IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 23-0215

PATRICIA TAFELSKI, et al., on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

MARK JOHNSON, TAMMI FISHER,
Plaintiffs-Objectors-Appellants,

v.

LOGAN HEALTH MEDICAL CENTER,
Defendant-Appellee.

APPELLANTS' OPENING BRIEF

On Appeal from a Final Judgment of the Montana Eighth Judicial District Court,
Cascade County
District Court Cause No. ADV-22-0108
The Honorable John W. Parker, Presiding

APPEARANCES:

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INTRODUCTION

Mark Johnson and Tammi Fisher, (hereinafter the "Mayors" or "Objectors"),[1] appeal the District Court's order awarding Class Counsel fees of $1,433,333 (33.33% of the $ 4.3 million settlement fund) for a case that was filed in March 2022 and settled four months later. During that short period, there was no motion for class certification, no depositions taken, no discovery propounded, no court hearings, and no appellate proceedings. Assuming a generous estimate of 300 hours of billable work by Class Counsel, their billing rate for this case would be nearly *$5,000 per hour*. And Class Counsel will be paid first; thousands of class members, on the other hand, might receive no recovery at all.

The Mayors can only make an educated guess as to how many hours Class Counsel devoted to this case. Class Counsel have not provided *any* evidence of their time and labor, despite percentage-based fee awards requiring competent evidence of, *inter alia*, "the time and labor required to perform the legal service properly." *Gendron v. Montana Univ. Sys.,* 2020 MT 82, ¶14, 399 Mont. 470, 461 P.3d 115.

One of the class attorneys in this matter, John Yanchunis, sought appointment as class counsel in *In re Amla Litigation,* 320 F.R.D. 120 (S.D.N.Y

[1] Johnson is the current mayor of Kalispell. Fisher is a former mayor of Kalispell. They are litigating this matter in their personal capacities.

2017). The court rejected the appointment, however, because Mr. Yanchunis' behavior exemplified why "class actions have repeatedly come under criticism for being of the lawyers, by the lawyers, and for the lawyers." *Id.* at 122. This case is another one that is of the lawyers, by the lawyers, and for the lawyers. The District Court's judgment must be reversed.

STATEMENT OF ISSUES

1. Did the District Court abuse its discretion by awarding attorney fees of $1,433,333 (33.33% of the settlement value) despite Class Counsel refusing to provide *any* evidence of their time and labor in support of their fee motion?

2. Did the District Court abuse its discretion by denying a motion for discovery by the Objectors?

STATEMENT OF THE CASE

This case involves a judgment granting final approval to a class action settlement arising from a breach of patient data at Defendant Logan Health in Kalispell (hereinafter, the "Hospital"). The Hospital announced the breach on February 18, 2022. Doc. 3, ¶ 5. Within two weeks, Class Counsel filed their complaint on March 2, 2022. D.C. Doc. 1. They filed an amended complaint on April 1, 2022. D.C. Doc. 3. Within four months, the Hospital settled on July 19,

2022, and agreed to pay $4.3 million. D.C. Doc. 26, Decl. of Counsel, ¶ 11.

The District Court granted preliminary approval of the settlement on December 6, 2022. D.C. Doc. 24. Class Counsel filed a motion for attorney fees on January 13, 2023, and requested 33.33% of the $4.3 million settlement fund. D.C. Doc. 26.

The Mayors filed an objection on February 8, 2023. D.C. Doc. 30. On that same day, they filed a motion for leave to propound discovery, D.C. Doc. 31, and a brief in support of the motion with their proposed discovery requests attached. D.C. Doc. 32. Class Counsel filed a response to the discovery motion on February 21, 2023. D.C. Doc. 33. They filed a motion for final approval of the settlement on that same day. D.C. Doc. 34. The Mayors filed a response to Class Counsel's motion for final approval on February 27, 2023, D.C. Doc. 36, and a reply in support of their discovery motion on March 6, 2023. D.C. Doc. 39.

The District Court held a fairness hearing on March 9, 2016. See Hrg. Trans. 1. In denying the discovery request, the District Court noted as follows:

> Now I want to further note that if the facts had been different and there have been additional discovery that could have created a major risk of unreasonable delay for the Class Members and *potentially exposed Objectors to some legal risk* which, I think, is worth noting on the record.

Hrg. Trans. 81:18-23 (emphasis added).

The District Court issued a written order on March 16, 2023, granting final approval of the settlement, overruling the Mayors' objections, and denying their

discovery motion. D.C. Doc. 44. The court issued its Judgment that same day. D.C. Doc. 43. The Mayors timely filed a notice of appeal in this Court on April 11, 2023. D.C. Doc. 48.

STATEMENT OF FACTS

This class action suit arises from a breach of patient data possessed by the Hospital. The Hospital suffered two prior data breaches before the breach at issue in this case: one in October 2019 and a smaller one in January 2021. D.C. Doc. 10 at 7-8. The former breach resulted in a class action suit. *Henderson v. Kalispell Regional Health*, 8th Jud. Dist., Cause No. CDV 19-0761.[2] Class Counsel for this matter also represented the class in *Henderson*. The court in *Henderson* issued a final approval order on January 5, 2021. Doc. 26, Decl. of Counsel, Exhibit A.

