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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE LITHIUM ION BATTERIES ANTITRUST LITIGATION,

This Document Relates to:

ALL INDIRECT PURCHASER ACTIONS

Case No. 13-md-02420 YGR (DMR)

MDL No. 2420

OBJECTION OF MICHAEL FRANK BEDNARZ TO PROPOSED IPP SETTLEMENTS AND FEE REQUEST

Judge: Hon. Yvonne Gonzalez Rogers
Courtroom: 1
Date: October 3, 2017
Time: 2:00 P.M.

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INTRODUCTION

Only twice in the past quarter-century has the Supreme Court opined on class action settlements. *See Amchem Prods. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). But its message in those cases was unambiguous: claims of widely divergent value and quality do not belong in the same class, whether that class is proposed for litigation or for settlement. *Amchem*, 521 U.S. at 620-28; *Ortiz*, 527 U.S. at 857-58. The putative settlement classes ignore that core message by lumping together individuals with qualitatively different claims in a single settlement class. Under the foundational rule of *Illinois Brick v. Illinois*, indirect purchasers cannot bring federal antitrust claims for money damages. 431 U.S. 720 (1977). Thus, the claims here rise or fall depending upon state law. But even though twenty states follow the rule of *Illinois Brick*, the settling parties propose a fifty-state unitary settlement class. The Court correctly rejected these efforts with respect to the non-settling defendants. Dkt. 1735 at 23-24. The calculus does not change because the proposal is for settlement rather than for litigation. *Amchem*, 521 U.S. at 620. The putative class cannot satisfy the prerequisites of Rules 23(a)(4) and (b)(3).

To add injury to an improper certification, the settling parties unfairly propose to distribute the settlement funds *pro rata* to all claimants regardless of whether they purchased in repealer or non-repealer states. This plan of allocation does not account for the variable strength of claims; thus, it is not fair as Rule 23(e)(2) demands.

Lastly, in the event that the Court reaches the question of attorneys' fees, it should examine class counsel's initial fee commitment, made under seal during the early stages of the litigation, to ensure that class counsel's current request does not exceed that of its original offer. Allowing class counsel to renege on their earlier bid would both countenance a breach of counsel's ethical duty and also undermine the integrity of the entire appointment process.

I. Frank Bednarz is a member of the proposed settlement classes and has standing to object.

Objector Michael Frank Bednarz is a member of the proposed IPP settlement classes with Hitachi-Maxell, NEC, and LG Chem through his purchase of a laptop in 2006 and a replacement lithium ion battery for his laptop in 2010. Declaration of M. Frank Bednarz ("Bednarz Decl.") ¶¶ 3-6. Bednarz' address is 1145 E. Hyde Park Blvd. Apt 3A, Chicago, IL 60615; his phone number is 801-706-2690; his email is

frank.bednarz@cei.org. Bednarz Decl. ¶ 2. Bednarz is an attorney with the non-profit Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF"), which also represents him *pro bono* in this matter. Bednarz Decl. ¶¶ 8-9. Bednarz intends to appear at the October 3, 2017 fairness hearing through counsel, which he reserves the right to substitute prior to the hearing, where he wishes to discuss matters raised in this Objection. Bednarz does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on the docket by any settling party, objector, or *amicus*. Bednarz also reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval, including any who testimony by declaration. Bednarz objects to the extent class counsel uses expert witnesses in a reply brief to support their fee application after the objection deadline. Such a procedure is unfair under Rule 23(h) and inconsistent with the rule of *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010). Any such new evidentiary submissions should be stricken. He joins by reference any substantive objections made by other class members not inconsistent with those made here.

CCAF represents class members *pro bono* in class actions where class counsel employs unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (observing that CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement.") (rejecting settlement approval and certification); Elizabeth Chamblee Burch, *Public Funded Objectors*, THEORETICAL INQUIRIES IN LAW, at 9 n.35 (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2923785 (listing CCAF as an organization "more likely to challenge the most egregious settlements [that has] develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees.").

Since it was founded in 2009,[1] CCAF has "recouped more than $100 million for class members" by

[1] In 2015, CCAF merged with the non-profit Competitive Enterprise Institute and became a program within CEI's law and litigation program.

driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* BOSTON GLOBE (Dec. 17, 2016); *see, e.g., McDonough v. Toys "R" Us,* 80 F. Supp. 3d 626, 661 (E.D. Pa 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members." (internal quotation omitted)). Because it has been CCAF's experience that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from the agenda of those who are often styled "professional objectors." A "professional objector" is a specific term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 n.150 (2003). This is not CCAF's *modus operandi*. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. *See generally* Declaration of Theodore H. Frank ¶¶ 4-21.

To avoid doubt about his motives, Bednarz is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of his objection. Bednarz Decl. ¶10; *see generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Bednarz brings this objection through CCAF in good faith to protect the interests of the class.

