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Lead Plaintiffs' Counsel

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation

Case No. 15-MD-02617-LHK

PLAINTIFFS' RESPONSE TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER RE: AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

Date: June 14, 2018
Time: 1:30 p.m.
Judge: Lucy H. Koh
Crtrm: 8, 4th Floor

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I. INTRODUCTION

The Special Master's report provides helpful insight into Plaintiffs' application for attorneys' fees and litigation expenses, but it also errs in several respects. *See* ECF 1008 (Report and Recommendations of Special Master re: Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Report")). The Special Master correctly concluded that Plaintiffs' Counsel achieved an "extremely positive" result for the class in a massive, complex, and high-risk case; approved Plaintiffs' Counsel's blended hourly rate and litigation expenses; and found that Counsel did not engage in improper billing practices. The Court should adopt these findings. Plaintiffs, however, respectfully object to five of the findings and recommendations set forth in the Report.

First, litigation expenses and service awards should not be deducted from Plaintiffs' fee award. The Report's recommendation to the contrary is inconsistent with Ninth Circuit law and the common fund doctrine. In the case of the service awards, it would also violate the California Rules of Professional Conduct, which prohibit the sharing of legal fees with non-lawyers. *See infra*, Section IV.C; Report at 28.

Second, the fee award should account for the valuable non-monetary benefits conferred on the class and the contingent risk assumed by Plaintiffs' Counsel. Relatedly, the fee award may not "double count" allegedly excessive hours and rates by *both* reducing the lodestar and then *also* applying a negative multiplier to the lodestar based on these same factors. On these points, and in considering the reasonableness factors, the Report misapplies Ninth Circuit law. *See infra*, Section IV.D-E; Report at 23.

Third, although the Report correctly determined that Plaintiffs could bill for the services of contract attorneys rather than treat them as a cost, it erred in concluding that Plaintiffs could only bill contract attorneys at (below market) paralegal rates. Contract attorneys performed important legal work that paralegals could not have performed, and were appropriately billed at a discounted rate below the prevailing market rate for attorneys of like experience in this district. *See infra*, Section IV.A.2; Report at 10-15.

Fourth, the hours expended on this litigation were reasonable. The Report's finding to the contrary was based on unsupported assumptions that "too much" time was devoted to class certification, depositions, and settlement, and that the use of 53 law firms necessarily resulted in overbilling. To the contrary, the record demonstrates that the time devoted to this case was necessary and reasonable: this

ground-breaking settlement would not have been possible without Plaintiffs devoting substantial time to class certification and settlement, and Plaintiffs' deposition staffing was appropriate under the circumstances (and, indeed, was leaner than Defendants' staffing). Ninth Circuit law is clear that where each hour spent was reasonable, it does not matter whether the billers were employed by one or many law firms. *See infra*, Section IV.A.3; Report at 15-18; *see also* ECF 916-9 (Cervantez Declaration) ¶¶46-47; ECF 944-1 (Cervantez Reply Declaration) ¶¶27-55.

Finally, a ten percent reduction to Plaintiffs' lodestar is inappropriate here because Lead Counsel have already made substantial cuts to hours and provided detailed explanations of why the hours billed were necessary (explanations that the Report does not address). And that lodestar generated significant value for the class: there can be "no doubt that the settlement reached . . . was of general public benefit" and the result of a "substantial and necessary time commitment." Report at 22-23. Plaintiffs stress, however, that if there is to be any reduction, it should be made only to Plaintiffs' approximately $38,000,000 lodestar, rather than "on-top" of other reductions.

For these reasons, and for the additional reasons set forth below,[1] Plaintiffs respectfully ask this Court to overrule the above five findings, and to award Plaintiffs fees of $37,950,000, costs of $2,005,068.59, and a cost reserve of $132,000.

II. STANDARD OF REVIEW

This Court reviews the Special Master's Report *de novo*, including its findings of fact and conclusions of law, because there is no stipulation among the parties adopting a different standard of review. *See* Fed. R. Civ. P. 53(f)(3), (f)(4).

III. RELEVANT EVIDENTIARY RECORD

Plaintiffs base their objections on the record in this case, including primarily the December 1, 2017; January 25, 2018; January 31, 2018; February 5, 2018; and March 26, 2018 Declarations of Eve Cervantez and Exhibits thereto (*see* ECF 916-9, 944-1, 960-2, 977-2, 1002-1); the December 1, 2017; January 18, 2018; January 25, 2018; January 31, 2018, and February 2, 2018 Declarations of Andrew Friedman and Exhibits thereto (*see* ECF 916-29, 945-1, 965-2, 973-3); the December 1 Declaration of

[1] In the argument section below, Plaintiffs address the Report's findings in the order presented in the Report.

Eric H. Gibbs (*see* ECF 916-30); the December 1, 2017; January 25, 2018; and January 31, 2018 Declarations of Michael W. Sobol (*see* ECF 916-31, 945-2, 965-5); the January 18, 2018 Declarations of Counsel (*see* ECF 938-1, 938-2, 938-3, 938-4), and the other information ordered filed by the Court. *See* ECF 987, 987-1, 1002–1004-37 (time records). Plaintiffs note that the Report fails to acknowledge or cite to the January 25, 2018 Cervantez Reply Declaration (ECF 944-1), even though that Declaration responds specifically to concerns about fees raised by Objector Schulman, many of which are also discussed in the Report.

Plaintiffs also respectfully submit a declaration from Professor William B. Rubenstein specifically responding to some of the points made by the Special Master ("Second Rubenstein Declaration"); *cf. In re High-Tech Emp. Antitrust Litig.*, No. 5:11-cv-03541, Doc. 54 at *16 (N.D. Cal. Sept. 2, 2015) (citing Professor Rubenstein).[2] Plaintiffs also respectfully submit a short Second Supplemental Declaration of Eve Cervantez attaching additional charts derived from existing evidence.

IV. ARGUMENT

A. Counsel's Lodestar Is Reasonable.

1. The Special Master correctly found that Counsel's rates are reasonable.

The Special Master found that the average rate per biller ($455) was not "excessive." Report at 15.[3] This finding is well-supported and should be adopted. Plaintiffs have provided citations to court approvals for the attorney rates, or equivalent rates, requested for each firm that billed in this case. ECF 916-12; *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) ("[R]ate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate.").

[2] On March 9, 2018, Plaintiffs requested leave to file a declaration from Professor William B. Rubenstein ("First Rubenstein Declaration") so that the Special Master could consider it in preparing his Report. ECF 991. The Court denied Plaintiffs' request. ECF 992. Plaintiffs respectfully re-submit Professor Rubenstein's First Declaration as Exhibit 1 to his Second Declaration in support of Plaintiffs' Motion for Attorneys' Fees, Litigation Expenses, and Service Awards to Class Representatives ("Second Rubenstein Dec."), which he has specifically reconsidered in light of the Special Master's Report.