The Hospital discovered another breach of its patients' data in November 2021 that resulted in 213,000 patients (including approximately 175,000 Montanans) having their confidential data compromised. D.C. Doc. 3, ¶ 5. The Hospital notified the victims of the breach on February 18, 2022. D.C. Doc. 3, ¶ 5.

In March 2022, eight law firms filed five separate lawsuits against the Hospital: two in Flathead County, two in Cascade County, and one in federal court

[2] Defendant Logan Health is the successor-in-interest to Kalispell Regional Health.

in Great Falls. This included the complaint in *Tafelski*, which was filed on March 1, 2022, and which ultimately became the lead case. D.C. Doc. 1.

The *Tafelski* attorneys, consisting of four law firms, filed a motion on May 18, 2022, seeking appointment as interim class counsel. D.C. Doc. 10. One of the firms that had filed in Flathead County, Morrison, Sherwood, Wilson & Deola, filed a motion to intervene in the *Tafelski* matter on June 6, 2022. D.C. Doc. 16. The Morrison firm offered to cap its fees at 20% of the amount recovered for the class if selected as interim counsel. D.C. Doc. 16 at 17.

The District Court nevertheless appointed the *Tafelski* firms as interim Class Counsel on June 21, 2022. D.C. Doc. 18. The Hospital stipulated to the appointment. Doc. 18 at 2.

Class Counsel and the Hospital participated in mediation on July 19, 2022, resulting in the Hospital agreeing to pay $ 4.3 million. D.C. Doc. 26, Decl. of Counsel, ¶ 11. The proposed settlement agreement allowed for Class Counsel to request 33.33% of the settlement fund as attorney fees, with the Hospital agreeing not to oppose the request. D.C. Doc. 23, Exhibit A, ¶ 91. The agreement gave priority to class members claiming out-of-pocket losses. *Id*., ¶ 67. If those claims exhaust the settlement fund, no other class members will be compensated. *Id.*

STANDARD OF REVIEW

Issue No. 1

A district court's grant or denial of attorney fees is reviewed for abuse of discretion. *In re Guardianship of A.M.M.*, 2015 MT 250, ¶ 18, 380 Mont. 451, 356 P.3d 474 (citations omitted). "A district court has abused its discretion if its award of attorney fees is not supported by substantial evidence." *Id.* (citations omitted). Awarding unreasonable fees also constitutes an abuse of discretion. *Gendron*, ¶ 11 ("When attorney fees are authorized, the controlling standard in all actions, including class actions, is that the amount of fees awarded be reasonable.").

Issue No. 2

A district court's discovery rulings are reviewed for abuse of discretion. *Palliser v. Blue Cross and Blue Shield of Montana, Inc.*, 2012 MT 198, ¶ 9, 366 Mont. 175, 285 P.3d 562. A class action settlement made before class certification requires "heightened scrutiny" by the district court to ensure that "sufficient information [is] provided to the class representatives, any objectors, and the district court to enable the parties and the court to reach a well-informed decision of whether the proposed settlement is fair, adequate and reasonable." *Id.*, ¶ 35.

SUMMARY OF ARGUMENT

The District Court's order granting Class Counsel's fee motion was an abuse of discretion for at least two reasons.

First, Class Counsel did not present competent evidence in support of the fee award. Montana law required them to present evidence of, *inter alia*, "the time and labor required to perform the legal services properly" to qualify for a percentage-based fee award. *Gendron*, ¶ 14. Class Counsel stated only that they spent "significant" time investigating the case, devoted "many" hours to settlement negotiations, and dedicated "significant" time to finalizing the settlement agreement and related documents. D.C. Doc. 33 at 6-7. The resulting 33.33% fee award was "not supported by substantial evidence," *In re Guardianship of A.M.M.*, ¶ 18, and the District Court abused its discretion by awarding it.

Second, the District Court abused its discretion by awarding a windfall to Class Counsel. Montana law requires that a district court's discretion in setting fees for class counsel in a class action suit be "exercised so as to achieve a reasonable result." *Gendron*, ¶ 15. A windfall percentage award made to counsel after an early settlement is unreasonable. *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002) ("If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is…in order" and a "court should disallow windfalls for lawyers.").

The Hospital notified the victims of the breach on February 18, 2022. Doc. 3, ¶ 5. Class Counsel filed their original complaint on March 2, 2022. D.C. Doc. 1. They filed an amended complaint on April 1, 2022. D.C. Doc. 3. Less than four months later, the parties settled. During that short period of time, there was no motion for class certification, no depositions taken, no discovery propounded, and no court hearings.[3] Assuming a generous estimate of 300 hours of billable work by Class Counsel, their billing rate for this case would be nearly $5,000 per hour. This is entirely unreasonable. *In re Facebook Biometric Information Privacy Litigation*, 522 F. Supp. 3d 617, 631 (N.D. Cal. 2021) (rejecting an hourly billing rate of $3,654 per hour for class counsel, "which is not reasonable by any measure.").