II. The district court has a fiduciary duty to the class as a whole.

"Class-action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval." *Pampers*, 724 F.3d at 715. Unlike ordinary settlements, "class-action settlements affect not only the interests of the parties and counsel who negotiate them, but also the interests of unnamed class members who by definition are not present during the negotiations. *Id.* "[T]hus, there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.*

To guard against this danger, a district court must act as a "fiduciary for the class . . . with 'a jealous regard'" for the rights and interests of absent class members. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (quoting *In re Washington Pub. Power Supply Sys. Litig.,* 19 F.3d 1291, 1302 (9th Cir. 1994)). Bednarz raises two primary objections, both of which invoke this special fiduciary role of the Court: (1) intra-class conflicts preclude certification of the putative class and (2) class counsel potentially seeks an excessive and unreasonable fee.

First, with respect to certification, Rule 23(a)(4) requires that class representatives adequately represent class members and Rule 23(b)(3) requires that issues common to all class members predominate over issues individual to each class member. These specifications are "designed to protect absentees by blocking unwarranted or overbroad class definitions." *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). Such requirements "demand undiluted, even heightened, attention in the settlement context." *Id.*; *accord Pampers*, 724 F.3d at 721 ("The requirements are scrutinized more closely, not less, in cases involving a settlement class"); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016) ("The requirements of Rule 23(a) are applied with added solicitude in the settlement-only context."). Put another way, "it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." *Amchem*, 521 U.S. at 623. Aside from concerns of trial manageability, the same "rigorous analysis" required when a defendant contests certification is required for a settlement-only certification. *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017). The proponents of certification bear the burden to demonstrate compliance with Rules 23(a) and (b). *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-980 (9th Cir. 2011); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997).

With respect to Bednarz's second objection to class counsel's common fund fee request, the need for court oversight is even more apparent. At the fee-setting stage, the relationship between class counsel and the class turns directly and unmistakably adversarial because counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Mercury Interactive*, 618 F.3d at 994. Given this natural adversity, there can be no deference to class counsel's recommendation.

Moreover, "in most common-fund cases, defendants have little interest in challenging class counsel's timesheets." *Gutierrez v. Wells Fargo, NA*, No. 07-cv-05923 WHA, 2015 WL 2438274, at *6 (N.D. Cal. May 21,

2015). That is the case here, seeing as the settlements do not include any limits on the amounts class counsel may seek from the common fund; defendants have agreed to pay regardless of what percentage goes to the class versus the lawyers. No individual class member has the financial incentive to object to an exorbitant fee request either; "[h]is gain from a reduction, even a large reduction, in the fees awarded the lawyers would be miniscule." *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992). The district court (and good-faith public-minded objectors) serve as the last line of defense against overreaching fee requests.

"Public confidence in the fairness of attorney compensation in class actions is vital to the proper enforcement of substantive law." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 688-92 (Cal. 2016) (Liu, J., concurring). Exorbitant fees erode public confidence in the class action device. To prevent that erosion, it is "it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so." *Piambino v. Bailey,* 757 F.2d 1112, 1144 (11th Cir. 1985); *see also In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (differentiating "reasonable" and "windfall" fees in megafund cases). "Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class action process." Advisory Committee Notes on 2003 Amendments to Rule 23.

III. Intraclass conflicts between class members who purchased in *Illinois Brick* repealer states and those who did not, preclude certification of the proposed classes.

"[W]here the court is '[c]onfronted with a request for settlement-only class certification,' the court must look to the factors 'designed to protect absentees.'" *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003) (quoting *Amchem*, 521 U.S. at 620). "Subdivisions (a) and (b) [of Rule 23] focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives", a "dominant concern [that] persists when settlement, rather than trial, is proposed." *Amchem*, 521 U.S. at 621. "[I]ntraclass equity" is a "requirement." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 863 (1999). Judicial supervision requires the court to weigh the value of differently-situated class members' claims against one another to determine whether common questions predominate ((b)(3)) or whether there exist irreconcilable intraclass conflicts that demand separate representation ((a)(4)).

It just so happens that this Court has already correctly answered the question, by denying certification of a proposed nationwide class against the non-settling defendants. *See* Order Denying Without Prejudice Motions for Class Certification, Dkt. 1735. As the Court determined, California's Cartwright Act cannot be

applied to indirect purchases made in *Illinois Brick* non-repealer states without overriding the policies of those non-repealer states and thereby creating a conflict of law. *Id* at 23-24. Quite simply, "a nationwide class under the Cartwright Act would not be appropriate." *Id.* at 24. Previously, the plaintiffs asserted that if the Court declines to certify a nationwide damages class under California law, they would seek certification of an alternative *Illinois Brick*-repealer-state-only class. IPP's Motion for Class Certification, Dkt. 1036 at 51; IPP's Fourth Consolidated Amended Complaint, Dkt. 1168 at ¶ 489.