[3] The Special Master appears to have calculated a $455 average by determining the blended rate for each of the 30 firms that billed over $100,000 and calculating the simple average of those rates. *See* Report at 15. The Special Master also calculated an average rate of $496/hour for the eleven firms whose billings are in the seven figures, which is also below the median and mean blended rates for this district, as discussed in the text. Report at 17.

Counsel's blended rate falls well below the median and mean rates in this district. Counsel's blended rate was $481.62, ECF 916-9 ¶48, which is considerably lower than the median rate upon which this Court relied in approving a blended rate of $533.21 in *High-Tech*, No. 5:11-cv-03541, Doc. 54 at *16. *See also id.*, No. 5:11-cv-02509, Doc. 1073-1 (May 7, 2015) (*High-Tech* Rubenstein Declaration) ¶¶28-30. Indeed, the mean blended rate for 41 class action lawsuits in this district during the past two years is $527.18, and Counsel's overall blended rate here is lower than all but 12 of the 41 cases. First Rubenstein Dec. ¶15; *see* also ECF 944-13 ¶29 (earlier calculation of mean blended rate in this district of $528.11).

The blended rate shows both that Counsel's rates are reasonable, and that Plaintiffs did not overstaff this case with higher-priced attorneys. Because the blended hourly rate is the total lodestar divided by the total number of hours expended, it reflects the cost of the average hour in the case and captures the extent to which the work was distributed among higher- and lower-cost professionals. When, as here, the blended hourly rate is well below the median, it shows that Counsel distributed work among partners, associates, contract attorneys, and paralegals in an even more cost-effective manner than has been found reasonable in past cases in this district. The number of hours billed by different timekeepers similarly demonstrates that Plaintiffs staffed the case in an appropriate pyramid-like manner: non-partner attorney timekeepers billed almost twice the number of total hours (approximately 48,000) as partners (approximately 24,000). First Rubenstein Dec. ¶14; ECF 960-5; *cf. Pollinator Stewardship Council v. U.S. Envt'l Prot. Agency*, -- F.3d --, 2017 WL 3096105, at *15 (9th Cir. 2017) ("[The] court may not set the fee based on speculation as to how other firms would have staffed the case.") (citing *Moreno v. City of Sacramento*, 534 F.3d 1106, 1114 (9th Cir. 2008)).[4]

2. Contract attorneys should be treated as any other attorneys.

a. The Special Master was correct to conclude that attorneys' fees do not become "costs" when they are incurred by contract attorneys.

The Special Master correctly concluded that Plaintiffs are not required to treat contract attorneys as "costs," but can instead bill their time as fees for legal services. Report at 12. This finding should be adopted.

[4] The favorable comparison between Counsel's blended rate and the blended rate in other class actions in this district, together with the evidence showing that Counsel staffed this case in a pyramid-like manner, demonstrates that the Report was not correct to find a "problem" with any alleged use of "higher priced lawyers to perform tasks such as document review." Report at 16-17; *see also* Second Rubenstein Dec. ¶5.

Federal courts widely agree that rates charged for contract attorneys should be based on the reasonable market value of their services, just like any other attorneys. ECF 945 (Pls. Reply ISO Atty Fees, Litigation Expenses, and Service Awards) at 12-14; *see also* First Rubenstein Dec. ¶¶25-27. These courts correctly reject the contention that rates charged for such attorneys should somehow reflect their "cost" to the law firm (particularly the hourly cost, which ignores overhead) or the "spread" between that cost and any other number. California courts have also held that it is inappropriate to evaluate the reasonableness of rates based on the difference between the amount paid to the contract attorney and the amount billed. *See, e.g.*, *Shaffer v. Superior Court*, 33 Cal.App.4th 993, 1003 (1995) (finding that a corporate firm's compensation of a contract attorney is not relevant to whether the fee charged for that attorney's work is reasonable, and any attempt by a court to determine reasonable fees for services based on a law firm's "profit margin" would raise numerous problems); *see also Margolin v. Reg'l Planning Comm'n*, 134 Cal.App.3d 999, 1004-05 (1982) (holding that "cost of providing legal services is not relevant to a determination of their value").

b. Contract attorneys are not comparable to paralegals.

The Report recommended treating contract attorneys as if they were paralegals for purposes of determining their reasonable market rate. Report at 12-14, 27. This recommendation was in error, and Plaintiffs are not aware of any court to have adopted this approach.

Contract attorneys were tasked with reviewing, analyzing, and synthesizing documents that were highly technical (e.g. related to data security) and legally complex (e.g. insurance contracts) to ascertain their relevance to numerous legal claims and theories. ECF 945 at 11-12, 944-1 at 19-20 ¶¶51-54. Only attorneys could perform this work. Plaintiffs are aware of no authority supporting the proposition that it would be permissible, let alone reasonable, to delegate such crucial legal work to paralegals. And to the extent certain types of simple "sorting" document review could be performed by paralegals, it was. *See, e.g.*, ECF 960-6 (chart showing timekeeper billing by task code, including paralegal time billing for task code 2 (document review)). *See also* Second Rubenstein Dec. ¶5.

c. The Ninth Circuit requires the use of market rates.

In the Ninth Circuit, attorneys must be billed consistent with prevailing market rates. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016) (lodestar calculation must be based on the current

prevailing rate (or the historical prevailing rate with an enhancement for delay)). Indeed, "no Ninth Circuit case law" permits a court to "determine the hourly rates for the members of Plaintiffs' legal team without relying on evidence of prevailing market rates." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1206 (9th Cir. 2013). As might be expected, contract attorneys were collectively billed well below the prevailing market rates for attorneys of similar experience in this district. The contract attorneys in this case had been out of law school for an average of 10.84 years (as of 2017), and their blended hourly rate of $360.12 is commensurate with a lawyer with only about four years of experience. *Compare* Second Supp. Declaration of Eve Cervantez, Ex. 1 *with* ECF 916-12 (providing rates of each timekeeper and support for each firm's rates); First Rubenstein Dec. ¶27.[5]

Professor Rubenstein's analysis also supports Plaintiffs' fee request. He shows that court-approved billing rates for contract attorneys in other cases have a blended hourly rate of $398.80, which is higher than the rate in this litigation. *See id*. The record also includes many additional instances of court-approved rates for contract attorneys above those billed here. ECF 945 at 12-13; ECF 945-1 (Friedman Reply Dec.) ¶¶2-3, Ex. A; ECF 944-13 (Cervantez Reply Dec. Ex. L) ¶¶31-35. Plaintiffs have compiled additional recent class action cases approving contract attorney rates, all of which are higher than, or comparable to, those here. Second Supp. Cervantez Dec. Ex. 2. By contrast, the Special Master concluded that Plaintiffs' rates for contract attorneys were too high by citing two cases that did not determine prevailing rates for contract attorneys. Report at 11 (citing *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016) and *Banas v. Volcano Corp.*, 47 F.Supp.3d 957 (N.D. Cal. 2014)). In *Dial* and *Banas*, counsel had billed the contract attorneys as expenses rather than as part of their lodestar, and therefore the courts had no occasion to rule upon the applicable market rate that could have been charged. *Dial*, 317 F.R.D. at 438; *Banas*, 47 F.Supp.3d at 980; *see also* Second Rubenstein Dec. ¶5.