The District Court also abused its discretion by denying the Mayors' motion for discovery. This Court has held that objectors "can also seek discovery and access to information that can help the parties, counsel and the reviewing court determine if the agreement meets the fairness standard." *Palliser,* ¶ 27. Discovery as to Class Counsel's time and labor was particularly important to determine whether the award was fair for the Mayors and their 200,000 fellow class members.

[3] For the Court's convenience, a copy of the District Court's Register of Actions showing entries made between the commencement of this action (March 2, 2022), and the settlement date (July 19, 2022) is attached to the Appendix at page 11.

ARGUMENT

I. The District Court Abused Its Discretion by Granting Class Counsel's Fee Motion in the Absence of Any Evidence of Their Time and Labor

The Court has repeatedly required parties seeking attorney's fees to support their request with competent evidence, including in class action suits:

> An award of fees, like any other award, must be based on competent evidence. Evidence elicited through oral testimony, cross examination, and the introduction of exhibits is competent evidence upon which an attorney's fee award can be based.

Gendron, ¶ 15; *id.* ("the court maintains broad discretion in its selection of the method of calculation and consideration of the guiding factors when awarding fees *based on the competent evidence presented*.") (emphasis added).

Basing fee awards upon competent evidence is important not only for the parties but also for the judiciary's reputation. *TCH Builders and Remodeling v. Elements of Constructions, Inc*., 2019 MT 71, ¶ 27, 395 Mont. 187, 437 P.3d 1035 ("the proper determination of a legal fee is central to the efficient administration of justice and the maintenance of public confidence in the bench and bar."). This is particularly important for class action lawsuits affecting large segments of the public. *City of Detroit v. Grinnell*, 495 F.2d 448, 469 (2d Cir. 1974) ("For the sake of their own integrity, the integrity of the legal profession, and the integrity of [Fed. R. Civ. P.] 23, it is important that the courts should avoid awarding 'windfall

fees' and that they should likewise avoid every appearance of having done so."); see also *Goldberger v. Integrated Resources, Inc*., 209 F.3d 43, 57 (2d Cir. 2000) (noting "our nagging suspicion that attorneys in [class action] cases are routinely overcompensated for such things as contingency risk.").

Competent evidence is especially important when deciding fee motions in pre-certification settlement cases. Because class members are absent during settlement negotiations, "class counsel and defense counsel may develop an alliance" and agree to reduce the overall settlement to be paid by the defendant in exchange for an increased allocation of that settlement to the class counsel. *Palliser,* ¶¶ 23-24. This risk requires "the district judge in the settlement phase of a class action suit [to be] a fiduciary of the class," and "subject therefore to the high duty of care that the law requires of fiduciaries." *Id.*, ¶ 24. Judges must subject settlement agreements in pre-certification cases to "heightened scrutiny," which "mandates that there be sufficient information provided to the class representatives, any objectors, and the district court to enable the parties and the court to reach a well-informed decision of whether the proposed settlement is fair, adequate and reasonable." *Id.*, ¶ 35. A fee motion unsupported by ***any*** evidence of class counsel's hours prevents district courts from fulfilling their fiduciary duty in at least two ways.

First, the district court is deprived of its discretion to select the method to calculate fees. Attorney fees in class actions can be calculated using either (1) the lodestar method, which involves multiplying the number of hours reasonably spent on the case by an appropriate hourly rate for such work, or (2) the percentage method, which authorizes fees to be paid from a percentage of a common fund or a contingency fee agreement. *Gendron*, ¶ 12. A district court has "broad discretion in its selection of the method of calculation and consideration of guiding factors when awarding fees based on the competent evidence provided." *Id.* Class counsel can deprive the district court of its discretion to choose the lodestar method, however, by refusing to present any billing information. Though the district court has the discretion to choose a percentage-based award rather than the lodestar, that choice belongs to the district court, not class counsel.

Second, even if a district court chooses the percentage method, there must still be competent evidence showing "the time and labor required to perform the legal service properly." *Gendron,* ¶ 14; *Lawler v. Johnson*, 253 So.3d 939, 953-54 (Ala. 2017) (for percentage-based fee awards, "the amount of time expended on behalf of the class is still a relevant factor that should be considered when determining a reasonable attorney fee in a class-action case."). Omitting evidence of time and labor from a fee motion prevents the district court from making a reviewable finding on the issue.

A fee motion unsupported by any billing evidence also hampers objectors' ability to evaluate the reasonableness of class counsel's fee request. Illustrating this point are several decisions holding that untimely fee motions prejudice class members by forcing them to decide whether to object without having reviewed class counsel's billing information. See, *e.g.*, *Redman v. RadioShack Corp*., 768 F.3d 622, 637-38 (7th Cir. 2014) (class members "were handicapped in objecting because the details of class counsel's hours and expenses were submitted later, with the fee motion, and so they did not have all the information they needed to justify their objections."); *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 994 (9th Cir. 2010) (class members "could not provide the court with critiques of the specific work done by [class] counsel when they were furnished with no information of what that work was, how much time it consumed, and whether and how it contributed to the benefit of the class"); see also *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244, 1252 (11th Cir. 2020). If objectors are prejudiced by untimely disclosures of class counsel's hours, it follows *a fortiori* that they are prejudiced when those disclosures do not occur at all.