Nonetheless, the plaintiffs now persist in proposing a nationwide settlement class, with claims of vastly different litigation value all receiving the same *pro rata* distribution of settlement funds. This forces class members with legitimate claims to unfairly compromise and dilute their claims for damages so that class members with no claims can participate in a single settlement class. If *Amchem* and *Ortiz* teach us one lesson it is that when a class is too splintered to be certified for litigation, it cannot be certified for settlement.

A. The putative class cannot satisfy (b)(3)'s predominance requirement.

"The Rule 23(b)(3) predominance inquiry tests whether the proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Here, the nationwide settlement class is not sufficiently cohesive: class members who indirectly purchased items in the approximately 30 *Illinois Brick*-repealer states have viable monetary antitrust claims, while class members who indirectly purchased items in the approximately 20 non-repealer states have no viable monetary antitrust claims.[2] This black-and-white conflict of applicable state law means that a unitary nationwide class cannot satisfy (b)(3). Dkt. 1735 at 23-24; *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590-96 (9th Cir. 2012) (decertifying class of Honda purchasers where "variances in state law overwhelm common issues and preclude predominance for a single nationwide class"); *Perras v. H & R Block*, 789 F.3d 914, 916 (8th Cir. 2015) (concluding that a putative nationwide class asserting Missouri consumer protection state law claims does not satisfy (b)(3)); *contra Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 301-02 (3d Cir. 2011) (*en banc*) (following Third Circuit precedent and declining to consider state law variation as an essential part of the predominance inquiry).

[2] It is undisputed that federal antitrust law does not permit indirect purchasers a cause of action to recover damages. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The court has listed the 30 *Illinois Brick* repealer jurisdictions in its order denying class certification against the non-settling defendants. *See* Dkt. 1735 at 24 n.11.

Again, to be faithful to *Amchem* and *Ortiz*, "the predominance inquiry—as distinguished from the trial-manageability inquiry—should not be watered down merely because the parties have entered a proposed settlement." *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 159 (S.D.N.Y. 2008). Where "differences in the applicable state laws go to the heart of Settlement Class members' substantive claims," it "undermine[s] the Settlement Class's cohesiveness" and makes certification "inappropriate." *Id.*; *see also Clement v. Am. Honda Fin. Corp.*, 176 F.R.D. 15, 23 (D. Conn 1997) (rejecting nationwide settlement class certification because of variation among state consumer protection laws). *Amchem* itself even mentioned "differences in state law" as a factor that compounded the individual questions and ultimate lack of predominance. 521 U.S. at 624.

The parties may point to *Sullivan* in support of their argument that the predominance requirement is met here. As a Third Circuit case, it is not controlling law, while the Ninth Circuit's rigorous adherence to Rule 23(b)(3) and *Amchem* is. *See Mazza*, 666 F.3d 581 (state law variation undermines predominance). Second, the reasoning of *Sullivan* is dubious. When *Sullivan* stated[3] that the settlement-only certification posture of the case "marginalizes" the force of predominance objections and the need for a rigorous analysis, it ignored *Amchem*. "[I]t is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place." 521 U.S at 623. Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Id.* at 621. And just in case Justice Ginsburg's message was not clear: "[t]he safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments—checks shorn of utility—in the settlement class context." *Id. Amchem* recognizes a truth that the *Sullivan* majority did not: "the requirements for certification are not the defendant's to waive; they are intended to protect absent class members." Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013); *accord Sullivan*, 667 F.3d at 354 (Jordan, J., dissenting) ("a defendant's willingness to waive an argument is not a reason to ignore it. It is rather the very reason that collusive settlements are a problem").

Sullivan's focus[4] on the common questions of "alleged anticompetitive conduct and the resulting injury

[3] 667 F.3d at 303-04.

[4] 667 F.3d at 304 n.30.

caused to each class member" as sufficient grounds to satisfy predominance does not square with *Amchem*. "Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding." 521 U.S. at 623-24. Again, this Circuit adheres to *Amchem*'s instruction. *Mazza*, 666 F.3d 581 (finding that while plaintiffs could satisfy their "limited burden" to show an (a)(2) common question they could show neither (b)(3) predominance of legal or factual questions).

Fortunately, it is the correct holdings of *Amchem* and *Mazza* which bind this Court, not the errant holding of *Sullivan*. In accordance with *Amchem, Mazza* and this Court's recent order denying nationwide IPP class certification (Dkt. 1735), the putative nationwide class must be denied certification for lack of predominance.

B. The putative class cannot satisfy (a)(4)'s adequacy requirement.

Not only does the conflict between repealer and non-repealer states' laws undermine the cohesiveness necessary for Rule 23 (b)(3) predominance, it also introduces a foundational intraclass conflict that violates the representational adequacy requirement of Rule 23(a)(4).

