UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: 100% GRATED PARMESAN CHEESE MARKETING AND SALES PRACTICE LITIGATION

This Document Relates to All Cases

1:16-cv-5802
MDL No. 2705

Judge Gary Feinerman

BRIEF OF AMICUS CURIAE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Competitive Enterprise Institute ("CEI") is an IRC § 501(c)(3) non-profit corporation incorporated under the laws of Washington, D.C., with its principal place of business in Washington, D.C. The Center for Class Action Fairness is a sub-unit within CEI. CEI does not issue stock and is neither owned by nor is the owner of any other corporate entity, in part or in whole. The corporation is operated by a volunteer board of directors.

INTRODUCTION

In MDL Case Management Order No. 1, this Court indicated its intent to address "the possibility of appointing plaintiffs' lead counsel, a plaintiffs' steering committee, and plaintiffs' and defendants' liaison counsel" at the initial status hearing on August 4, 2016. Dkt. 9 at 4; Dkt. 24. The Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") submits this brief respectfully to recommend that the Court select plaintiffs' lead counsel through a competitive bidding process among those firms who are qualified and interested in serving in such capacity.

Selection of counsel in this manner is consistent with the Seventh Circuit's requirement that attorneys' fees be based on market rates and related admonition that such a determination should occur at the beginning of the litigation. While the Seventh Circuit does not mandate the use of competitive bidding, "fundamental economic analysis teaches" that a competitive bidding process that determines which among the qualified bidding firms is willing to act as lead counsel "on the terms most favorable to the entire class" is "the only way in which there is any real assurance of maximizing the class' ultimate welfare." *In re Comdisco Sec. Litig.* ("*Comdisco*"), 150 F. Supp. 2d 943, 949 (N.D. Ill. 2001). Competitive bidding will enable the Court to fulfill its fiduciary duty to avoid awarding windfall attorneys' fees out of the class' recovery and to ensure a real "market rate"—consistent with what a plaintiff would negotiate for itself in the market—while minimizing the potential for coordination among the many plaintiffs' firms likely to seek their share of the pie at the expense of the class.

The use of competitive bidding in this case is particularly appropriate. This MDL is a consolidation of tens of lawsuits arising from a news article reporting that independent laboratory

testing detected "significant amounts of cellulose in several brands" of parmesan cheese. *See* Transfer Order (Dkt. 1) at 1. There is no reason to believe that the defendants—blue-chip companies such as Kraft and Wal-Mart—are anywhere close to insolvency such that a substantial settlement or the ability to pay attorneys' fees is in doubt. Additionally, the issues and class are well defined, *see id.* at 4; the number of consumers harmed nationwide by defendants' alleged conduct is high, making a large payment likely; and the lawsuits arise from news reporting of an independent laboratory's test results for products labeled as 100% parmesan cheese and a government investigation involving similar issues, such that competitive bidding will not dampen the incentive for plaintiffs' attorneys to independently investigate illegal behavior, *see id.* at 1; Lydia Mulvany, *The Parmesan Cheese You Sprinkle on Your Penne Could Be Wood*, BLOOMBERG, Feb. 16, 2016.[1]

Accordingly, CCAF asks the Court to give preference in its selection process to putative lead plaintiffs' counsel who submit applications with detailed qualitative data about the firm's capabilities and commitment to serve as lead counsel (as a bulwark against underbidding by unqualified counsel) and a detailed quantitative fee structure. While the bids should remain under seal until after all of the applications have been submitted to prevent an unfair advantage for those submitting bids later in the process, the bids should be made publicly available thereafter to promote confidence, transparency, and fairness in the process.