Class Counsel in this matter have never disclosed how much time and labor they invested in this case. They told the District Court simply that they spent "significant" time investigating the case, devoted "many" hours to settlement negotiations, and dedicated "significant" time to finalizing the settlement

agreement and related documents. D.C. Doc. 33 at 6-7. Adjectives, however, are not competent evidence of time and labor. Indeed, Class Counsel refused to prepare any billing records for this case. As explained by one of the members of Class Counsel, "I took on this case on a contingency fee basis and so there was no reason to do billing records." Hrg. Trans., p. 61:22-24.

By contrast, Class Counsel have acknowledged that they provide "detailed billing records" in out-of-state class action suits. Doc. 34 at 25.[4] That they have not provided such data in this matter is telling.

Despite the dearth of evidence provided by Class Counsel, the District Court determined that "the offer of proof from Class Counsel confirmed that significant time and effort went into achieving this settlement." D.C. Doc. 44 at 7; Appendix at 7. Class counsel's "offer of proof" as to the "significant" time spent on this case, however, consisted solely of assertions that they devoted "significant" time to

[4] Along with the cases cited in their brief, there are several other cases in which Class Counsel provided courts with their hours when seeking percentage-based fees. See, *e.g., McKnight* v. *Hinojosa,* 54 F.4th 1069, 1074 (9th Cir. 2022); *In re TikTok, Inc., Consumer Privacy Litigation,* 2022 WL 2982782, *29 (N.D. Ill. July 28, 2022); *In re Zoom Video Communications, Inc. Privacy Litigation,* 2022 WL 1593389, *11 (N.D. Cal. Apr. 21, 2022); *Kukorinis v. Walmart*, 2021 WL 8892812, *4 (S.D. Fla. Sept. 21, 2021); *Richards v. Chimes Financial, Inc.* 2021 WL 2075689, *8 (N.D. Cal. May 24, 2021).

the case. D.C. Doc. 33 at 6-7. This conclusory evidence was insufficient to support a reviewable finding of time and labor. *Gendron,* ¶ 14.[5]

And it was insufficient for a "proper determination of a legal fee" and, therefore, injurious to "public confidence in the bench and bar." *TCH Builders*, ¶ 27. Most class action suits involve class members spread out across a state or, sometimes, across the nation. In this case, however, the class members are all patients of the Hospital in Kalispell. As a result, a substantial majority of the over 200,000 class members in this case reside in northwest Montana. Nearly every person in that area either is a class member or knows one. There is intense local interest in this case, as shown by the fact that both the current and former mayors of Kalispell are objectors, and the press has already published several stories about Class Counsel's obscene fees.[6]

[5] The District Court also approved Class Counsel's request for $23,334.12 "for costs and expenses that were reasonably and necessarily incurred to litigate this case." Doc. 44 at 8; Appendix at 8. Class Counsel never identified what those costs and expenses were, thereby preventing the Court and the Mayors from having any way to verify the reasonable (or even the existence) of the costs and expenses. They provided only a small chart showing the total amount of expenses allegedly incurred by each of the four firms representing the class. D.C. Doc. 26, Decl. of Counsel, ¶ 56.

[6] Darrel Ehrlick, *Kalispell Mayor, Former Mayor Object to Settlement in Logan Health Data Breach*, DAILY MONTANAN, Feb. 18, 2023; Derrick Perkins, Mayor, Former Mayor Challenge Settlement of Class-Action Lawsuit Against Logan Health, DAILY INTER LAKE, Feb. 14, 2023.

The public is watching this case. If affirmed by this Court, the windfall awarded to Class Counsel, without *any* evidence of their time and labor, will inevitably undermine public confidence in the bench and bar

II. The District Court Abused Its Discretion by Awarding a Windfall to Class Counsel

It is black-letter law that fee awards, including percentage-based awards, must not result in a windfall for attorneys who performed relatively few hours. *Gisbrecht v. Barnhart*, 535 U.S. 789, 808 (2002) ("If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is…in order" and a "court should disallow windfalls for lawyers.") (citations omitted). Courts in other jurisdictions have consistently rejected windfall fees for class counsel. See, *e.g.*, *Fischel v. Equitable Life Assurance Soc.,* 307 F.3d 997, 1007 (9th Cir. 2002) (upholding 3% fee award because "[t]he fact that the case was settled early in the litigation supports the district court's ruling; the 25 percent benchmark of the percentage-of-the-fund approach might very well have been a 'windfall.' "); *Goldberger,* 209 F.3d at 49 (noting that courts seek to "prevent unwarranted windfalls for attorneys" in affirming fee award of 4% of settlement fund to class counsel). Likewise, Montana law requires that a district court's discretion in setting class counsel fees be "exercised so as to achieve a reasonable result." *Gendron*, ¶ 15, quoting *In re Bluetooth Headset Prods. Liab.*

*Litig.,*654 F.3d 935, 942 (9th Cir. 2011); Mont. R. Civ. P. 23(h) (requiring that any fee award in class action suits be "reasonable").