One final point. Even if the Special Master were correct that contract attorneys should be treated as paralegals, the $156 per hour rate used by the Special Master is well below court-approved rates for

[5] The discount Plaintiffs applied to contract attorney rates in this case appropriately reflects the Ninth Circuit's guidance that the prevailing market rate should take into account the attorneys' skills, qualifications, and reputations, as well as the complexity of the legal work they complete. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008); *Gonzalez*, 729 F.3d at 1207.

paralegals in this district. *See, e.g.*, ECF 916-12 (citing several courts approving higher paralegal rates); *In re High-Tech*, No. 5:11-cv-03541, Dkt. 54 at *16 (approving rates for paralegals and other support staff, including from firms in this case, ranging "from about $190 to $430, with most in the $300 range").[6] The Special Master's $156 rate appears to come from the "Summary of Rates per Thomson Reuters," which includes the Laffey Matrix paralegal rate of $156 per hour. Report at 10. As the Special Master acknowledges, however, "[t]he Ninth Circuit has rejected the Laffey Matrix . . . ." *Id.* at 8 (citing *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 454 (9th Cir. 2010)). It would be reversible error to compensate even paralegals at this rate, much less attorneys. *See Gonzalez*, 729 F.3d at 1206-07 (vacating district court's "arbitrar[y]" use of a $125 per hour paralegal rate instead of setting the rate based on the prevailing market rate). *See also* Second Rubenstein Dec. ¶5.

3. Counsel spent an appropriate number of hours prosecuting this litigation.

The Special Master properly recognized that this was "a massive case in all respects," Report at 15, but found certain time spent to be excessive "on its face." Report at 16. The Report, however, does not fully account for the volume of work required to effectively litigate this massive case, nor does it acknowledge (much less reject) the evidentiary record detailing why these hours were appropriate. *Compare* ECF 916-9 at 46-47 (Cervantez Declaration) ("I am familiar with each firm's contribution in terms of locating plaintiffs, responding to discovery on behalf of their clients, defending or taking depositions, or contributing research or writing with respect to specific areas of expertise, and assured myself that the time claimed for each task for each firm was reasonable") *and* ECF 944-1 (Cervantez Reply Declaration) *with* Report at 6-7, 15-18. In order to determine "how much time an attorney can reasonably spend on a specific case," it is necessary to consider "case-specific factors including among others, the complexity of the legal issues." *Costa v. Comm'r of Soc. Sec. Admin.*, 690 F.3d 1132, 1136 (9th Cir. 2012). Here, the full record shows that Plaintiffs spent a reasonable amount of time litigating this case. *See, e.g.*, ECF 916-9 ¶¶21-43; 944-1 ¶¶27-50; 960-2 ¶¶3-7; 1002-1 – 1004-37.

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[6] *See also, e.g.*, *In re Yapstone Data Breach*, No. 4:15-cv-04429, Dkt. 84 at *2 (N.D. Cal. Aug. 8, 2017); *id.*, Dkt. 78-3 at *4 (May 16, 2017) (paralegals billed at $265 per hour); *In re Omnivision Techs, Inc. Sec. Litig.*, No. 5:11-cv-05235, Dkt. 186 at *3 (N.D. Cal. June 5, 2015); *id.*, Dkt. 180-9 at *9 (May 1, 2015) (paralegals billed at between $270 and $325 per hour).

a. Plaintiffs staffed depositions efficiently.

Plaintiffs spent 13,800 hours on tasks that related to 194 fact and expert depositions. This was entirely appropriate: (1) the issues in the case were complex and novel; (2) Defendants produced millions of pages of documents on the eve of depositions; (3) the majority of the depositions required significant travel time; and (4) many depositions required multiple attorneys from both Plaintiffs and Defendants.

First, the issues in this case were factually complex because of the contract, insurance, and cybersecurity technology involved. *See* ECF 916-7 at 8-10. Perhaps even more important, the issues were highly novel: at the time the depositions were being taken, *no federal court had certified a litigation class in a data breach case*. *See id*. It was not possible, then, to borrow work from past cases, and it took particularly extensive time to prepare for depositions of Defendants' cybersecurity professionals and to prepare to take and defend the ten novel expert depositions. *See, e.g.*, ECF 944-1 ¶42. In the case of depositions of the 100-plus Named Plaintiffs, it was not possible to clone work from one to the next: Counsel had to carefully review all relevant documents and interrogatory responses produced by or about that individual and meet with each Named Plaintiff to prepare. ECF 916-9 ¶29. Plaintiffs respectfully submit that their *Daubert* and class certification briefing shows compellingly that this deposition time was well-spent and generated very significant value for the class. *See* ECF 719-729, 743-753, 826-827, 832-833 (class certification briefing); ECF 818-4, 818-6, 819-824, 857-859 (*Daubert* briefing).

Second, after producing approximately 600,000 pages of documents by July 2016 – as depositions were beginning – Anthem produced 2.3 million additional pages of documents between July 18 and October 19, 2016, during the most busy deposition period. *See* ECF 514, 541, 601. The Non-Anthem Defendants also produced thousands of pages of documents just a week or two before the depositions of each of the 13 Non-Anthem Defendants, which involved 41 depositions of corporate designees in 13 states over 37 days (between November 14 and December 20, 2016). *See* ECF 944-1 at ¶39. This meant that the attorney taking a particular deposition frequently had to review a very significant volume of documents in a short time period – time that was billed to deposition preparation rather than "document review." The time billed to depositions necessarily also included paralegal time locating and pulling documents for exhibits; attorney and paralegal time coordinating with opposing counsel and more than 100 Named Plaintiffs about the logistics of a schedule that involved 194 depositions in 63 cities over a

compressed five-month period (ECF 916-9 ¶¶29, 34; Second Supp. Cervantez Dec. Ex. 3); and time to review every deposition transcript for confidentiality designations and errata. *Cf.* ECF 293 (Stipulated Protective Order).