INTEREST OF AMICUS CURIAE

CCAF is a sub-unit of the IRC § 501(c)(3) non-profit Competitive Enterprise Institute ("CEI"). CCAF is recognized as "the leading critic of abusive class action settlements." Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. TIMES, Aug, 13, 2013, at A12; *see also* Roger Parloff, *Should Plaintiffs Lawyers Get 94% of a Class Action Settlement?*, FORTUNE, Dec. 15, 2015 (calling CCAF's founder "the nation's most relentless warrior against class-action fee abuse"). CCAF stands for the

[1] *Available at* http://www.bloomberg.com/news/articles/2016-02-16/the-parmesan-cheese-you-sprinkle-on-your-penne-could-be-wood.

principles that settlement fairness requires that the primary beneficiary of a class-action settlement should be the class, rather than the attorneys or third parties; and that courts scrutinizing settlements should value them based on what the class actually receives, rather than on illusory measures of relief. In CCAF's six-year history, CCAF attorneys have won numerous landmark decisions in support of these principles. *E.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013); *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011). CCAF submits this *amicus* brief *pro bono* and will not seek any compensation for its work on this brief.

ARGUMENT

I. This Court has a fiduciary duty to protect absent class members' rights by ensuring fair and reasonable attorneys' fees are awarded.

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) (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)). The fiduciary role is necessary because the relationship between class members and counsel turns directly adversarial at the fee-setting stage. 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 v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). At the same time, "class counsel, ungoverned as a practical matter by either the named plaintiffs or the other members of the class, have an opportunity to maximize their attorneys' fees [from the total settlement amount] … at the expense of the class." *Id.* It thus is incumbent upon the court both "to secure the best representation possible" for the class, *In re Wells Fargo Sec. Litig.* ("*Wells Fargo*"), 157 F.R.D. 467, 468 (N.D. Cal. 1995), and 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). "To do so, … the court must strive to emulate the arrangements and decisions that the class itself would make were it able to negotiate." *Wells Fargo*, 157 F.R.D. at 468; *see also In re Amino Acid Lysine Antitrust Litig.* ("*Lysine*"), 918 F. Supp. 1190, 1194-95 (N.D. Ill. 1996)

(selection of "best choice" for lead counsel from a number of qualified firms requires court to reference the fee economics).

As explained further below, selecting class counsel *ex ante* through a market-mimicking competitive bidding process is fully consistent with the court's fiduciary duty, is further consistent with the Seventh Circuit's approach to attorneys' fees, and best protects the interest of absent class members.

II. Selecting lead counsel through a competitive bidding process will ensure a "market price" for attorneys' fees as required by controlling Seventh Circuit precedent.

A court's oversight role begins at the outset of the case, when it is called upon to select lead counsel and ensure that the class will be charged a market rate for that counsel's services at the conclusion of the litigation. The Seventh Circuit has "held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Marketing Litig.* ("*Synthroid I*"), 264 F.3d 712, 718 (7th Cir. 2001); *see also In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568, 570 (7th Cir. 1992) (judge's role "is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order," as "[m]arkets know market values better than judges do"). It has further made clear that "[t]he best time to determine this rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low)" because "[t]his is what happens in actual markets." *Synthroid I*, 264 F.3d at 718.

Failing to determine the market rate for attorneys' fees *ex ante* creates unnecessary complexities at the end of the litigation, when it is nearly impossible to determine what the market rate would have been. An *ex post* fee determination here is likely to be particularly inaccurate and protracted at the expense of the class. As this Court has observed, class settlements are often accompanied by a fee request that is uncontested and premised on both bloated rates and bloated hours. *De La Riva v. Houlihan Smith & Co.*, No. 10 C 8206, 2014 U.S. Dist. LEXIS 172350, at *6-*9 (N.D. Ill. Dec. 12, 2014) (discussing the phenomenon of *ex post* caselaw that "is so generous to plaintiffs' lawyers"

(internal quotation omitted)); *Gehrich v. Chase Bank USA*, No. 12 C 5510, 2016 U.S. Dist. LEXIS 26184, at *56 (N.D. Ill. Mar. 2, 2016) ("The evolution of Class Counsel's fee request through the course of the settlement approval process confirms the request's lack of a principled mooring."). Tens of cases have been formally consolidated in this MDL, and, in such circumstances, there is a strong possibility that plaintiffs' counsel will negotiate amongst themselves a split of windfall fees. *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) ("MDL involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the Godfather movies"). The possibility is made more likely by the large number of consumers impacted nationwide, the concomitantly large potential payment to the class, and the source of the information that gave rise to the lawsuits. *See Eubank*, 753 F.3d at 720. Specifically, rather than resulting from an enterprising plaintiffs' attorney investigation of potential wrongdoing, the lawsuits arose after the media reported on an independent laboratory's finding that significant amounts of cellulose were present in several brands of parmesan cheese and a government investigation involving similar allegations of falsely labeled parmesan cheese products.