In class action suits resulting in common funds, the average fee awarded to class counsel is around 25 percent of the fund. 5 *Newberg on Class Actions*, § 15.83 (6th ed.).[7] Many federal courts have established a 25% "benchmark" that can be "adjusted upward or downward to account for any unusual circumstances involved in the case." *Fischel*, 307 F.3d at 1006.

But early settlements often result in courts significantly reducing fees. See, *e.g., Munoz v. UPS Ground Freight, Inc*., 2009 WL 1626376, *5 (N.D. Cal. June 9, 2009) (court awarded fees of 12% of $3 million settlement rather than 20% as requested by class counsel because counsel worked only 300 hours and, "given the limited hours spent by counsel on this matter and the rapidity with which the matter was settled after the motion to dismiss, a lower percentage than requested is merited."); *Dorsette v. TA Operating LLC*, 2010 WL 11583002 (C.D. Cal. July 26, 2010) (rejecting fee request of 25% and relying instead upon lodestar method because "given that class counsel only spent a total of 283.50 hours litigating this

[7] *See* also Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833 (2010) (finding that "[t]he average award [under the percentage method] was 25.4 percent and the median was 25 percent"); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud., 241, 260 (2010) (finding that "[t]he median and mean fee to recovery ratios were 0.24 and 0.25, respectively" in percentage method cases).

case, the use of a percentage calculation would result in a windfall"); *In re Twinlab Corp. Sec. Litig*., 187 F. Supp. 2d 80, 88 (E.D.N.Y. 2003) (awarding a 12% fee after finding "that a 25% fee ... would be excessive considering that the parties did not engage in extensive discovery, motion practice, trial or appeals and that the action was settled shortly after the motions to dismiss were decided."); *Alberto v. GMRI*, 252 F.R.D. 652, 667-69 (E.D. Cal. 2008) (rejecting class counsel's request for fees of 22% and ordering submission of a "thorough fee award petition…that details the hours reasonably spent" because "other than filing two complaints, engaging in mediation, and filing the instant joint motion, the circumstances necessitating a fee award for plaintiff's counsel at 22% of the settlement amount are not readily apparent to the court.").

Of particular note is the recent fee order issued in *Richards v. Chimes Financial, Inc.*, 2021 WL 2075689 (N.D. Cal. May 24, 2021), a class action resulting from the disruption of a bank's online services. John Yanchunis, who is a member of Class Counsel in this matter, was also class counsel in *Richards*. He filed suit in November 2019 and participated in two settlement conferences, leading to a settlement in May 2020. *Id.* at *1. He claimed to have created a $12.4 million common fund and requested a $750,000 fee award based upon 490 hours of work that resulted in a lodestar of $380,968. *Id.* at *9-10.

The court analyzed the motion using the Ninth Circuit's 25% benchmark as its starting point. *Id.* at *9. It then found that Mr. Yanchunis and his co-counsel had inflated both the value of the fund as well as their billable hours. *Id.* at *9-12. After "considering the procedural posture of the case, the amount of substantive litigation, the minimal issues in dispute, and the lack of motion practice," the court applied the lodestar method and awarded fees of $346,857 – less than half of what Mr. Yanchunis had requested. *Id.* at *13.

Also noteworthy is the fee award in *Palliser.* Unlike Class Counsel in this case, class counsel in *Pallister* submitted timesheets in support of a percentage-based award, albeit the day before the fairness hearing. *Pallister* ¶ 78 (Morris, J., dissenting). And unlike this case, the attorneys had litigated for three years and invested 2,156.75 hours to obtain a $2.37 million settlement, yet received a *lower* percentage, 25%, than the 33% awarded by the District Court in this case. *Id.,* ¶¶ 67, 78 (Morris, J., dissenting).

Class Counsel settled this matter after performing very little work relative to other class actions. Objectors can only guess at just how little – Class Counsel has omitted all billing data, timesheets, and even summaries of timesheets from their motion. What can be adduced from the District Court's Register of Actions is that Class Counsel filed a complaint in March 2022, filed a nearly identical amended complaint in April 2022, opposed the Hospital's Rule 12(b) motion to dismiss,

opposed intervention by other attorneys, and participated in mediation before settling in July 2022. Appendix at 11. Absent from March 2022 to July 2022 is any class certification motion, court hearing, scheduling order, deposition, or appellate proceeding.

Other facets of this case show that Class Counsel performed relatively little work. The Hospital had (according to Class Counsel) a "wasting/cannibalizing" insurance policy that was being consumed by defense costs, thereby motivating Class Counsel to settle early. D.C. Doc. 19 at 13. That fact undermines Class Counsel's claim that the proposed settlement resulted from Herculian efforts entitling them to obscene fees.