Third, many depositions required significant travel time. *See* ECF 916-9 ¶¶29, 35-36; 944-1 ¶41. Indeed, 174 of the depositions occurred in places other than San Francisco or Washington, D.C. (where Lead Counsel/PSC firms are located). *See* Second Supp. Cervantez Dec. Ex. 3. These depositions would have required even *more* travel time had Lead Counsel not planned and staffed them efficiently, including by having some Named Plaintiffs travel to "hub" cities for their depositions and by assigning non-PSC firms to defend certain Named Plaintiff depositions and to take certain Non-Anthem 30(b)(6) depositions. *See* ECF 916-9 ¶¶29, 36; ECF 944-1 ¶32.

Fourth, many depositions required more than a single attorney. *See* Report at 17 (noting Lead Counsel had explained why multiple attorneys were present at depositions and hearings).[7] For example, it was important to have Named Plaintiffs' retained attorneys present at the depositions of their clients, given that they had pre-existing relationships with the Named Plaintiffs and knew the facts of their cases. It was also prudent to allow Named Plaintiffs' retained attorneys to attend these depositions, given that this case is a multi-district proceeding made up of multiple class actions consolidated for pre-trial proceedings, and individuals with cases in multi-district proceedings (which could be remanded back to home districts) typically have a right to continued representation by their own attorneys, even if Lead Counsel has an oversight role. These were reasonable staffing decisions, and courts routinely award fees for the presence of more than one attorney at a deposition. *See, e.g.*, *Kelly v. Wengler*, 7 F.Supp.3d 1069, 1079 (D. Idaho 2014) (finding that "the compressed litigation schedule and volume of discovery in this case justified using two attorneys at the depositions"), *aff'd*, 822 F.3d 1085 (9th Cir. 2016). Such decisions were particularly reasonable given that Defendants staffed these depositions similarly, or with more attorneys: 134 more attorneys appeared for Defendants than for Plaintiffs at these depositions, and

[7] In 171 of the 194 depositions, there were no more than two attorneys present for Plaintiffs. In approximately 23 instances, Plaintiffs believed the presence of a third attorney at a deposition was necessary. Plaintiffs cut the time of the third attorney at 12 depositions prior to submitting billing records to the Court. Counsel have since discovered 11 instances in which Lead Counsel billed for the presence of a third attorney. Second Supp. Cervantez Dec. ¶7. If the time of the third attorney were deducted from Counsel's reasonable lodestar, it would reduce the lodestar by approximately $55,000. *Id.*

even excluding Defendants' in-house counsel/client representatives, there were 56 more defense attorney appearances than Plaintiffs' attorney appearances. *See* Second Supp. Cervantez Dec. ¶6 & Ex. 3; First Rubenstein Decl. ¶¶20-21; *see generally Bravo v. City of Santa Maria*, 810 F.3d 659, 671 (9th Cir. 2016) (Reinhardt, J., concurring) (assessing hours spent by defense counsel to determine whether hours spent by plaintiffs' counsel were reasonable). *See also* Second Rubenstein Dec. ¶6 (opining that deposition time was not excessive on its face).

b. Plaintiffs spent an appropriate amount of time preparing for class certification.

The class certification motion here was exceedingly complex and high stakes. More importantly, a significant amount of the approximately 3,300 hours billed to the class certification task code was also instrumental to the development of the *merits* of the claims and defenses. *Cf. True Health Chiropractic Inc v. McKesson Corp.*, No. 13-cv-02219, 2015 WL 273188, at *2 (N.D. Cal. Jan. 20, 2015) (declining to bifurcate class and merits discovery in part because of the typical overlap between the two). The case schedule appropriately required an intensive investigation into the merits at the same time as class certification because all discovery was conducted simultaneously, and either party could have moved for summary judgment without addressing class certification. *See Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984). This was *positive* for the class: Counsel may not have been able to achieve such a strong settlement if the schedule had been less aggressive. But because the billing system only allowed a biller to select one task code for each time entry, all of this work was billed under the "class certification" time code, although the detailed description of the work reveals that much of it was just as relevant to the merits.

The overlap is evident from Plaintiffs' class certification motion and its many exhibits, which advanced proof important to the merits and was indispensable for reaching and structuring the settlement. *See* ECF 719-729, 743-753, 826-827, 832-833. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 & n.8 (9th Cir. 2011). For example, Plaintiffs filed a Trial Plan in which they determined each fact they would need to establish to prevail on the merits and compiled the evidence needed to prove each of those facts. *See* ECF 743-14. Similarly, Plaintiffs determined the legal theories and expert evidence they would need to establish their right to injunctive

relief and damages on the merits, and presented that evidence with their class certification briefing. *See* ECF 752 (index of evidence); 805-1 (index of evidence). Additionally, portions of the time spent briefing *Daubert* motions were billed to class certification because the issues were so closely intertwined. The Report's conclusion that Plaintiffs billed an excessive amount of time to class certification was error because it was based on the mistaken belief that the 3,300 hours billed to the class certification time code meant that Counsel spent this entire time on a single motion. The record in this case establishes otherwise.

It bears emphasis that the class certification brief and supporting documents here were much more complex than in the average case. When Plaintiffs moved for class certification, no federal court had certified a litigation class in a data breach class action. *See* ECF 916-7 at 13, 944-1 ¶45. Accordingly, Plaintiffs researched numerous cutting-edge legal issues of first impression. *See* ECF 916-7 at 8-10, 12-14, 944-1 ¶45. Counsel had to scour Anthem's document productions to locate every contract Anthem produced and then carefully analyze and categorize every contract. *See* ECF 746-1, 746-2 (Rule 1006 Summary of Evidence Chart of Anthem Contracts), 747-1; *see also* ECF 944-1 ¶¶45, 52. Counsel also had to master the intricacies of Anthem's cybersecurity, *see* ECF 745-2, as well as the economic damages to be proved by a conjoint survey, the need for credit monitoring, and other issues raised by multiple experts. *See* ECF 916-7 at 9-10, 916-9 ¶¶40-42, 944-1 ¶¶52-53. Indeed, Plaintiffs' class certification briefing was supported by 190 exhibits in seven volumes, and Defendant's opposition (which Counsel had to thoroughly review and understand to reply) included an additional 119 exhibits. *See* ECF 944-1 ¶45 (describing effort), 752 (index of evidence), 805-1 (index of evidence), 838 (citing exhibits); *see generally* ECF 719-29, 743-53, 780-788, 797-805-3, 826-827, 832-833. And because Defendants applied heightened confidentiality designations to many exhibits, Class Counsel had to engage in document-by-document, line-by-line negotiations over the propriety of these designations. This added considerable time to class certification briefing. *See, e.g.*, Joint Admin. Motion to File Under Seal, ECF 743, and the supporting declarations of Moore, Hoover, Kavanaugh, Putziger, Klein, Griffin, Cervantez, and Pascual, ECF 743-1 – 743-8; *see also* Cervantez Dec. ISO. Admin. Motion to File Under Seal, ECF 797-2 ¶46.