Needless to say, such actions latching on to a journalist's or government agency's work are considered much more profitable and preferable to the entrepreneurial investigation of wrongdoing. It is not surprising that numerous attorneys filed related actions, and one can expect numerous firms to seek a piece of what they expect to be windfall fees in this MDL. *See Lysine*, 918 F. Supp. at 1192 (expressing concern "that the best interests of the putative plaintiff class would not be served by the kind of proliferation of plaintiffs' counsel that ordinarily marks a like proliferation of the number of cases that so often spring up after a triggering event"); *Comdisco*, 150 F. Supp. 2d at 950 n.12 ("[T]he award to a single bidder that is then responsible for performing and monitoring all of the work (enlisting any assistance that the bidder finds necessary) eliminates the phenomenon that this Court has sometimes described as multiple lawyers feeding at the trough …, a situation that inevitably ups the ante in terms of the total fee applications tendered to the court for approval."). The factors cited

above create the "ideal" case for competitive bidding because plaintiffs will likely succeed on their claims, against defendants who are financially able to pay the damages, with much of the investigation undertaken by third parties, almost certainly resulting in attorneys' fees paid to counsel—thus requiring a much lower risk premium than other cases taken on a contingency basis. *See* James L. Tuxbury, Note, *A Case for Competitive Bidding for Lead Counsel in Securities Class Actions*, 2003 COLUM. BUS. L. REV. 285, 288 (2003).

A. Competitive bidding at the beginning of the case creates a market system that best determines the market rate and thereby avoids the likelihood of above-market returns to plaintiffs' counsel at the expense of the class.

This court can avoid a painstaking and inaccurate *ex post* fee determination by selecting class counsel through an *ex ante* competitive bidding process. District courts in the Seventh Circuit have recognized that competitive bidding "serves as the 'ideal proxy' for the one-to-one lawyer-client agreement in conventional litigation" and replicates the market rate for legal services better than alternative approaches. *In re Bank One Shareholders Class Actions* ("*Bank One*"), 96 F. Supp. 2d 780, 785 (N.D. Ill. 2000); *see also, e.g.*, *Lysine*, 918 F. Supp. 1190; *Comdisco*, 150 F. Supp. 2d 943. This recognition is consistent with *Synthroid*'s holding that the market rate for attorneys' fees is determined "by reference to arrangements that satisfy willing buyers and sellers rather than the compensation that a judge thinks is appropriate as a matter of first principles." *In re Synthroid Marketing Litig.* ("*Synthroid II*"), 325 F.3d 974, 975 (7th Cir. 2003). *Cf. Synthroid I*, 264 F.3d at 721 (bids solicited by court reveal "what levels of compensation attorneys are willing to accept in competition").

Ordinarily, in a competitive market, a firm proposing to a sophisticated client a rate that would result in an above-market return would find itself underbid by competitors willing to accept a smaller above-market return, until all above-market rents were bid away. In the class-action context, however, the client is a diffuse body of individual claimants, typically with less at stake and thus little incentive and even less ability to negotiate down the rates offered by competing counsel. *See Wenderhold v. Cylink Corp.*, 188 F.R.D. 577, 587 (N.D. Cal. 1999) (lack of sophisticated lead plaintiff, "together with the inherent conflicts and agency problems in class actions and the limited ability of the court to address

such problems through case management" led court to determine that competitive bidding "is necessary to protect the interests of the putative class members"); *see also Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014) ("individual members of the class have such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant"). Competitive bidding stands as an analog to "the familiar 'beauty contest' among highly qualified law firms" by which "discerning clients make use of free market competitive principles" to select legal representation. *Raftery v. Mercury Fin. Co.*, No. 97 C 624, 1997 U.S. Dist. LEXIS 12439, at *7 (N.D. Ill. Aug. 7, 1997).