Moreover, the Hospital had suffered several recent data breaches before this case. D.C. Doc 10 at 8. As Class Counsel pointed out, these prior breaches severely undermined the Hospital's position. D.C. Doc. 10 at 7 ("Logan Health was particularly aware of the risk of a data breach because Logan Health has experienced other breaches in recent years due to its cavalier approach to data privacy and the privacy of its patients."). As a result, the Hospital's liability was clear and little work was necessary to settle this matter.

One of Class Counsel's arguments for appointment as interim counsel was that their prior experience suing the Hospital would enable them to litigate this case efficiently. D.C. Doc. 10 at 4 (Class Counsel had "specific familiarity with

the Defendant"). In appointing Class Counsel, the District Court noted that none of the other attorneys had participated in the prior data breach lawsuit against the Hospital. D.C. Doc. 18 at 2. Class Counsel cannot argue, on the one hand, that their efficiency entitled them to be named as interim Class Counsel while now arguing that the case required extensive work entitling them to a 33.33% windfall. This is particularly so when one of the firms passed over by the District Court – a well-respected Helena firm – had advised the court that it would cap its fees at 20% if appointed as class counsel. D.C. Doc. 16 at 17.

In light of these facts, 300 hours of non-duplicative work by Class Counsel would be a generous estimate. This would mean that the District Court's $1.43 million fee award resulted in a billing rate for Class Counsel of $4,777.78 per hour. This would be exorbitant even in a major metropolitan area, which Montana is not. *See In re Facebook Biometric Information Privacy Litigation*, 522 F. Supp. 3d 617, 631 (N.D. Cal. 2021) (rejecting a fee request equating to an hourly billing rate of $3,654 per hour, "which is not reasonable by any measure.").

Class Counsel refused to provide any evidence of their hours for one simple reason: doing so would have highlighted just how little work they performed for such a huge windfall. The District Court abused its discretion in approving the award.

III. The District Court Abused Its Discretion by Denying Objectors' Any Opportunity for Discovery

Objectors such as Kalispell Mayor Mark Johnson and former Kalispell Mayor Tammi Fisher can play a critical role in aiding judges to fulfill their fiduciary duties to class members:

> Objectors can encourage scrutiny of a proposed settlement and identify areas that need improvement. They can provide important information regarding the fairness, adequacy, and reasonableness of the settlement terms. They can also seek discovery and access to information that can help the parties, counsel and the reviewing court determine if the agreement meets the fairness standard.

Palliser, ¶ 27. The need for discovery by objectors is particularly important in settlement-only class actions where the parties have not propounded any discovery.

An objector's ability to encourage scrutiny of settlements and identify areas that need improvement, however, is only as good as the information they receive about the settlement. The Mayors moved for leave to propound discovery and attached their proposed discovery requests to their motion. D.C. Doc. 32. The District Court denied the motion, however, which undermined the Mayors' attempt to critique the settlement. When, as in this case, class counsel omits evidence of its time and labor, and the District Court refuses to allow objectors any discovery, objectors "[can] not provide the court with critiques of the specific work done by [class] counsel when they were furnished with no information of what that work was, how much time it consumed, and whether and how it contributed to the

benefit of the class." *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d at 994. As a result, the District Court had no competent evidence upon which to make a finding as to *Gendron's* time-and-labor factor – and this Court has no meaningful way of reviewing that finding. For this reason alone, the District Court's denial of the Mayors' discovery motion was an abuse of discretion.

The lack of discovery hindered the Mayors in other ways. In their motion for final approval, Class Counsel stated that they were "willing to make their respective firms' lodestar available upon the Court's request for *in-camera* review." Doc. 34 at 25, n.1. A month later, however, Class Counsel told the District Court that they did not "do billing records." Hrg. Trans., p. 61:22-24. Class Counsel has not explained this contradiction, and the Mayors could not investigate it in the absence of discovery.

Another example concerns Class Counsel's supporting evidence for the first *Gendron* factor: the novelty and difficulty of the legal and factual issues. *Gendron,* ¶ 14. Class Counsel argued that this is a "highly complicated data breach case" for which "there are very few attorneys in this state and nationally who are willing and capable" of representing the class members. Doc. 26 at 10. They also claimed that the case had "complicating insurance coverage issues." Doc. 26 at 10. Earlier in this case, however, Class Counsel made clear that insurance issues had greatly simplified and shortened the case by hastening settlement negotiations:

> When the undersigned learned that Logan Health had a wasting/cannibalizing insurance policy, they worked to secure a settlement to ensure insurance proceeds went to the affected class rather than being consumed by defense costs.

Doc. 19 at 13. The District Court refused to allow the Mayors to review the insurance policy, thereby preventing them from meaningfully analyzing Class Counsel's conflicting statements.

The Mayors' lack of discovery also hindered their ability to address the fourth *Gendron* factor: the result secured by Class Counsel. *Gendron,* ¶ 14. Class Counsel claimed to have secured a "phenomenal result." D.C. Doc. 26 at 12. But they also claimed in the same paragraph to have "secured the maximum remaining insurance proceeds under Defendant's policy." *Id.* The Mayors requested a copy of the policy to verify Class Counsel's claims. The District Court denied the request.