"Adequate representation depends upon an absence of antagonism and a sharing of interests between representatives and absentees." *Radcliffe v. Experian Info. Solutions*, 715 F.3d 1157, 1165 (9th Cir. 2013) (internal quotation and alteration omitted). But for a putative class to even be capable of being adequately represented at all in the first place, they must share a community of typical claims and interests. *See Ortiz*, 527 U.S. at 856-57. "Conflicts of interest may arise when one group within a large class possesses a claim that is neither typical of the rest of the class nor shared by the class representative." *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010); *see also Melong v. Micronesian Claims Comm'n*, 643 F.2d 10 (D.C. Cir. 1980) (affirming denial of certification of a class that attempted to consolidate in a single class those with strong and weak claims). "A representative must 'possess the same interest and suffer the same injury as the class members' and must be aligned in interest such that no conflicts exist between the representative and any 'discrete subclasses' within the broader class he purports to represent." *In re Asbestos Litig.*, 134 F.3d 668, 677 (5th Cir. 1999) (Smith, J., dissenting) (quoting *Amchem*), *rev'd sub nom. Ortiz*, 527 U.S. 815. *Accord* MANUAL FOR COMPLEX LITIGATION (4th ed.) § 21.612. If significant differences in interests exist between different groups within the class, the certification must create subclasses, with separate representatives and class counsel for each subclass. *Id.* § 21.23.

Here, the single nationwide settlement class kludges together two subgroups of class members with qualitatively different claims: indirect purchasers in *Illinois-Brick* repealer states (who have stronger claims) and indirect purchasers in non-repealer states (who have weak to no claims). Because these two groups are competing for the same set of settlement funds, it creates an untenable intraclass conflict of interest to merge them into the same class with the same representation. *See, e.g., Ortiz*, 527 U.S. at 857; *In re Literary Works in Electronic Databases Copyright Litig.*, 654 F.3d 242, 251-52 (2d Cir. 2011).

Ortiz is instructive. There, the proposed class included plaintiffs exposed to asbestos both before and after the defendant's insurance policy had expired. 527 U.S. at 857-58. Because the settlement proceeds were originating with the insurer, the pre-expiration claimants had claims that were inherently more valuable, just as the damages claims of those who indirectly purchased in *Illinois Brick*-repealer states are inherently more valuable under black letter antitrust law. And just as the pre-insurance-expiration claimants in *Ortiz* would not have chosen an allocation that treated all claimants the same, *Illinois Brick*-repealer state purchasers would not have chosen an allocation that valued their claims the same as far more speculative claims. At bottom, under *Ortiz*'s framework, the legal strength of claims matters to adequacy. *Id.* at 857 (holding that it violates intraclass equity requirement to intermingle claims of divergent legal value).

Courts undertaking a Rule 23(a)(4) analysis have followed *Amchem* and *Ortiz* to hold that classes that include claims of sharply different litigation value fail to meet the Rule's adequate representation requirement. In *Literary Works*, class counsel attempted to negotiate compensation from Google for three separate "categories" of copyright-holding class members in a single settlement. 654 F.3d at 246. Each category received a different damages formula. As in this case, each class representative "served generally as a representative for the whole, not for a separate constituency." *Id.* at 251 (quoting *Amchem*, 521 U.S. at 627). Each category had qualitatively different claims. Regardless of whether the allocation negotiated for any category was unfair or inadequate, the Second Circuit struck down the settlement on Rule 23(a)(4) grounds because the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original).

Even more analogously to this settlement, in *Smith v. Sprint Communications*, the Seventh Circuit vacated certification of a nationwide settlement class where differences in state law meant that class members had claims of materially different value. 387 F.3d 612 (7th Cir. 2004). Even though "the settlement agreement

provided that adjustments [would] be made to the amount of recovery available to landowners in a given state, based on an analysis of that state's law by independent property-law experts," that still did "not provide the 'structural assurance of fair and adequate representation' prior to the settlement" required by Rule 23. *Id.* at 615 (quoting *Amchem*, 521 U.S. at 627)). Landowning class members in Tennessee and Kansas had fundamentally superior legal claims to other class members in other states. *Id.* at 214. As such, they required separate representation. If anything, the state-by-state variation in law here is more profound; it is the difference between a cognizable claim and no claim at all. As the Court has observed, the reason that plaintiffs didn't even assert state antitrust claims on behalf of alternative subclasses in non-repealer states was "doubtless" "because [non-repealer states'] antitrust laws follow *Illinois Brick* and prohibit recovery by indirect purchasers." Omnibus Order re: Motions to Dismiss the Second Consolidated Amended Complaints of Direct and Indirect Purchaser Plaintiffs, Dkt. 512 at 36 (internal quotation omitted). As in *Smith*, the state subclasses with the stronger claims here have obtained success in this litigation that the nationwide class has not. *See* Dkts. 512; 1735.