"The market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Synthroid I*, 264 F.3d at 721. Competitive bidding appropriately takes all of these considerations into account. If

> the skilled and experienced lawyer knows that he or she is competing against others who are likewise skilled and experienced, that lawyer perforce bases his or her proposal on the best possible informed evaluation of the potential risks and rewards of handling the case as known at the outset—an evaluation that deals with the uncertainties of recovery or nonrecovery, as well as with an estimated up-front quantification of the potential recovery if successful. That is the true essence of the free market of properly structured competitive bidding.

Comdisco, 150 F. Supp. 2d at 948.

Putative lead counsel are well positioned to assess their risk and price their services accordingly based on their lodestar in similar class actions and their broader litigation experience. *See, e.g.*, *Lysine*, 918 F. Supp. at 1196 ("knowledgeable law firms are well qualified to [assess *ex ante* risks] every day in establishing fee arrangements with their own clients"). For example, if *ex ante*, an attorney believes she has a very low chance of success, then she would propose a larger percentage of the recovery or a guaranteed minimum payment, as she would in the marketplace, to compensate her for that risk. *See Comdisco*, 150 F. Supp. 2d at 948 n.9 ("any sensible lawyer will have pegged his or her proposal high enough to take into account the possibility of ending up with no recovery"). With competitive bidding,

then, "the court knows the *best* deal that a qualified firm is prepared to make, submitted at a time when the firm knows that other qualified and competing firms are also tendering their own proposed best deals." *Lysine*, 918 F. Supp. at 1196 (emphasis in original).

The results from cases that have employed competitive bidding bear this out. A Federal Judicial Center study found that attorneys' fees in cases that selected lead counsel through competitive bidding resulted in bids for "lower percentage fee awards than what firms might have been expected to obtain under a percentage-of-the-fund method." Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, Federal Judicial Center (Aug. 29, 2001)[2] at 7-8 (finding that attorneys' fee awards ranged from 5% to 22.5%, with the majority of fee awards less than 9%). *See also* Tuxbury, *supra*, at 319-321 (in securities class actions, the average attorneys' fee was 10.8% and the median was 8.2% in competitive bidding cases, while in non-competitive bidding cases, the mean was 28.5% and the median was 30%). As one specific example, in *Bank One*, 96 F. Supp. at 785 n.5, the court noted that the successful bidder in *Lysine* "ultimately received something in the range of just 6% of the total class recovery of well over $50 million," resulting in the plaintiff class receiving between $5 million and $10 million more "than would have been true in the typical lead counsel-liaison counsel-counsel committee arrangement, with scads of lawyers feeding at the trough." *See also In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1458 (N.D. Cal. 1994) ("*ex ante* competitive bidding was effective in this case in producing 'reasonable' fees from an *ex post* perspective as well"); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201 n.6 (3d Cir. 2000) (competitive bidding "appears to have worked well, and we commend it to district judges").

Without a court-ordered, market-mimicking approach such as competitive bidding, there is a strong risk that the many firms vying to be appointed will "simply agree to work together and submit a joint fee proposal that they later present the class and the court after they complete their services," rather than "bid against [their] actual rivals by offering to lower [their] fees in order to induce the class

[2] *Available at* http://www2.fjc.gov/sites/default/files/2012/auctioning.pdf.

to hire [the firm] (or, more precisely, the court to appoint it)." Joseph Ostoyich, *That's Your Defense to Price-Fixing?*, LAW360, Oct. 24, 2014;[3] *see also In re Lucent Techs. Sec. Litig.* ("*Lucent*"), 194 F.R.D. 137, 156 (D.N.J. 2000) (remarking on the lack of opposition to the motion for lead counsel as "suggest[ing] possible collusion or a 'too comfortable' arrangement among counsel").