Another example involves the fifth *Gendron* factor – Class Counsel's reputation. That reputation is poor - they have been rebuked by judges across the nation for unethical billing practices in class action cases. A federal judge in Miami declared that Mr. Yanchunis and his firm "will not be bringing home as much bacon as it had hoped" because of its "patently unreasonable" fee request. *Kukorinis v. Walmart*, 2021 WL 8892812, *1, 3-4 (S.D. Fla. Sept. 21, 2021). The judge also criticized Mr. Yanchunis because a "group of claimants was potentially added to create the specter of a heightened benefit conferred upon the Class to

bolster a request for attorneys' fees and costs." *Id.* at 3. Another Miami judge rejected Mr. Yanchunis' fee request as "simply exorbitant." *Davis v. Bank of America*, 2006 WL 8433706, *3 (S.D. Fla. June 30, 2006). As noted previously in this brief, the courts in *Richards v. Chimes Financial, Inc.*, 2021 WL 2075689 (N.D. Cal. May 24, 2021) and *In re Amla Litigation,* 320 F.R.D. 120 (S.D.N.Y 2017) have also rebuked Class Counsel for their unethical billing practices.[8]

Not only have judges accused members of Class Counsel of fee-related improprieties, Class Counsel have repeatedly accused *each other* of the same thing. In one case, Mr. Yanchunis accused Ahdoot & Wolfson (another of the firms representing class members in this case) of negotiating a settlement that "reeks of a reverse auction." D.C. Doc. 16, Exhibit E at 22.[9] In another case, Mr. Yanchunis accused Ahdoot & Wolfson of attempting to "undercut any real change or relief for the millions of customers and employees whose data was compromised so plaintiffs' counsel can make a quick turnaround on attorney's fees." D.C. Doc. 16, Exhibit F at 1.[10] Ahdoot & Wolfson "filed in March [2021] and settled two months

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[8] See pages 2 and 17, *supra*.

[9] That exhibit consists of a motion filed by Mr. Yanchunis in the matter of *Breyer v. Flagstaff Bancorp Inc*., Case No. 5:21-cv-02239-EJD (N.D. Cal. Dec. 2021).

[10] That exhibit consists of a motion filed by Mr. Yanchunis in the matter of *Cochran v. The Kroger Co*., Case No. 5:21-cv-01887-EJD (N.D. Cal. Oct. 28, 2021).

later….That is, they may seek over $1 million for filing a case and then immediately settling it." D.C. Doc. 16, Exhibit F at 15. Mr. Yanchunis rightly complained that it was "impossible to know at this point how the …attorneys could have billed so much since they do not …include the total number of hours billed to date." *Id*.

Only a few months later, however, both Mr. Yanchunis and Ahdoot & Wolfson jointly sought appointment as interim class counsel in this matter. Given that these two firms were recently at each other's throats over accusations of unethical billing, and given the repeated rebukes made against Class Counsel by federal courts around the nation, the Mayors were certainly entitled to discovery concerning Class Counsel's time and labor in this case.

If a fee of over $1 million for a few weeks of work is objectionable in the San Francisco area, as Mr. Yanchunis has rightly claimed, D.C. Doc. 16, Exhibit F at 15, it is also objectionable when he and his co-counsel demand the same in Montana. And it was all the more reason why the Mayors were entitled to discovery that could "encourage scrutiny of a proposed settlement and identify areas that need improvement." *Palliser,* ¶ 27.

The District Court also abused its discretion by refusing to allow discovery concerning Class Counsel's request for $23,334.12 for costs and expenses. The court found them to be "reasonably and necessarily incurred to litigate this case."

Doc. 44 at 8; Appendix at 8. Class Counsel never identified what those costs and expenses were, however, thereby preventing the District Court and the Mayors from having any way to verify the reasonableness (or even the existence) of the costs and expenses. Class Counsel provided only a small chart showing the total amount of expenses allegedly incurred by each of the four firms representing the class. D.C. Doc. 26, Decl. of Counsel, ¶ 56.

There are still more reasons why the Mayors were entitled to discovery. Because this case involves a pre-certification settlement of a class action, the District Court had a heightened duty to guard against potential collusion between Class Counsel and the Hospital as well as the possibility of a "reverse auction," *i.e.*, an effort by a defendant facing multiple class action suits to achieve a global settlement with the class attorneys who offer the most lenient terms. *Pallister,* ¶¶23-24; *In re M3 Power Razor System Marketing & Sales Practice Litigation*, 270 F.R.D. 45, 54 (D. Mass. 2010) ("considerations stemming from structural concerns about potential collusion and reverse auctions in settlement class actions make it incumbent on the district court to give heightened scrutiny to the requirements of Rule 23 in order to protect absent class members.").

