UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UFCW LOCAL 1500 WELFARE FUND; CEMENT AND CONCRETE WORKERS DC BENEFIT FUND; et al. Plaintiffs, v. THE NEW YORK AND PRESBYTERIAN HOSPITAL, Defendant.	25-cv-05023 25-cv-05571 Hon. Brian M. Cogan

NYP'S RESPONSE TO PLAINTIFFS' MOTIONS
<u>FOR APPOINTMENT AS INTERIM "LEAD" CLASS COUNSEL</u>

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I. INTRODUCTION

NYP does not oppose the appointment of interim class counsel after the Court rules on NYP's pending motion to dismiss. Nor does NYP care which of the two slates of competing law firms this Court selects to fill the role. NYP, however, writes to address several significant defects or deficiencies in plaintiffs' proposals that stand to adversely affect NYP's legitimate and protectable interests under Rule 23(g).

To address these concerns, as detailed below, NYP requests that the Court require each plaintiff to submit competing proposals for "attorney's fees and nontaxable costs," as specified under Rule 23(g)(1)(C) and (D). NYP also requests that this Court limit each proposal to no more than two law firms, and that it clarify that its Appointment Order does not include authority for the appointed counsel to direct or approve the work of other, non-appointed counsel, or to permit such non-appointed counsel to share in any fee award. These safeguards will ensure that this case does not become a law firm cash cow that could otherwise hamper the resolution of this case. *See Pagano v. HN & Sons LLC*, 2026 WL 1758204, *2 (E.D.N.Y. 2026) (Cogan, J.) ("It is proper for the Court to intervene to make sure that these cases … are being primarily run for the benefit of the plaintiffs, and not their attorneys").

II. THE COURT SHOULD REQUIRE PLAINTIFFS TO SUBMIT SUPPLEMENTAL APPLICATIONS TO ADDRESS SEVERAL DEFICIENCIES

A. This Court Should Require Plaintiffs to Supplement Their Proposals with Competing Fee Proposals, Including Caps on Attorneys' Fees.

The appointment of class counsel is a key event in the lifecycle of any class action. It determines who gets paid out of any settlement or judgment, and how much goes to the lawyers. As such, the Court should consider not just the firms' qualifications, but their economic proposals for controlling litigation fees and costs. If it does not, settlements become less likely, not more: the more mouths to feed, or the more that is directed to counsel, the larger the pot needs to be and the harder resolution becomes. That is why Rule 23 authorizes the Court to order potential class counsel "to propose terms for attorney's fees and nontaxable costs," and permits the Court to "include in the appointing order provisions about the award of attorney's fees or nontaxable costs." Fed. R. Civ. P. 23(g)(1)(C), (D).

Neither plaintiff address the economic terms of its proposal, deferring that issue until time of settlement. But as the Seventh Circuit has explained, "the best time to determine [the market rate for counsel to handle the matter] is [at] the beginning of the case, not the end." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718-19 (7th Cir. 2001); *Silverman v. Motorola Sols., Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) ("establishing a fee structure at the outset of a suit is desirable …, common and beneficial," noting, in that case, that it was "unfortunate that the district judge … did not consider the possibility of establishing a fee schedule when he appointed a lead plaintiff and [instead] approved [the] party's choice of counsel").

As Judge Kaplan of the Southern District explained, class counsel is a "coveted prize to be fought over or bargained for," and should not be "presented as a fait accompli for the court to summarily endorse." *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71, 75 (S.D.N.Y. 2000). In that case, after evaluating the pros and cons, Judge Kaplan concluded that the case was "appropriate for the use of an auction" to "approximate an efficient market" for the role. *Id*. at 82. By requiring plaintiffs to propose such caps at the outset as part of a competitive process, the Court will reduce the need to impose such caps by judicial fiat, rather than agreement and consent, at the end of the case. *See also In re IndyMac Mortg.-Backed Sec. Litig.,* 94 F. Supp. 3d 517, 522 (S.D.N.Y. 2015) (Kaplan, J.) (lamenting that courts addressing fees at time of settlement do not have the benefit of "any … adversarial testing [and] are left pretty much at sea").