The risk of such coordination "harms both actual class members and competition as a whole by reducing overall recoveries for class members, and only benefitting the attorneys." Joseph A. Ostoyich & William C. Lavery, *So We Agree It's Price-Fixing, But* …, LAW360, Aug. 18, 2014;[4] *see also In re Stericycle, Inc.*, No. 13 C 5795, 2013 U.S. Dist. LEXIS 147718, at *3 n.2 (N.D. Ill. Oct. 11, 2013) (the task of evaluating applications for fee awards in class action "too often reveals an excess of lawyers seeking to share the wealth"); John C. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 908 (1987) (observing that where plaintiffs' attorneys elect their own lead counsel, competing groups have "invite[d] other attorneys into the action in order to secure their own vote for lead counsel," and that the result of some private ordering is a "political compromise," the price of which is "often both overstaffing and an acceptance of the free-riding or marginally competent attorney, whose vote gave him leverage that his ability did not").

Our concern is not merely hypothetical. Pernicious anti-competitive coordination reared its ugly head to the detriment of class members in this very district last year in *In re Capital One TCPA Litigation*, 80 F. Supp. 3d 781 (N.D. Ill. 2015). There, six firms endeavored to seek and privately divide a lump sum fee award of 30% of an approximately $75 million common fund. They did so without

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[3] *Available at* http://files.bakerbotts.com/files/Uploads/Documents/That's%20Your%20Defense%20To%20Price%20Fixing.pdf; *see also* Ostoyich, *supra* ("Think of it … this way: If the putative class sent out a request for proposal asking 10 to 15 law firms to submit bids for the opportunity to represent it, and each firm sent in the proposal saying it was adequate for the job and should be hired—but none contained a fee proposal and, instead, the bidders shortly afterwards pulled their individual bids and submitted a joint fee proposal—that would not likely pass Sherman Act muster.").

[4] *Available at* http://www.law360.com/articles/566261/so-we-agree-it-s-price-fixing-but.

providing any information regarding their lodestar to the court. CCAF's objecting client moved to lift the discovery stay and require class counsel to divulge their lodestar data in that case and past TCPA cases. Over counsel's objection, the motion for discovery was granted, ultimately revealing a multiplier of more than 10 in the *Capital One* litigation and that nearly 2/3 of class counsel's investment of time in TCPA litigation more broadly had been compensated (*i.e.* the litigation was far less risky than class counsel suggested after the fact). *See* Expert Report of M. Todd Henderson, No. 1:12-cv-10064, Dkt. 294 at 2-4 (N.D. Ill. Dec. 5, 2014). Judge Holderman relied on competitive fee structures negotiated in cases that utilized *ex ante* bidding. 80 F. Supp. 3d at 800-03 ("the analysis does … suggest that selecting competent counsel using a competitive process generates a lower percentage-of-the-fund fee arrangement than Eisenberg and Miller's mean and median percentages, which mostly reflect awards granted *ex post*"). However, because the court did not require *ex ante* bidding amongst the six firms from the outset, it was hamstrung after the fact by a "joint representation model" that was not "highly competitive." *Id.* at 808. Instead of a fee request bid competitively down to the break-even 1.57 multiplier from a single firm, counsel agreed to divide a much larger fee amongst many more firms. This Court likely saw a similar phenomenon at work in *Gehrich* where class counsel submitted a joint fee request that amounted to a blended rate of $4,092 per hour equating to a lodestar multiplier of over 7. 2016 U.S. Dist. LEXIS, 26184, at *55. *Ex ante* bidding would nimbly sidestep these pitfalls.