In these circumstances, then, there is no reason to suspect that Counsel would "spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both

the result and the amount of the fee." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). In general, the Court should defer to counsel's professional judgment as to how much time was required for class certification and the merits here. *See id*.

c. Plaintiffs settled the case efficiently.

The approximately 2,500 hours spent on tasks related to the settlement is also well supported by the record and reasonable, despite a suggestion in the Report to the contrary. *See* Report at 17. The time billed to settlement included three separate days of mediation attended by five attorneys from Plaintiffs' Co-Lead Counsel and Steering Committee firms; travel to New York City and San Francisco for those days of mediation; and many rounds of drafting and documenting a lengthy and complex settlement agreement, including business practice changes. *See* ECF 944-1 ¶46. It also included significant class notice and administration tasks, such as drafting and revising several versions of class notice; soliciting and vetting bids for settlement administration services and negotiating contracts for those services; soliciting and vetting bids for credit monitoring services and negotiating contracts for those services; and supervising the settlement administrator with respect to issues related to class notice, claims, and the settlement website. *See id*. In addition, the 2,500 hours billed to the settlement task code included time spent drafting motions for preliminary and final approval of the settlement and supporting materials, as well as time responding to hundreds of class member inquiries, including on lengthy phone calls. *See id*. In sum, this expenditure of time was reasonable and necessary to achieving the exemplary settlement in this case.[8]

d. The hours billed were reasonable, notwithstanding the number of law firms.

Defendants retained four primary law firms in this matter, so Plaintiffs can understand why the Special Master had initial concerns that Plaintiffs used far more law firms in this litigation. *See* Report at 17-18. But what matters for purposes of a fee application is whether the number of hours billed was

[8] Work performed after the case settled in June 2017 was also necessary. Though the Report does not acknowledge this, *see* Report at 17, many of the settlement-related tasks described above (such as moving for Final Approval, supervising the notice and claims procedure, and assisting settlement class members) were necessarily performed after the case settled in June. *See* ECF 944-1 ¶14. *See, e.g., Moore v. Verizon Commc'ns Inc.*, No. C 09-1823, 2014 WL 588035, at *13 (N.D. Cal. Feb. 14, 2014) ("Class Counsel's work is not done when the settlement is reached. To the contrary, to make the settlement meaningful to the class, Counsel must often incur substantial time to ensure that the settlement in facts works as envisioned.").

reasonable, not whether the persons billing those hours were employed by a single law firm or by multiple law firms. *See Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994) ("On the issue of whether the time expended by law firms in addition to the [lead] law firm should be compensated, the test is whether the time expended was duplicative.").

Put another way, the question is not how many firms a paying client would retain, but how much the client would pay to have the work done. *See Moreno*, 534 F.3d at 1111 ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client."). This rule reflects the practical reality that even the largest plaintiff-side law firms are only a fraction of the size of major defense firms, and therefore must pool their human and financial resources to litigate significant cases. For example, the 12 firms named by Law 360 as the country's top Plaintiffs' firms are *collectively* smaller than just one of Defendants' defense firms. Cervantez Dec. ¶9 & Ex. 5; *see also* Second Rubenstein Dec. ¶7. Asking whether a paying client would retain 53 law firms ignores the reality that Named Plaintiffs and putative class members are *not* paying clients, and that plaintiff-side class action firms, which are almost never paid for many years (and bear the contingent risk of not being paid *ever*), necessarily operate differently than defense firms which are paid each month. Contingent firms are smaller to avoid excess overhead that must be paid regardless of income, and they often jointly prosecute larger cases, allowing for the sharing of risk and pooling of resources (and expertise), lest one catastrophic loss bankrupt the entire firm.[9]

The Ninth Circuit's approach to assessing whether the total number of *hours* is reasonable and non-duplicative is consistent with multiple decisions approving fee petitions where dozens of law firms worked on a large-scale case. For example, in *In re Vitamin Cases*, 2004 WL 5137597 (San Francisco Cty. Super. Ct. Apr. 12, 2004), the court reviewed plaintiffs' fee request with a particular emphasis on fees attributable to 52 firms not on Plaintiffs' Executive Committee ("PEC"). It found that "[w]hile the number of law firms claiming fees is large, the number of attorneys performing work on the case is not

[9] *Cf. Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-50 (9th Cir. 2002) (rejecting use of a "paying client" standard to determine what percentage of the fund should be awarded in common fund cases, stating that "[a]n attempt to estimate the terms of the contract that private plaintiffs would have negotiated with their lawyers had bargaining occurred at the outset of the case strikes us as entirely illusory and speculative" (internal quotation marks omitted)).

unreasonably large given the tasks performed," and "had the non-PEC firms not performed the work assigned, the PEC firms would have had to do the very same work":

> According to the declarations of counsel previously submitted to the Court, over fifty percent (50%) of the time non-PEC firms spent on the case was devoted to reviewing and coding documents in a document depository in San Francisco at the direction and under the supervision of the PEC. Based on the evidence before the Court, the Court finds that the time the non-PEC firms spent coding, reviewing, and analyzing the equivalent of over 240,000 pages of documents was necessary in order to allow Plaintiffs' Counsel to assess liability, perform a credible damage analysis and to participate in settlement discussions from a position of knowledge and strength. The fact that many Plaintiffs' Counsel performed the document review does not establish that the time spent reviewing the documents was duplicative. The Court finds that these documents needed to be read, coded, and analyzed regardless of whether the case was litigated by few firms or many. The declarations of Plaintiffs' Co-Liaison Counsel ("PCC") show that PCC implemented procedures designed to avoid duplication and inefficiency. As shown by the time records of the firms that participated in this document review, when considered in the context of the entire case, the time spent in the document review was not unreasonably duplicative, excessive, or unnecessary. The work on the project was simply divided among many firms rather than concentrated into the hands of a few lead counsel. The Court also finds that had the non-PEC firms not performed the work assigned, the PEC firms would have had to do the very same work.