As other courts have noted, retrospective studies have confirmed that "the fee percentages tended to be lower" in "cases in which 'auctions' were conducted for the selection of class counsel" than "those awarded retrospectively by the courts." *In re AOL Time Warner, Inc. Sec. Litig*., 2006 WL 3057232, *12 (S.D.N.Y. 2006); *Manual for Complex Litigation (Fourth)*, § 14.121 (2004) ("judges who have used competitive bidding to select counsel and establish the terms for attorney fee awards have produced percentage-of-recovery awards considerably lower than the 20%-30% average award" under the anticompetitive private ordering approach); L. Hooper & M. Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, pt. VII (2001) (noting that courts employ an auction result in substantially lower fee awards that ranged from 5% to 22%, with 9% being the median award).

Here, the Court need not mandate a formal auction. But the choice of counsel should focus on the economics of each slate's proposal. Both slates of counsel are competent, and the differences between them are minimal. UFCW says its counsel should drive the bus because it is the largest named plaintiff by dollar volume, and so they surmise (without evidence) that they will exercise more direction over the litigation, which will serve as a constraining force on over-lawyering. Cement Workers claims that their counsel put more effort into drafting their complaint.[2] The Court is, of course, free to weigh these relative attributes however it wishes. But none seems like a compelling reason to choose one slate over the other. What would be compelling is any economic difference between them. Moreover, even if the Court were inclined to make its choice based on quality alone, encouraging price competition is only to the good.

[2] Cement Workers claims they were investigating NYP since 2022, three *years* before they filed suit. If so, it either speaks to extreme inefficiency, or the fact that they could not come up with any basis for a claim during that time. The reality is that Cement Workers did not file suit until the DOJ investigation was well underway, and after the Wall Street Journal and the New York Times published articles about it and a different union's (successful) efforts to exclude NYP from its health plans. *See Cement Workers*, 25-cv-06140, Initial Complaint, ECF 1 (S.D.N.Y. July 31, 2025); https://www.wsj.com/health/healthcare/new-york-presbyterian-hospital-payment-union-3b2100f5 (May 21, 2024); https://www.nytimes.com/2025/07/28/nyregion/doj-ny-presbyterian-health.html (July 28, 2025).

This Court should, therefore, direct each slate to present their best economic proposal. This should include disclosure of their billing rates,[3] and proposed caps for: (i) the maximum fee award as percent of recovery, as well as any tiers plaintiffs propose; and (ii) the maximum premium over billed hours. For example, as an illustration, a reasonable proposal might cap fees so that:

> Class counsel may receive 20% of any recovery up to 100% of their billed fees, 10% of any additional recovery up to 150% of billed fees; 5% of any further recovery up to 250% of billed fees.[4]

This implements the Second Circuit's preference for awards in contingency class actions under Rule 23(g) that are based on a percentage of the recovery using the lodestar as a cross-check. *In re Merrill Lynch Tyco Rsch. Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008) ("Even in cases where the court applies the percentage method of fee calculation, documentation of hours remains a useful cross-check on the reasonableness of the requested percentage").

To the extent plaintiffs propose sharing any fee award among appointed counsel on a basis other than proportionate hours, such allocations should also be disclosed, as it will inform the Court of the necessity of appointing a multiplicity of firms. Moreover, because most clients in the ordinary course require budgets, the court should also consider requiring plaintiffs to propose estimated fees and costs by phase as well. To the extent such a budget raises work product

[3] Disclosure of rates is necessary to ensure that they are consistent with the "prevailing rates in this district" for *non-contingency* cases of a similar type. *Moore v. Rubin*, 766 F. Supp. 3d 423, 427-428 (E.D.N.Y. 2025) (Cogan, J.). It would be inappropriate to consider the contingency agreement or rates for contingency work, since such rates already build in a multiplier for risk and would result in double-counting if used to calculate the *base* lodestar amount. *Id.* ("the fundamental question [turns on the] fee the prevailing attorney would have received "if he or she had been representing a paying client who was billed by the hour").