Courts nationwide likewise have recognized the significant harm posed to the class by the lack of true competition among counsel ostensibly competing for the lead counsel position. *See In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 75 (S.D.N.Y. 2000) (when "plaintiffs' lawyers negotiate among themselves to select lead counsel or a team of lead counsel, … the choice is not necessarily in the plaintiffs' best interests"); *Lucent*, 194 F.R.D. at 156 ("'unless there has been active, effective client participation in the [selection] process, it is possible that the counsel arrangement may simply reflect bargaining among lawyers for their own stake in the case, and not serve the best interests of the class'" (quoting *In re Milestone Scientific Sec. Litig.*, 187 F.R.D. 165, 177 (D.N.J. 1999)); *Sherleigh Assocs. v. Windmere-Durable Holdings, Inc.*, 186 F.R.D. 669 (S.D. Fla. 1999) (rejecting consortium of ten law firms

as "not in the best interests of the class" and instead selecting counsel through competitive bidding). Indeed, a report by the Third Circuit Task Force on the Selection of Class Counsel found:

> [V]oluntary agreements among lawyers may create cartel-like groupings that favor some lawyers and disfavor others on the basis of factors that have little to do with ability or fees, and such agreements may also result in overstaffing and padded hours. In order to reach a "deal," lead counsel may have to "cut in" so many lawyers that the representation of the class becomes inefficient and the ultimate fee request becomes inflated.

Final Report, Third Circuit Task Force on the Selection of Class Counsel at 10 (January 2002).[5]

B. The critiques of competitive bidding are largely inapplicable here or readily addressed through judicial oversight.

Courts and legal commentators have noted several concerns regarding the use of competitive bidding. While valid in some instances, those concerns largely have been dismissed as unpersuasive by courts in the Seventh Circuit or otherwise are inapplicable or readily addressed with proper judicial oversight in the present case.

One concern sometimes cited is that legal services are difficult to auction due to variations in the quality of services offered by different firms and attorneys. Less capable attorneys may submit the lowest rates, the critique goes, and yet not have the professional experience or capability to maximize the recovery of the class. Or, lawyers that propose lower fees have less incentive to commit time and resources to the case than lawyers charging higher fees.

Judicial gatekeeping solves this potential concern. Despite the pejorative mislabeling of competitive bidding by some critics as an "auction," a court certainly is not obligated to select the lowest bid. *See In re Stericycle, Inc.*, 2013 U.S. Dist. LEXIS 147718, at *11 n.8 (distinguishing competitive bidding, "a procedure that also takes into account an evaluation of the quality of class representation," from the "unfortunate and inaccurate label" of "auction" "that connotes competition based on price alone"). Instead, with the eye of a client assessing its legal options in the market, the court should

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5 *Available at* http://www.ca3.uscourts.gov/sites/ca3/files/final%20report%20of%20third%20circuit%20task%20force.pdf.

analyze the bids to determine the experience and capabilities of the law firms, how the proposed fee structure benefits the class and incentivizes counsel, and whether the firm properly commits to and will prioritize the case. *See, e.g.*, *Synthroid I*, 264 F.3d at 720 ("Judges don't look for the lowest bid; they look for the best bid—just as any private individual would do in selecting a law firm, an advertising firm, or a construction company ... [and ultimately] select[] the firm that seems likely to generate the highest recovery net of attorneys' fees."); *Gorham v. General Growth Props.*, 256 F.R.D. 602, 604 n.3 (N.D. Ill. 2009) (competitive bidding "applies strict scrutiny to the quality of representation and to the experience afforded by the law firms involved, to make certain that the class receives the best possible substantive representation as well as getting it on favorable economic terms"); *Lysine*, 918 F. Supp. at 1195, 1199 (calling argument that selection of counsel "based on price alone" is undesirable a "straw man" because, while the "money factor" is important, "it is essential to choose counsel who have impeccable credentials in terms of ability and experience" and assess whether any facet of a proposal "could serve to chill or misdirect counsel's efforts to the detriment of the class"); *Wells Fargo*, 157 F.R.D. at 468 ("court must examine not only quantitative factors, such as the cost of each firm's services, but also the various qualitative attributes of the … firms and their bids"); *In re Oracle Sec. Litig.*, 852 F. Supp. at 1456-57 ("The bids were analyzed and compared using multiple criteria before the court made its choice of class counsel. The [firm] bids ultimately selected by the court offered class counsel performance initiatives while simultaneously protecting against lawyer windfalls.").