More problematic still, unlike in *Literary Works* and *Sprint Communications*, the parties deliberately chose "simple, straightforward" leveling of all claims regardless of the strength of the claim, without even the pretense of an argument that unlike claims were appropriately weighted to reflect their relative strengths. While the settling parties may contend that this means everyone has received equal representation, "[i]t is no answer to say that…these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes." *Ortiz*, 527 U.S. at 857. "The very decision to treat [all claims] the same is itself an allocation decision…" *Id.* "The problem here is not that some absent class members who deserve compensation are left out by the settlement. The problem is that some class members who deserve nothing are included in the settlement and hence are diluting the recovery of those who are entitled to make claims. That harm is real, and the cause of it, the overbreadth of the class, is akin to the problem in *Amchem*." *Sullivan*, 667 F.3d at 353 n. 22 (Jordan, J., dissenting).[5]

[5] *Sullivan*'s majority opinion focused on Rule 23(a) commonality and Rule 23(b) predominance, and did not address the issue of Rule 23(a)(4) intraclass conflicts and adequacy because the appellants in that case

To eliminate intraclass conflicts, subclassing is required, with each subclass having "separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856. *See also In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 233-34 (2d Cir. 2016) ("*Amchem* tells us that such divergent interests require separate counsel when it impacts the 'essential allocation decisions' of plaintiffs' compensation and defendants' liability.") (quoting *Amchem*, 521 U.S. at 627); *Literary Works*, 654 F.3d at 252 ("Only the creation of subclasses, **and the advocacy of an attorney representing each subclass**, can ensure that the interests of that particular subgroup are in fact adequately represented.") (emphasis added); Federal Judicial Center, MANUAL ON COMPLEX LITIGATION § 21.27 (4th ed. 2004) ("If the certification decision includes the creation of subclasses reflecting divergent interests among class members, each subclass must have separate counsel to represent its interests."); *cf. also Mazza*, 666 F.3d at 596 & n.4 (vacating class certification where variances in state law precluded a finding of predominance and noting that the "opinion does not foreclose in an appropriate case the use of smaller statewide classes of those purchasing in a particular state, or the use of subclasses within a larger class"). That is, "reclassification with separate counsel," not merely separate named representatives. *Id.* at 857. Before *Amchem* and *Ortiz* entered the necessary course correction, there was an "endemic problem that transcend[ed] the asbestos context" of "intra-class tradeoffs" made by "even the well-meaning plaintiffs' attorney" whose role had gradually shifted away from that "of an advocate and adviser for clients" to one "of a philosopher king, dispensing largess among his client subjects." John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1443 (1995).

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did not raise that objection. *See Sullivan*, 667 F.3d 273, 342 n.4 (3d Cir. 2011) (Jordan, J. dissenting) (noting that appellant-objectors failed to particularly "press the [Rule 23(a)(4)] issue in their briefs"). Nonetheless, Judge Breyer followed *Sullivan* in dismissing a similar (a)(4) objection made by CCAF in *In re Transpacific Passenger Air Transportation Antitrust Litigation*. No. C 07-05634 CRB, 2015 WL 3396829, at *3 (N.D. Cal. May 26, 2015). The court declined to resolve an *Illinois Brick* intra-class conflict objection stating that it didn't "believe that its role is to 'differentiate within a class based on the strength or weakness of the theories of recovery." *Id.* (quoting *Sullivan*). Over a dissent, the Ninth Circuit affirmed in a non-precedential decision. *In re Transpacific Passenger Air Transportation Antitrust Litig.*, __Fed. Appx. __, 2017 WL 2772177 (9th Cir. Jun. 26, 2017). Even if *Transpacific* were a correct statement of the law, it is distinguishable here because there is nothing "speculative" about the conflict Bednarz asserts. *Id.* at *1. The defendants here *have* raised the argument and the Court has ruled in the non-settling defendants' favor on the issue. *E.g.* Dkt. 1551 at 43-50; Dkt. 1735. A related issue regarding the interplay between 23(a)(4) and divergent state law was argued early this year in the Ninth Circuit and awaits decision. *See Ahearn v. Hyundai Motor Am.*, No. 15-56014, *video of oral argument available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010947.