[4] This would result in a lodestar of up to 2.5 if plaintiffs are successful, which is at the high-end for complex class actions. *See In re Payment Card Interchange Fee Antitrust Litig.*, 2019 WL 6888488, *3 (E.D.N.Y. 2019); *Cuthbert v. New Soldier's Rest. Inc.*, 2015 WL 1321676, *2 (E.D.N.Y. 2015) (Cogan, J.) ("A reasonable multiple here is 2.5"); *IndyMac*, 94 F. Supp. 3d at 522 (cutting recovery to "115 percent of counsel's original lodestar."). Indeed, if this case ever gets to a jury, plaintiffs would only be able to recover a maximum lodestar of 1 *from the defendant*, since that amount is fixed by statute. *In re Vitamin C Antitrust Litig.*, 2013 WL 6858853, *1, 4 (E.D.N.Y. 2013) (Cogan, J.) (authorizing lodestar of 1 with no "upward adjustment" and requiring offsets for prior settlement fee awards).

concerns, the Court can order in camera submissions of the budget.

B. The Court Should Prohibit Interim Class Counsel from Directing Compensable Work to Attorneys that Have Not Been Appointed Interim Class Counsel.

Both plaintiffs' proposals seek appointment of a different slate of three law firms to interim "lead" class counsel. But Rule 23 does not create distinctions between "lead" class counsel and non-lead class counsel. It is also not clear what plaintiffs mean by "lead" class counsel, as neither slate submitted a Proposed Order outlining their authority. But whatever it means, this Court should make clear in its Appointment Order that they may not direct work to other lawyers or law firms that have not been expressly approved by this Court to act as interim class counsel.

Put simply, this Court should not delegate its appointment authority to so-called "lead" interim class counsel. Rule 23 expressly forbids it. Under Rule 23(g)(1), the Court "must appoint class counsel," can only do so after finding that the lawyer or firm "is adequate under Rule 23(g)(1) and (4)," and "if more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(1), (2). This structure is inconsistent with delegation of the appointment authority to "lead" class counsel. Indeed, were it otherwise, lead counsel could appoint a firm that the Court previously rejected as inadequate to represent the class and share in the fee award.

The concern over non-appointed lawyers is not hypothetical. UFCW has noted that it plans to seek fee awards – not just for the appointed slate of counsel – but for "any other firm who works on the matter." *See UFCW* ECF 44, ("*UFCW Proposal*"), at 28. Who are these unnamed firms? Why are they necessary? And by what authority will they be granted the right to bill time to the matter? These are all questions UFCW leaves unanswered.[5]

[5] In the signature block for UFCW in the Consolidated Complaint (ECF 41) filed just a few weeks ago, the Labaton firm is listed as counsel. But that firm is not mentioned in UFCW's Appointment Motion. Nor does the Labaton firm otherwise appear on the docket. To the extent the Labaton firm works on this matter, it is an example of the type of

For their part, counsel for Cement Workers also disclosed that they plan to use their appointment to direct other, specific non-appointed firms to bill time to the matter. They identify two firms – Keller and HRSR – with whom they have a "close relationship" and want to share in the fee award. *See UFCW*, ECF 45-1, ("*CW Proposal*"), at 1 n.1. But they do not seek formal appointment for these other firms. One wonders why. Perhaps they sought to sidestep the Rule's requirement that the Court appoint only the "best applicant," or the well-recognized judicial hostility to appointment of a multiplicity of firms.[6] But excluding them from the Appointment Order – by designating the other three firms as "lead" with rights to divert compensable work to others – does not solve the problem. It violates Rule 23(g)(1).

C. The Court Should Limit the Number of Appointed Counsel to No More Than Two Firms.

This case involves a challenge to a handful of contractual provisions that appear in contracts with five dominant insurers. Most of these challenged provisions have remained unchanged for decades. While all class actions are, by their nature, complex, a seasoned class action firm should be able to handle the case. It is for this reason that courts often limit the class counsel appointment to no more than one or two firms. Here, each competing slate consists of three firms. Each slate makes a reasonable case for the appointment of one or two firms, but neither provides sufficient justification for a three-firm panel.