Once the court has determined that there are a "number of highly credentialed and highly experienced lawyers available…, the choice of which of them is primus inter pares reduces to a highly imperfect one, necessarily partaking of subjective and personalized factors. To require a court to make that choice without reference to economics—what level of compensation are the different available and well-qualified counsel willing to work for?—does *not* simulate what the informed client would do." *Lysine*, 918 F. Supp. at 1195 (emphasis in original).

After the court selects lead counsel, it has countless tools to ensure the firm acts in the best interests of the class for the entirety of the litigation. It can require the winning firm to place an amount

in escrow that would be forfeited if the firm fails to fulfill its obligations to the class, or require the winning firm to guarantee a certain recovery before it will be entitled to fees. Likewise, serious bidders can voluntarily commit to these safeguards, or simply discuss the self-policing incentives built into their bids. Hooper, *supra*, at 29-36 (describing court guidelines for bid proposals in past cases); *see also Bank One*, 96 F. Supp. at 785-89 (analyzing in detail "wide-ranging proposals"); Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POLICY REV. 69, 75-76 (2004) (proposing that the "contract for which [counsel] bid structures their incentives in a way that turns faithful representation of the suing class into the only profitable course of action"); *id.* at 79 (devising auction process in which the only "type of attorney capable of winning … [is one] who conscientiously estimates the class members' expected recovery, offers them a competitive fee and pledges her earnings from the case as a security for her undertaking to provide the class members both a loyal and competent representation"). The court has a duty to closely scrutinize any settlement before providing approval and can reject any settlement that is reached before the parties have properly determined the case value or that provides too little benefit to the class.

Another concern is that competitive bidding may discourage attorneys from acting as "private attorneys general" by investigating and seeking to remedy illegal activity, as the attorney who takes the initiative in such investigation might be frozen out in the bidding process and thus uncompensated for his effort. Here, however, "no attorney initiative was required here to ferret out the alleged wrong committed by defendants," *see supra*, and, thus, such a concern is not relevant. *See Auction Houses*, 197 F.R.D. at 82.

III. The bids should be submitted under seal to avoid anti-competitive coordination and made public within 48 hours of the submission deadline.

As is the practice in cases that select lead counsel through a bidding process, the Court should order all bids to be submitted under seal and bar coordination among the competing firms, "[i]n order to maximize competition in the best interests of the prospective class." *Lysine*, 918 F. Supp. at 1192 n.7. "[A]ny such cooperation among counsel that could cut back on the number of prospective bidders

or could otherwise inhibit the independent judgment of those who bid would clearly seem to operate in restraint of trade." *Id.*

Once the bids have been submitted, and at least by the time the Court announces its lead-counsel decision, the Court should "disclose the terms of the winning bidder as well as the proposed terms of the competing bidders." Hooper, *supra*, at 60. "In most cases," courts have adhered to the practice of requiring bids to be submitted under seal and then disclosing the terms at least by the time it has announced the winning bidder. *Id.* As Judge Walker, a pioneer of competitive bidding commented, "disclosure of class counsel's compensation arrangements benefits the class … by producing information highly pertinent to class counsel's performance" and impedes the ability of class counsel and defendants to reach a settlement that puts their interests ahead of the class. *In re Oracle Sec. Litig.*, 136 F.R.D. 639, 645 (N.D. Cal. 1991). Moreover, disclosure of class counsel's bids benefits the class because "[u]nlike the usual attorney-client situation, … class members do not participate in the negotiations by which a part of their claim is bargained away." *Id.* Thus, from a policy standpoint, public disclosure promotes class members' confidence in the fair administration of their case, to which they are largely detached due to the inherent structure of class actions, and gives them a fuller view of the process, while also deterring the possibility of fraud or other injustice against the class. After all, disclosure is the "first and perhaps most important principle for class action governance." Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 118-125 (2004).

CONCLUSION

For the foregoing reasons, lead plaintiffs' counsel should be selected through a competitive bidding process conducted by the Court to ensure the class is best represented at rates that are at or near the market rate, thereby protecting the interests of the class.

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Respectfully submitted,

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