The Ninth Circuit has identified several "red flags" potentially indicative of collusion between class counsel and a defendant. *In re Bluetooth,* 654 F.3d at 947. One is where class counsel "receive a disproportionate share of the settlement or

when the class receives no monetary distribution but class counsel are amply rewarded." *Id.*; *Laffitte v. Robert Half Internat'l, Inc*., 376 P.3d 672, 677 (Cal. 2016) ("a percentage award may also provide incentives to attorneys to settle for too low a recovery because an early settlement provides them with a larger fee in terms of the time invested.").

Class Counsel sought $1.43 million for a few months of work. D.C. Doc. 26. This is a disproportionate share of the settlement. And Class Counsel will receive payment before the class members. D.C. Doc. 23, Exhibit A, ¶¶ 22, 91. Indeed, thousands of class members might not receive any funds. *Id.* ¶ 67.

A settlement agreement might also be a product of collusion when it includes a "clear sailing" agreement by which the defendant agrees not to challenge class counsel's fee motion. *In re Bluetooth*, 654 F.3d at 947. The settlement agreement in this case had a clear-sailing provision. D.C. Doc. 23, Exhibit A, ¶ 91.

Discovery was warranted by the possibility that a reverse auction had occurred. Within weeks of the Hospital announcing its data breach, eight law firms were vying to become class counsel. One firm presented a settlement offer to the Hospital, D.C. Doc. 19 at 1, while another offered to cap its fees at 20%. D.C. Doc. 16 at 17. The Hospital instead stipulated to Class Counsel's appointment as interim counsel. D.C. Doc. 18 at 2. A month later, Class Counsel reached a

tentative settlement with the Hospital that included $1.43 million in fees for a few months of work – and a remaining settlement fund that may leave thousands of class members without any recovery.

The District Court's abuse of discretion in denying the discovery motion is also demonstrated by this remark:

> Now I want to further note that if the facts had been different and there have been additional discovery that could have created a major risk of unreasonable delay for the Class Members and *potentially exposed Objectors to some legal risk* which, I think, is worth noting on the record.

Hrg. Trans. 81: 18-23 (emphasis added). The District Court's remark about "legal risks" for objectors who seek discovery was unwarranted and, frankly, inappropriate. This Court encourages discovery by objectors. *Palliser,* ¶ 27 (objectors "can also seek discovery and access to information that can help the parties, counsel and the reviewing court determine if the agreement meets the fairness standard."). A reaffirmation of that principle by this Court would alleviate the potential chilling effect the District Court's remark could have on objectors seeking discovery in the future.

The District Court was obliged to rigorously examine this proposed settlement – and to give the Mayors the discovery tools they needed to aid in that examination. The court's failure to do so constitutes reversable error.

IV. Affirming Windfall Fee Awards Will Transform Montana Into A Class-Action Magnet

The Mayors have not found (and Class Counsel has not cited) a class action decision anywhere in the nation like this one: a case with a 33% fee award for relatively little work and no evidence of class counsel's time and labor. Affirming the District Court's ruling will encourage plaintiffs' attorneys across the nation to turn Montana into a class-action magnet.

> In the class action context …forum shopping takes a different, and more sinister, form. It entails the ability of class counsel to commence an action in a forum that is most favorable to *counsel's own* (rather than the class members.) interests, such as a forum in which judges are predisposed to exercising little scrutiny of class action settlements.

M. Kahan & L. Silberman, *The Inadequate Search for "Adequacy" in Class Actions*, 73 N.Y.U. L. Rev. 765, 775 (1998) (emphasis in original).

This might already be happening. A week after the filing of the *Tafelski* complaint in Cascade County District Court, members of Class Counsel filed a parallel complaint in federal district court in Great Falls. *Smeltz v. Logan Health*, Case No. 4:22-cv-00028-BMM-JTJ (Dist. Mont. Mar. 9, 2022). They did not pursue the federal case, however, quite possibly because they anticipated a more favorable review of their fee motion in state court than they would have received in federal court.

Alabama has long been a favored forum of the class action bar. See, *e.g., State v. Homeside Lending, Inc*., 826 A.2d 997, 1020 (Vt. 2003) (noting that for

"whatever reason, Alabama has been a magnet forum for national class actions, even when Alabama has no connection with the vast majority of the plaintiffs or with the defendants."). But even Alabama courts have cracked down on awards that are unsupported by competent evidence. *Lawler v. Johnson*, 253 So.3d 939, 953-54 (Ala. 2017) (as with lodestar awards, for percentage-based fee awards, "the amount of time expended on behalf of the class is still a relevant factor that should be considered when determining a reasonable attorney fee in a class-action case.").

A ruling by this Court upholding windfall awards without any evidence of time and labor, particularly in cases that settle early, would encourage plaintiffs' attorneys around the nation to file their cases here – not to promote class members' interests but rather those of the attorneys. Montana would become the next Alabama. This Court should not let that happen.

CONCLUSION

For all of the foregoing reasons, Mayor Mark Johnson and former Mayor Tammi Fisher respectfully request that the Court reverse the judgment of the District Court.

DATED: July 17, 2023

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word is exactly 7266 words, excluding caption page, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED: July 17, 2023

Respectfully submitted,

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