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shadow appointments Rule 23(g)(1) prohibits.

[6] *See* Fed. R. Civ. P. 23(g)(2); *Dial Corp. v. News Corp.*, 314 F.R.D. 108, 121 (S.D.N.Y. 2015) (rejecting plaintiffs' five-firm proposal and permitting "no more than two law firms" because the "class certification is intended to streamline proceedings and introduce efficiencies into case management); *Castaneda v. Burger King Corp.*, 264 F.R.D. 557, 573 (N.D. Cal. 2009) (Alsup, J.) ("from over 35 years of practice and presiding, the undersigned is convinced that it is best to have only one law firm as class counsel"); *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 267 n.4 (3d Cir. 2005) ("if plaintiffs believe that more than one law firm is necessary, they must demonstrate to the Court's satisfaction the need for multiple lead counsel"); *Miller v. Ventro Corp.*, 2001 WL 34497752, *13 (N.D. Cal. 2001) ("the Court … has strong reservations about appointing multiple co-counsel").

1. The Court Should Require Cement Workers and Pointers to Submit Separate One or Two Firm Proposals.

When Cement Workers filed the first complaint in these matters, it did so with a slate of two firms: Fairmark and HRSR. Since the initial complaint, Cement Workers also added Keller. But Cement Workers is not represented by the two other firms – Susman or Farella – that make up two-thirds of its proposed counsel slate. Nor is it clear that Susman and Farella are needed for Cement Workers to prosecute this case. Presumably, Cement Workers believed at the time it filed suit that Fairmark (and HRSR) were sufficient to adequately and efficiently represent the interests of the union and the putative class.

Similarly, Pointers is represented by Susman and Farella.[7] Susman and Farella tout their successes in other antitrust cases, their experience handling similar cases (including the *Sutter* case), and their ability and resources to devote to the matter. They do not need Fairmark. *See In re Wells Fargo Sec. Litig.*, 156 F.R.D. 223, 227 (N.D. Cal. 1994) (rejecting separate bids by each firm; "[b]ecause the court has an obligation to attempt to obtain representation of the class on the best terms available, the court rejects the suggestion that it allow Lieff, Cabraser and Milberg Weiss to submit a joint proposal to complete this litigation on behalf of the class").

Accordingly, this Court should direct Cement Workers and Pointers to submit separate proposals for interim class counsel, each limited to no more than two firms. This would likely inject a third, independent proposal for the Court to consider, as well as reduce the number of firms who bill time to the matter. Other than seeking to prevent competition between Cement Workers and Pointers (both for the position of named class representative and for the position of interim

[7] It appears that Pointers is represented by five firms: Susman, Farella, Fairmark, HRSR, and Keller. The first two of these represent only Pointers, with the other three firms also representing Cement Workers. This is exactly the type of sprawl that leads to inefficiency and overbilling. It is, of course, up to Pointers who it wants to present *its* interests. But it does not get to dictate who – or how many firms – can represent the putative class.

class counsel), neither has identified any reason why all three firms and both unions must act jointly, rather than competitively.[8]

Requiring Cement Workers and Pointers to compete, rather than coordinate, is consistent with the Supreme Court's view that, where the competition occurs on an RFP-by-RFP basis, the relevant market should be viewed as the firms actually competing for the spot, and that advance coordination of rates submitted to the court for approval among otherwise competing lawyers can be anticompetitive. *See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 179 (2006) ("Once a … customer has chosen the particular dealers from which it will solicit bids, the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (agreements among lawyers on the fees to charge and present to the court can be anticompetitive); *Wells Fargo*, 156 F.R.D. at 226 (allowing "plaintiffs firms [to] join together … to prosecute big cases … effectively extinguishes competition among the plaintiffs lawyers," and "essentially permits these lawyers to create an ad hoc monopoly in each such case").