Id. at *4-5 (footnote omitted).[10] These authorities establish that the "number of law firms that billed hours" is not a basis for denying or reducing a fee request, because it cannot be *assumed*, as the Report erroneously found, that "the inevitable result of 53 law firms billing participants presents at least a strong probability of duplication and unreasonable hours," Report at 18. *See* Second Rubenstein Dec. ¶7 (noting Report's failure to consider staffing levels characteristic of megafund cases). Rather, the requested lodestar should be reduced only if the use of multiple firms *actually* resulted in duplication or inefficiency.

That did not occur here. The key assumption underlying the Report's contrary conclusion is that "every time a new law firm was added to the group, those lawyers had to spend time learning the history, issues, and facts being litigated." Report at 18. This was incorrect: non-PSC firms were forbidden to bill for any start-up time learning the facts and law of the case. *See* ECF 916-9 ¶¶44-47 (explaining tasks for

[10] *See also, e.g.*, *In re Insurance Brokerage Antitrust Litigation*, No. 04-5184, 2007 WL 1652303 at *7 (D.N.J. 2007) (approving class counsel fee application of $25,803,000 for work done by more than 50 law firms and noting that "work [was] allocated to specific firms to avoid duplication and deal with specific areas of the litigation") *aff'd* 579 F.3d 241, 282-285 (3rd Cir. 2009); First Rubenstein Decl. ¶¶22-24 (reviewing large nationwide class actions for which Plaintiffs submitted fee requests for between 36 and 119 law firms and opining that Counsel's use of numerous law firms in this case is not unprecedented or unreasonable); *see also* ECF 945 at 10-11.

which Lead Counsel did not allow firms to bill and describing lead counsel's active oversight of time submitted); 190-1 at 5-9 (one of several memos on billing sent to counsel). And where non-PSC firms submitted hours that appeared duplicative, inefficient, or otherwise non-compensable, Lead Counsel cut them. *See* ECF 916-9 ¶46 ("I personally reviewed all time submitted, line by line, for every single law firm, to remove or reduce duplicative and excessive billing entries."); 960-2 ¶¶3-7; 960-4. In fact, Lead Counsel cut more than 3,400 hours from non-PSC time, reducing the lodestar by approximately $1.5 million on the basis of that time alone. *See id.*; *see also Moreno*, 534 F.3d at 1112 (finding it significant that Counsel had already cut her own fees by 9%).

This case required an extraordinary amount of work within a very short time period, particularly given Defendants' delays in producing documents, the short fact discovery period, and Plaintiffs' determination not to request a continuance because of the importance of securing protection for class members' data as soon as possible. During the busiest period in this case, Counsel put in massive amounts of work: more than 7,000 hours in August 2016, more than 8,000 hours in September 2016, more than 9,000 hours in October 2016, and more than 9,500 hours in November 2016. *See* Second Supp. Cervantez Dec. Ex. 4. Counsel would not have been able to do that work within the required timeframe absent the assistance of non-PSC firms. First Rubenstein Decl. ¶¶17-21 (opining that staffing in this case, including number of law firms used, was necessary in light of defense); ECF 916-9 ¶¶30-36, 944-1 ¶39.[11]

Law firms outside of the PSC billed primarily for a few discrete tasks: (1) identifying potential named plaintiffs for the amended complaint(s), ECF 944-1 ¶30, (2) acting as primary point persons for Named Plaintiff discovery and communications with the clients who retained them, *id.* ¶¶31-34, (3) taking the depositions of some of the 13 non-Anthem defendants, *id.* ¶¶39-43, and (4) reviewing documents, *id.* ¶¶35-38; *see also* ECF 960-6 (Task Code Billing by Timekeeper). *Cf. id.* ¶44 (explaining minimal other work). Assigning these discrete tasks to non-PSC firms did not create any duplication or inefficiencies,

[11] This Court specifically questioned the use of four firms that it chose not to appoint to the PSC. Counsel stress that these firms were not in any way given work simply because they had joined in Lead Counsel's initial application for PSC positions, and these firms had no role in strategic decision making. Rather, Lead Counsel had initially included these firms in their application because they had significant resources that Lead Counsel believed would benefit the class, and Lead Counsel understood the Court's Orders to allow Lead Counsel to continue to leverage these resources for the benefit of the class. *See* ECF 284 at 3 (Lead Counsel to "consult with the other applicants"); ECF 286 (discrete resource intensive tasks could be assigned "to counsel for other plaintiffs in this MDL").

and in fact made litigation more efficient. It was efficient for non-PSC firms to assist with the first two tasks, given that they had pre-existing relationships with and knowledge of facts pertaining to the Named Plaintiffs. *See id.* ¶¶30-33. With respect to the third task, Lead Counsel provided a deposition outline for use by non-PSC firms taking Non-Anthem depositions (generally assigned by virtue of geographical proximity), although each deposition necessarily required review of documents specific to that defendant (which would have had to be reviewed by whoever took that deposition, from a PSC or non-PSC firm). *Id.* ¶¶39-40. Finally, partners at PSC firms held conference calls to train all attorneys reviewing documents (PSC and non-PSC alike), and held weekly telephone calls with them, operating no differently than if all document reviewers had worked at the four PSC firms. ECF 916-9 ¶31; 944-1 ¶¶35-37, 54.

The Ninth Circuit has said that "the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case." *Moreno*, 534 F.3d at 1112. The Court should defer to Counsel's judgment here as to the number of hours required to reach the $115 million settlement and achieve the significant changes in business practices. Because Plaintiffs have shown that the *hours* spent on the case were reasonable and non-duplicative, the Court should not reduce the requested fee award based on the number of *law firms* that billed for those reasonable hours.

B. The Special Master Correctly Found That Plaintiffs' Expenses Are Reasonable.

The Report states that Plaintiffs have "submitted a detailed Declaration, with multiple exhibits substantiating the request for expenses incurred" during this litigation. Report at 18-19. In light of this information, the Special Master found that "the expense items do not appear inappropriate for a case of this size." *Id.* at 19. The Court should adopt this finding. As Plaintiffs have previously explained, ECF 916-6 at 21, attorneys in class action cases are entitled to recover out-of-pocket "expenses that would normally be charged to a fee-paying client." *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotations omitted); *de Mira v. Heartland Emp. Serv., LLC*, No. 12-cv-04092, 2014 WL 1026282, at *5 (N.D. Cal. 2014) (applying *Harris* in common fund case). Each of the expenses Plaintiffs have claimed fit this description. Accordingly, the Court should award full recovery of $2,005,068.59 in expenses that Plaintiffs incurred during this litigation, as well as the reserve fund of $132,000 that Plaintiffs have requested to fund the call center and expert monitoring of the settlement. *See* ECF 916-9 ¶¶56-61 & Ex. 4-10; ECF 944-1 ¶¶23-24 & Ex. I-K.