Class counsel here have fallen back into that discredited role of philosopher king. Plaintiffs and class counsel themselves appear to be at least cognizant of the problem, because they proposed alternative repealer-only state classes in the event the Court declined to certify a nationwide class under California law. IPP's Motion for Class Certification, Dkt. 1036 at 51; IPP's Fourth Consolidated Amended Complaint, Dkt. 1168 at ¶ 489. The Court has now ruled against nationwide certification under CA law. Dkt. 1735 at 23-24. Yet having reached a settlement with the defendants, plaintiffs make no attempt to unwind the putative nationwide settlement class certification. Perhaps they are contractually obligated not to abandon the proposed nationwide settlement certification. That obligation however serves only class counsel's self-interest in obtaining a single undivided fee, the named plaintiffs' interest in an incentive award, and the defendants' interest in obtaining a global release. These interests cannot trump the due process rights of the uncertified subgroup of the class with the strongest claims to adequate, zealous representation. The settlement chooses to dilute those repealer-state claims under the fiction that uncertified subgroups of the class with inferior claims are entitled to the equivalent relief. If repealer-state purchasers had separate representation from non-repealer state purchasers, as Rule 23(a)(4) requires, this inequity never would have occurred. The settlement class cannot be certified and must be rejected.[6]

IV. A plan of allocation that does not recognize the intraclass schism is not fair or reasonable.

Beyond the (a)(4) and (b)(3) certification problems, the undifferentiated distribution of settlement

[6] The ability to "opt out" does not alter a court's Rule 23(a)(4) analysis. *See Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) ("Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members."); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1179 (9th Cir. 1977) (Kennedy, J., concurring) ("I do not believe that a provision for opting out of the class provides an entirely satisfactory answer to the claim that a lead attorney failed to discharge that duty of representation. Particularly where the settlement could be easily modified to resolve the class conflicts, the dissident members should not be required to take the settlement or leave it."). It the availability of an opt-out were a panacea, then *Amchem* itself, as a (b)(3) opt-out action, would have come out the other way.

A class member's failure to object or opt-out, particularly in a large-scale consumer class action that provides much notice by publication and relatively little individual direct notice, cannot be interpreted as agreement with the settlement terms or provide any indication of the settlement's fairness. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (describing it as "naïve" to infer assent from silence); Theodore Eisenberg & Geoffrey Miller, *Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense indicates that apathy, not decision, is the basis for inaction.").

funds to individuals with significantly weaker claims violates Rule 23(e)(2)'s requirement of fairness. "[J]udges have the responsibility of ensuring fairness to all members of the class presented for certification" under Rule 23. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The most important factor in determining the fairness of the settlement is the "strength of the plaintiffs' case." *Churchill Village v. Gen. Elec. Co.*, 361 F.3d 566, 576 (9th Cir. 2004). Where class members have claims whose qualitative value is materially different, the court's evaluation must weigh not only the total constructive common fund against the value of the class claims in toto, but the compensation for each of the individual types of claims. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004). The Ninth Circuit demands even more fulsome scrutiny of settlements that precede class certification. *E.g. Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017); *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015).

The *Churchill Village* test analysis here is simple: indirect purchasers in repealer states have strong claims while indirect purchasers in non-repealer states have no claim. "[A]n agreement that gives the same monetary remedy to all members of the class, despite significant differences in the nature of their claims or injuries, may not be fair and reasonable." Am. Law Institute, *Principles of the Law of Aggregate Litig.* § 3.05, cmt. b (2010). The overarching principle is "to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated." 4 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 13:59, at 500 (5th ed. 2014). Courts in this Circuit routinely deny approval to settlements that treat dissimilarly-situated class members identically. *Philliben v. Uber Tech., Inc.*, No. 14-cv-05615-JST, 2016 WL 4537912, at *5 (N.D. Cal. Aug. 30, 2016) (rejecting settlement that failed to distinguish between the type of Uber ride or service used even though certain class members had no claim); *Altamirano v. Shaw Indus.*, No. 13-cv-00939-HSG, 2015 WL 4512372, at *1 (N.D. Cal. Jul. 24, 2015) (explaining that the initial settlement was rejected because the "proposed *pro rata* method did not account for [the] reality" of intraclass variance and would have resulted in "drastic[] undercompensat[ion]" of one portion of the class); *Newman v. Americredit Fin. Servs.*, No. 11-cv-3041, 2014 U.S. Dist. LEXIS 15728 (S.D. Cal. Feb. 3, 2014) (rejecting equal treatment where half the class had potentially no claim); *Valdez v. Neil Jones Food Co.*, No. 1:13-cv-00519, 2014 WL 3940558 (E.D. Cal. Aug. 11, 2014) (rejecting equal treatment where class members made differing wages); *Sanchez v. Frito-Lay, Inc.*, No. 1:14-cv-00797, 2015 WL 4662636 (E.D. Cal. Aug. 5, 2015) (rejecting identical treatment where some employees worked less hours for differing pay).

Indeed, in almost every other case in this District alleging similar electronic component antitrust claims, the settlements correctly distinguish between class members who purchased in repealer states, and those who purchased in non-repealer states. *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016) (excluding residents of non-repealer states from settlement class definition); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 721680 (N.D. Cal. Jan. 28, 2016) (excluding indirect purchasers in non-repealer states from distribution under plan of allocation); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827, 2013 U.S. Dist. LEXIS 49885 (N.D. Cal. Apr. 1, 2013) (same); *but see In re DRAM Antitrust Litig.*, No. 02-md-1486, 2014 U.S. Dist. LEXIS 89622 (N.D. Cal. Jun. 27, 2014) (approving, over objections, a settlement that indiscriminately commingled indirect purchasers in repealer and non-repealer states).