2. The Court Should Limit UFCW's Proposed Slate to Two Firms.

UFCW also proposes a three-firm structure. But beyond the conclusory assertion that "the three-firm leadership structure strikes the right balance," it provides no reason why UFCW needs three firms to represent it or the putative class. *UFCW* ECF 44 at 9. At least two of the firms –

[8] Fairmark notes that it and Susman "have, since 2023, worked to develop the liability and damages theories in this case." *UFCW* ECF 45-1 at 2. But Susman does not represent Cement Workers and did not join the initial complaint. The sharing of "theories" is not a valid reason for appointing both of them. Indeed, Susman's contributions were apparently not sufficient to give it a seat a Cement Worker's counsel's table. To the contrary, the fact that Fairmark tried, unsuccessfully, to enlist Susman's deep pockets (and that Susman was unwilling to lend its support until after the DOJ filed its own suit) raises several questions about whether these firms' pre-client retention coordination waived privilege. *See Castro v. Sanofi Pasteur Inc.*, 2013 WL 1707094 (N.D. Ill. 2013) (because work product privilege belongs to clients under the Federal Rules, it does not cover pre-retention attorney work, which is just non-privileged business development activities); *Castro v. Sanofi Pasteur Inc.*, 2013 WL 3771493 (N.D. Ill. 2013) (same); *Hill v. City of Chicago*, 2015 WL 12844948, *2 (N.D. Ill. 2015) (citing authorities).

DiCello and Lieff – purport to have healthcare antitrust class action experience. But the third firm – Gerwin – does not. Nor does UFCW explain why the other two firms are inadequate, or what additional capabilities Gerwin brings to the table that the others lack. That is not to impugn Gerwin, but this Court should require more before appointing a third firm as class counsel.

D. The Court Should Reject UFCW's Attempt to Impose a Contested Case Schedule Without Meeting and Conferring.

UFCW also included a proposed case schedule in their appointment motion. *See UFCW* ECF 44-6. This is the same schedule UFCW proposed, over NYP's objection and competing schedule, in connection with the parties' 26(f) report. *See UCFW* ECF 28; ECF 28-3 (NYP's Proposal). UFCW did not meet and confer over its recent proposal. Nor should this Court enter a schedule until after resolution of NYP's motion to dismiss, which will be fully briefed by July 7, 2026, since that motion goes to the heart of whether plaintiffs have standing to pursue their claims. If the Court denies NYP's motion to dismiss, it should either adopt NYP's proposed schedule for reasons explained in the Rule 26(f) report or order the parties to further meet and confer.

III. NYP HAS STANDING TO OBJECT TO PLAINTIFFS' APPOINTMENT.

In their pre-conference motion, plaintiffs asserted that NYP "has no stake in this Court's appointment" of class counsel. *See UFCW*, ECF 42. Not so. Because attorneys' fees are often a primary consideration in attempting to settle class actions, Rule 23 expressly grants a "party from whom payment [may be] sought" the right to "object." Fed. R. Civ. P. 23(h)(2).

In plaintiffs' view, no one has standing to object to their appointment. Certainly, none of the cooperating plaintiffs' firms – or their clients – will object. Nor can they be reasonably expected to challenge the lack of any pricing caps in their rival slate's proposal, given their own failure to include such a cap and their mutual desire to avoid price competition. Similarly, unnamed class members cannot be expected to object, since class notice has not gone out. That leaves only NYP – the ultimate source of recovery – as the only party with both the incentive and ability to challenge imprudent appointment proposals. Our judicial system rests on the principle that the adversarial process produces the best outcomes. It only works here if the party from whom payment is sought – *i.e.*, the defendant – has standing to contest the terms of the appointment.

IV. CONCLUSION

For the foregoing reasons, this Court should (i) require each competing slate of proposed interim class counsel to supplement their proposals with their best economic terms; (ii) require that each proposal be limited to no more than two firms; and (iii) clarify that the appointment order does not carry with it the authority to appoint or direct work to non-appointed counsel.

Dated: July 6, 2026

Respectfully submitted,

/s *Colin R. Kass*

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WORD COUNT CERTIFICATION

Pursuant to Local Rule 7.1(c), I hereby certify that the total number of words in this memorandum, excluding the caption, table of contents, table of authorities, signature block, and word count certification is 3,639.

/s/ *Colin R. Kass*