C. It Is Not Appropriate To Offset Fees With Litigation Expenses Or Service Awards.

The Report recommends that the Court offset the fee award by the requested litigation expenses and services payments. Such offsets are impermissible.

1. The Court should not deduct litigation expenses from the fee award.

The Report correctly found that Plaintiffs' claimed expenses are appropriate. *See* Report at 18-19. Nonetheless, the Report recommends that the Court deduct those expenses from Plaintiffs' fee award. *See* Report at 19, 27. There is no legal or logical basis for this deduction.

Once a court has found that the amount of claimed litigation expenses is reasonable, as the Special Master has found, "[t]here is no doubt that an attorney who has created a common fund for the benefit of the class is *entitled to reimbursement of reasonable litigation expenses from that fund*." *Acosta v. Frito-Lay, Inc.*, No. 15-cv-02128, 2018 WL 646691, at *11 (N.D. Cal. Jan. 31, 2018) (emphasis added) (internal quotation marks omitted). This is so because the common fund doctrine "is designed to spread litigation costs proportionately among all the beneficiaries…" *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) ("[T]he fundamental purpose of the common fund doctrine is to spread the burden of a party's litigation expenses among those who are benefited.").[12] Accordingly, "[l]ike attorneys' fees, these [litigation] expenses should be paid from the common fund because all beneficiaries should bear their fair share of the costs of the litigation, and these are the normal costs of litigation that are traditionally billed to paying clients." *Williamson v. Microsemi Corp.*, No. 5:14-CV-01827, 2015 WL 13650045, at *2 (N.D. Cal. Feb. 19, 2015).

A contrary conclusion would undermine the core principles of the common fund doctrine, would be contrary to public policy, and would have a chilling effect on the contingent enforcement of remedial statutes in particular – and on quality class action litigation in general – by discouraging class counsel from spending the money necessary to effectively represent the class and prevail in litigation. Here,

[12] Where fees are awarded as a percentage of a common fund, courts have discretion to deduct expenses from the common fund prior to calculating the relevant percentage fee award (as opposed to calculating the fee award as a percentage of the gross fund). *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015). But Plaintiffs' Counsel have located no case in which costs were *deducted* from an award of attorneys' fees, and the Report cites none.

Plaintiffs' largest expense was experts. *See* ECF 944-10 (summary of expenses). Those experts included Plaintiffs' security experts, who provided the technical expertise that allowed Class Counsel to formulate the carefully crafted business practice changes and custom designed credit monitoring services that were necessary to protect class members. ECF 944-1 ¶¶25-26. Class Counsel should not be forced to bear the burden of those necessary expenditures, and the related financial risk, because they were a benefit *to the class*. Similarly, the case could not have been litigated—nor the settlement achieved—without necessary expenditures on deposition transcripts and travel, the next largest expense categories. So too with all of the costs, which were necessary and reasonable. As the Special Master found, "[t]he risks undertaken by class counsel *and their sizable investment in an unknown result*" yielded a settlement that was "extremely positive, including the commitment by Anthem to undertake extensive curative actions." Report at 26 (emphasis added). The Court should therefore allow Plaintiffs to be reimbursed for litigation costs advanced on behalf of the class out of the common fund, and independent of their fee award.

2. The Court should not deduct service awards from the fee award.

Service awards are intended "to compensate class representatives for work undertaken on behalf of a class." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015). As such, in common fund cases, courts routinely grant service awards out of the common fund. *Id.* at 947-48; *see also, e.g., Williamson*, 2015 WL 13650045, at *1. The class members would not have obtained a settlement without the important work of Named Plaintiffs, who produced documents, responded to written discovery requests, sat for depositions, and, in some instances, turned over their personal computers for forensic examination. *See* ECF 916-9 ¶¶62-70; *see also* ECF 916-7 at 22-25. That was indispensable work for which the *class* (not Lead Counsel) should compensate Named Plaintiffs. There is no rationale by which service payments recognizing the contribution of Named Plaintiffs to the Settlement Class's recovery should be deducted from Counsel's requested fee award, which is intended to compensate Counsel for distinct work *Counsel* performed on behalf of the class.

Deducting Named Plaintiff service awards from counsel's fee award also poses ethical concerns. *See* 5 *Newberg on Class Actions* § 17:5 (5th ed.) and cases cited therein. For example, the rules of ethics in California prohibit the sharing of legal fees with persons who are not lawyers. *See* California Rules of Professional Conduct 1-320. At least one court has held that "funding [an] incentive award by offsetting it

against Class Counsel's fees would constitute sharing fees with a non-lawyer, which is prohibited by [R]ule 1-320 of the State Bar Rules of Professional Conduct." *Campbell v. Fireside Thrift Co.*, No. A099196, 2004 WL 49708, at *11 (Cal. Ct. App. Jan. 12, 2004) (unpublished). Similarly, offsetting service awards against fee awards creates a potential conflict of interest because it creates an incentive for unethical attorneys to downplay the contributions of class representatives and request lower-than-appropriate service awards on their behalf. *See id.* at *12 ("[I]t also appears to us to present at least a potential conflict of interest for class counsel to negotiate the payment of an incentive award out of their own fees, because of the resulting divergence between their own interests, those of the class representative, and those of the class as a whole."). *See also* Second Rubenstein Dec. ¶8.

D. The Report's Recommendations For Determining A Lodestar Fee Award Are Contrary To Ninth Circuit Law.

A proper analysis of the lodestar method under prevailing Ninth Circuit law supports Plaintiffs' requested fee award, not the two alternative lodestar-based fee awards recommended in the Report. *See* Report at 26-28.

The lodestar analysis in the Ninth Circuit has two steps. At the first step – the calculation of reasonable rates and reasonable hours – a court may cut unnecessarily duplicative hours, but only if the court provides a "specific explanation" of any cuts beyond a 10% "haircut." *Moreno*, 534 F.3d at 1112. As the Report provides no such specific explanation, it does not form a basis for more than a $3.8 million "haircut" to Counsel's claimed lodestar of $38,015,714,[13] for a total fee award of $34,214,143.[14] *See* ECF 944-1 ¶17 (total lodestar). *See also* Second Rubenstein Dec. ¶8 (a 10% haircut would equate to a negative

[13] The Special Master erroneously conducted its lodestar analysis on the assumption that the starting lodestar was $37,950,000. *See* Report at 27. But that is the figure Counsel requested in fees based on the limit set in the Settlement Agreement. *See* ECF 869-8 ¶12.1. Counsel's lodestar through December 31, 2017 was $38,015,714. *See* ECF 944-1 ¶17. Counsel have done additional work since then, including drafting the Reply in Support of the Motion for Final Approval, appearing at the Final Approval Hearing, and continuing to assist Settlement Class Members. *See* ECF 944. Counsel will continue to do work well into the future overseeing the claims process and monitoring Anthem's compliance with the settlement. *See* ECF 944-1 ¶21.