The prejudice and dilution here is appreciable and material. By population, the non-repealer states constitute more than 40% of the nationwide population. (The calculation is based on data compiled from https://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population). As a result, assuming equal geographic distribution of claims, a repealer-state purchaser who might otherwise have received $200, would instead be diluted to $120. This phenomenon occurred after the Third Circuit affirmed the *Sullivan v. DB Investments* antitrust settlement. There, a class member with a $3000 claim ultimately received a check for only $48. *See* Ted Frank & Adam Schulman, *Sullivan v. DB Investments: Judge Jordan's dissent was right*, http://www.pointoflaw.com/archives/2013/06/sullivan-v-db-investments-judge-jordans-dissent-was-right.php (Jun. 18, 2013). Certainly, not all or even most of the *Sullivan* discounting was due to dilution, but it goes to show that in class settlements, there are often simply not enough funds available to meaningfully compensate those with real claims if also compensating those without valuable claims.

V. No fee should be awarded in excess of Lead Counsel's sealed bid.

In support of their motion to be appointed class counsel, co-lead class counsel Hagens Berman provided a confidential fee proposal designed to be "very competitive, if not compelling and in the best interests of the proposed class." Declaration of Steve W. Berman in Support of Application to Appoint Hagens Berman as Interim Class Counsel, Dkt. 108-1 ¶¶ 17-18 ("Berman Decl."). The terms of this proposal were redacted in class counsel's fee motion, due to the nature of the bidding process. *Id.* ¶ 17. Now, in their fee

request, Hagens Berman seeks 25% of the common fund without publicly revealing or even alluding to their earlier commitment. Indirect Purchaser Plaintiffs' Motion for Attorneys' Fees ("Fee Motion"), Dkt. 1809. Class counsel's bid should be unsealed and made accessible to class members and the general public. *In re Cendant Corp.*, 260 F.3d 183, 193-96 (3d Cir. 2001). Bednarz objects to class counsel's fee request to the extent it exceeds the redacted bid of Hagens Berman or any other law firm that sought lead counsel status.

Awarding Hagens Berman a fee award above their competitive bid would deprive the class of the benefits of Hagens Berman's offer. A judge selecting class counsel for a putative class is acting as a fiduciary of that putative class. *See In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 468 (N.D. Cal. 1995) ("[T]he court's fiduciary obligation to the plaintiff class compels it to secure the best representation possible.). As fiduciary, the court is effectively negotiating on behalf of the class, and trying to get the best deal possible for class members. *See id.* ("To do so, . . . the court must strive to emulate the arrangements and decisions that the class itself would make were it able to negotiate."); *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (discussing how "the judge has so step in and play surrogate client" when selecting class counsel).[7] Hagens Berman's low bid is a benefit that this Court was able to extract for the class. The class should not now be deprived of the benefit of this bargain.

"It is inherently illogical for lawyers to undertake litigation on the basis of the risks and rewards they perceive at the beginning, yet be compensated on the basis of the risks and rewards the court perceives at the end of the litigation." *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 692 (N.D. Cal. 1990) (Walker, J.). Yet this is exactly what class counsel are attempting to do here. *See* Fee Motion at 14-15 (touting the risks looking backward at the litigation). It's one thing to adopt of necessity an *ex post* perspective when there is no record evidence of how the lawyers initially perceived the risks of litigation. But it would be another entirely to do so when Hagens Berman's bid is a matter of record in the litigation. "Determining attorney fees after resolution of the litigation … disserves both the class and class counsel." *Oracle*, 131 F.R.D. at 692.

Judge Alsup confronted a similar situation to this one in *Dugan v. Lloyds TSB Bank, PLC*, No. 12-2549 WHA, 2014 WL 1647652 (N.D. Cal. April 24, 2014). There, in their retainer agreement with the class representatives, class counsel promised that they would not seek 35% of the common fund. *Id.* at *1. But in

[7] The Court's duty in selecting class counsel *ex ante* reemerges at the forefront again when awarding reasonable fees *ex post*. *See supra* at 3-4 (discussing fiduciary duty with respect to awarding fees).

their fee request, class counsel sought well over that amount. *Id.* As here, *Dugan* class counsel "failed to even mention their written promise in their…motion for fees and expenses." *Id.* at *2. Noting the "foreseeable risk[s]" of litigation, Judge Alsup held that counsel should be held to their earlier representation: "[w]hen an attorney makes a promise like this one to cap fees, it is meant for the benefit of the class and is a factor in why the class representatives have chosen that particular counsel. . . . In turn, judges may approve the selection based in part on such a fee cap." *Id.* at *3. "When attorneys promise to restrict the fees to be sought in a fee petition, that *ex ante* promise should be honored, absent special circumstances." *Id.*[8]

