide a benefit to a class defined as those injured by Capital One's *past* conduct, *see Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646, 654 (7th Cir. 2006), and arguably creates an intra-class conflict that requires separate representation under Rule 23(a)(4), *cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997).

The identity of the *cy pres* beneficiaries is a material element of the relief. If a *cy pres* recipient's identity were simply an immatieral administrative detail, courts would not invalidate distributions on the grounds that the recipient was improperly selected. *See, e.g.*, *Dennis*, 697 F.3d at 866 (reversing where proposed charities had "little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved"). Under Rule 23(e), class members must have notice and a fair opportunity to object to this material aspect of the settlement. This Court should reject the *cy pres* clause as "unacceptably vague."

V. The Court should not infer approval of the Fee Request from a low number of objectors, especially because the parties have artificially reduced the number of objections.

Any given class action settlement, no matter how much it betrays the interests of the class, will produce only a small percentage of objectors. The predominating response will always be apathy because objectors without counsel must expend significant resources on an enterprise that will create little direct benefit for themselves. *See Vought v. Bank of Am.*, 901 F. Supp. 2d. 1071, 1093 (C.D. Ill. 2012) (citing, *inter alia*, a 1996 FJC survey that found between 42% and 64% of settlements engendered no filings by objectors). Silence is simply *not* consent. *In re GMC Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir. 1979). "[S]ilence is a rational response to any proposed settlement even if that settlement is inadequate." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 73 (2007). Without *pro bono* counsel to look out for the interests of the class, filing an objection is economically irrational for any individual. *See In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The Court should draw no inference in favor of the Fee Request from the number of objections, especially given the vociferousness of the objectors, *see Vought*, 901 F. Supp. 2d at 1093, and because the parties have elected a process of objecting and opting out which is "unnecessarily onerous," *see Galloway v. Kan. City Landsmen*, No. 4:11-1020-CV-W-DGK,

2012 U.S. Dist. LEXIS 147148, at *16 (W.D. Mo. Oct. 12, 2012). Indeed, personal notice was distributed via internet, yet absent class members' responses cannot be made in the same medium.[5]

CONCLUSION

The Court should deny approval of the fee request until class counsel discloses both the empirical evidence of risk and opportunity cost in this case, 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 so that the fee request is no more than the sliding-scale percentages suggested by *Synthroid*.

Dated: October 27, 2014.

/s/ Melissa A. Holyoak
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5 Other settlements permit the efficient (indeed, close to costless) method of transmitting objections by a single electronic submission; *see e.g., In re Motor Fuel Temperature Sales Practices Litig.*, No 07-md-01840-KHV-JPO, Order (Dkt. No. 3019), at 2 (D. Kan. Nov. 10, 2011); Robert H. Klonoff, *Making Class Actions Work: The Untapped Potential of the Internet,* 69 U. Pitt. L. Rev. 727, 766 n. 251 (2008) ("[T]he ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class member participation.").

Certificate of Service

The undersigned certifies she electronically filed the foregoing Objection and associated Declaration of Jeffrey T. Collins via the ECF system for the Northern District of Illinois, thus effecting service on all attorneys registered for electronic filing. Additionally she caused to be served via first class mail a copy of this Objection and associated Declaration of Jeffrey T. Collins upon the following:

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Additionally, she caused to be mailed a courtesy copy of the foregoing via overnight courier addressed to:

Hon. James F. Holderman
United States District Court for the Northern District of Illinois
Everett McKinley Dirksen United States Courthouse
Room 2516A
219 South Dearborn Street
Chicago, IL 60604

Dated: October 27, 2014.

/s/ Melissa A. Holyoak