[14] And even if it could somehow be acceptable to bill contract attorneys as if they were paralegals working at below market rates for paralegals, this would have reduced Counsel's claimed lodestar by $3,963,671, and the resulting lodestar would still be $34,052,043; a 10% haircut off that figure results in an award of $30,646,838.70.

multiplier of .9 and result in an overall fee award of less than 30% of the $115 million settlement fund).

Once the lodestar has been calculated, there is "a strong presumption that the lodestar figure represents a reasonable fee." *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.8 (9th Cir. 1996), *opinion amended on denial of reh'g*, 108 F.3d 981 (9th Cir. 1997). The Court may nevertheless adjust the lodestar upwards or downwards at the second step of the analysis, based on certain recognized "reasonableness" factors. *See id.* at 363 & n.8. But none of those factors contemplate a downward adjustment based on the value of claimed litigation expenses, reserve costs, or service awards. *See id.* It would therefore be an abuse of discretion to deduct those payments from the reasonable lodestar. Yet the Report recommends deducting litigation expenses from fees to reach a "fee award" of $28,587,696, a cut of about 25% to Counsel's claimed lodestar, and *then* recommends also deducting the reserve costs of $132,000 and service awards (which amount to $597,500) from that figure. Report at 27-28. The result would be a fee award of $27,858,196, which is a cut of about 27% to Counsel's lodestar, constituting a negative lodestar multiplier of about 0.73.

Second, and relatedly, it would be legal error to find that "if anything, a negative multiplier [to the lodestar] is appropriate" at the second step of the analysis, based on the "number of billers and overstated rates." Report at 23. The *Kerr* factors do not contemplate a downward adjustment based on the "number of billers and overstated rates," because the court's determination of the lodestar – which is reasonable hours times reasonable rates – already corrects for any inefficient time or overstated rates. *See Morales*, 96 F.3d at 363-364 & n.9 (adjustment to lodestar may be made only "on the basis of the *Kerr* factors that are not already subsumed in the initial lodestar calculation"; error to double count by adjusting at both steps of lodestar analysis based on the same factor).[15]

[15] If anything, an *upwards* departure from the lodestar is warranted here, based on the risks assumed by Plaintiffs' Counsel and the *Kerr* factors, including the "preclusion of other employment by the attorney due to acceptance of the case" and "time limitations imposed by . . . the circumstances." *Morales*, 96 F.3d at 363 n.8 & 364 n.9; *Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis. . . . [T]he district court must apply a risk multiplier to the lodestar when (1) attorneys take a case with the expectation they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence the case was risky. Failure to apply a risk multiplier in cases that meet these criteria is an abuse of discretion." (internal quotation marks and citation omitted)); *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1301 (9th Cir. 1994) (rationale for not

Accordingly, these recommendations must be overruled.[16]

E. The Report's Recommendations About The Percentage Of The Fund Method Misapply Ninth Circuit Law.

One of the three "alternative recommendations" in the Report contemplates an award of fees using the Ninth Circuit's benchmark of 25% of the common fund without reference to the lodestar. Report at 26; *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (recognizing 25% benchmark in Ninth Circuit). Specifically, the report recommends awarding 25% of the $115 million settlement fund, or $28,750,000, from which Plaintiffs' $2 million in expenses would be deducted, for a total fee award of $26,750,000.

This calculation is not correct. First, it would violate the common fund doctrine to require that Class Counsel, rather than the Settlement Class, bear litigation costs without which the case could not have been litigated and settled, and without which there would have been no common fund. *See supra*, Section IV.C. Second, this calculation does not consider the direct and mathematically ascertainable benefits to the class in the form of business practice and cybersecurity improvements, which vastly expand the settlement's value. *See* ECF 916-6 at 5-6 (describing benefits); ECF 945 at 3 (same). The court may add this value to the $115 million settlement fund before calculating the percentage fee recovery, or it may choose to consider these benefits "as a relevant circumstance" warranting an upward adjustment in the percentage recovery. *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (internal quotation marks

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applying risk multipliers in statutory fee-shifting cases does not apply in common fund cases). *See* ECF 916-9 ¶¶30, 34 (time limitations); 916-9 ¶71, 916-29 ¶3, 916-30 ¶4, 916-31 ¶¶11-12 (preclusion of other work); Report at 22 (recognizing Counsel made "a substantial and necessary time commitment" to the case); Report at 26 ("The risks undertaken by class counsel and their sizable investment in an unknown result, typical of class actions, were magnified in the instant megafund case."); *see also* Report at 23 (recognizing "general public benefit" and "significant rewards" of settlement); Report at 24 (recognizing "significant benefit to the class" and "substantial efforts of class counsel"). While Plaintiffs do not seek an upwards departure from their lodestar – and in fact requested a *downwards* departure to $37,950,000 – their satisfaction of the lodestar multiplier factors underscores that an award based on the lodestar is reasonable and that no negative multiplier is appropriate here.

[16] Moreover, the Court should not calculate the lodestar by using Counsel's "average" rates rather than prevailing market rates, as suggested in one of the alternative lodestar-based recommendations, Report at 27. *See supra* Part IV.A.2.c.; *Stetson*, 821 F.3d at 1166; *Carter v. Caleb Brett LLC*, 757 F.3d 866, 870 (9th Cir. 2014) (questioning district court's decision to average rates, since average rate does not reflect distribution of work among different billing levels).

omitted). The Court may not, however, ignore altogether the value of these benefits to the class in calculating the percentage recovery, as the Special Master has done. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (court must consider "all of the circumstances" when determining the percentage of recovery).

V. CONCLUSION

The Special Master confirmed that Plaintiffs have achieved an excellent result in this massive and complex high-risk case, including by conferring important non-monetary benefits on the Settlement Class. The Special Master approved Counsel's blended rate, and found that Counsel may charge a reasonable rate for contract attorneys, rather than treating them as a cost. The Special Master also approved Plaintiffs' litigation expenses. Finally, the Special Master reviewed the record to assess whether Plaintiffs' work on this case involved any collusion, conflicts of interest, or deliberate overbilling, and found none. The Court should adopt these findings.

The Court should overrule the Special Master's other findings, and reject the Report's three alternative recommendations for a final fee award, as contrary to the record and controlling Ninth Circuit law. Instead, for the reasons set forth in Plaintiffs' original fee motion, the Court should award the full requested amounts of $37,950,000 in fees and $2,005,068.59 in costs, as well as a cost reserve of $132,000 and service awards totaling $597,500.

Respectfully Submitted,

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