Just so here. In their motion to be appointed class counsel, Hagens Berman may have offered to take a smaller percentage of the common fund than the percentage they are now requesting. If they did so, it was doubtlessly intended to push the Court towards selecting them as lead counsel. Such a promise serves to benefit the putative class, and should be honored. Indeed, Steve Berman averred that his firm's sealed bid "provide[d] for fair compensation while minimizing the impact on the proposed class." Berman Decl. ¶ 18. That precise representation demonstrates why this Court need not award a higher fee.

Also, holding Hagens Berman to their promise would preserve the integrity of the class counsel appointment process. Conversely, allowing counsel to later renege comes "at the expense of future settlements, inasmuch as [courts] will be unable to trust assurances made by plaintiffs' counsel." *Evans v. Jeff D.*, 475 U.S. 717, 737 n.29 (1986). Competitive bidding in class counsel selection is a laudable practice that benefits class members in all class actions where it is used. 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

[8] Last year in another antitrust case, Judge Seeborg refused to hold Hagens Berman to its initial fee bid based upon various "imponderables" that affected the litigation. *In re Optical Disk Drive Prods. Antitrust Litig*, No. 3:10-md-02143-RS, Dkt. 2133, at 19 (N.D. Cal. Dec. 19, 2016). Respectfully though, the need for multiple class certification motions and appeals to the Ninth Circuit during a six-year litigation is not an imponderable result for a massive MDL. And even if those did qualify as circumstances warranting upward departure from the initial fee submission, the litigation *here* is only four-years old without any substantive appeals litigated at the Ninth Circuit. "The present case is certainly time-consuming and involved, but plaintiffs' original counsel knew or should have known what this case would require at its inception." *Wright v. Ford Motor Co.*, 982 F. Supp. 2d 1292, 1297 (M.D. Fla. 2013) (refusing to allow an upward modification to a contingency percentage agreed upon at the outset).

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"); *accord 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"). So it is best when, just as in a competitive market, prospective class counsel themselves look at the expected opportunity cost, the expected chance that investment in the case would produce no return, and the expected size of a settlement in the litigation. They would then, as lead counsel did here, propose a contingency-fee percentage that compensates them for that expected risk and opportunity cost. *See FTC Workshop—Protecting Consumer Interests in Class Actions*, 18 GEO. J. LEGAL ETHICS 1243, 1261 (2005) ("If you're going to award lawyers for the risk that they undertake in litigation, the best time to measure that risk, and in fact the only time that you can do so effectively, is at the outset of the case."). "Empirical evidence suggests that *ex ante* fee negotiation is a key mechanism for reducing agency costs between counsel and the class they represent." *Laffitte v. Robert Half Int'l*, 376 P.3d 672, 690 (Cal. 2016) (Liu, J., concurring).

The results from cases that have employed competitive bidding bear this out. "[A] series of antitrust class action auctions demonstrated that qualified counsel would generally offer to represent the class for fee awards in the 10-15% range." John C. Coffee, *The PSLRA and Auctions*, N.Y.L.J., May 17, 2001, at 5. 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) 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 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").

By contrast, *ex post* fee evaluation is "likely to be distorted by hindsight bias." *Laffitte*, 376 P.3d at 690

(Liu, J., concurring). *Ex post* awards overshoot the market in part because they are usually awarded without a serious adversarial presentation. *See Sakiko Fujiwara v. Sushi Yasuda Ltd.*, 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014) ("By submitting proposed orders masquerading as judicial opinions, and then citing to them in fee applications, the class action bar is in fact creating its own caselaw on the fees it is entitled to... No wonder that "caselaw" is so generous to plaintiffs' attorneys."). The major force that exerts downward pressure *ex ante*—the threat of losing the litigation to another firm—dissipates by the time of settlement.

If Hagens Berman's fee request exceeds their sealed bid, then this very case would demonstrate why competitive bidding is such a salutary practice. The sealed bid was made under competitive pressure; at that time, it was not guaranteed that they would be lead counsel. Their current fee request is made under non-competitive conditions; there is no risk that they would lose out to another firm. If there is a difference between the two bids, it would reflect a precise estimate of the value of competitive bidding to this class. But, if courts do not hold law firms to their bids, firms will cease to take their representations seriously, and that value will be lost to future classes.

CONCLUSION

For the foregoing reasons class certification and settlement approval must be denied. If the Court approves the settlement nonetheless, it should not award any fee greater than class counsel's initial bid would dictate.

Dated: August 9, 2017

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Objection using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 9th day of August, 2017.

/s/ Theodore H. Frank

Theodore H. Frank