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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re Anthem, Inc. Data Breach Litigation

ADAM E. SCHULMAN,

Objector.

Case No. 15-md-02617-LHK

RESPONSE TO PLAINTIFFS' OBJECTION TO REPORT AND RECOMMENDATION OF SPECIAL MASTER RE: AWARD OF ATTORNEYS' FEES

Date: June 14, 2018
Time: 1:30 p.m.
Courtroom: 8, 4nd floor
Judge: The Honorable Lucy H. Koh

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INTRODUCTION

Plaintiffs acknowledge that courts should approximate market rates when awarding attorneys' fees, yet they submit a 25-page memorandum and 30 pages of declarations without once addressing the key question: what would actual clients agree to pay? The answer reflects poorly on their fee request. Instead, plaintiffs dwell on fees awarded by other courts, often *ex parte*, without an objector acting on behalf of absent class members.

At times courts have tolerated billing practices that wouldn't pass muster with even a distracted general counsel. As a result, class action fee awards have diverged from their black letter function: to fairly compensate counsel as if they were paid and supervised by knowledgeable clients. Whereas privately-retained counsel employ contract attorneys to *control* litigation costs, class counsel instead engages these temporary employees to fatten their bills with markup. To combat this unfortunate tendency, district courts have an obligation to "act with a jealous regard to the rights of those who are interested in the fund," in effect to act as a "surrogate client" supervising class counsel. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) (cleaned up); *In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992).

Plaintiffs' response fundamentally misapprehends the market for legal services. Professor Rubenstein illustrates this when he argues that class counsel will "simply stop using contract attorneys" if they are not allowed to leverage profits off of them. *See* Second Declaration of William B. Rubenstein ("Rubenstein 2d") at 5. This prediction is unsupportable: defense counsel (and some plaintiffs' counsel) bill contract attorneys at cost, yet the use of contract attorneys has never been more popular. Why? *Because knowledgeable clients demand it*. Knowledgeable clients—not busy courts acting *ex parte*—best approximate the marketplace for legal fees. Clients in the marketplace tolerate *neither* paying associate rates for low-level document review *nor* exorbitant markup on contract attorneys. In the actual marketplace contact attorneys are simply costs, not profit centers.

Plaintiffs' response invites the Court to deny class members the advantage that every corporate defendant in the country has: a knowledgeable fiduciary charged with protecting their interests, who curtails wasteful and unjustified litigation expenses. The defendants rely on their

general counsel to provide this protection, but no one but the Court can protect the class. The Court should not rubber-stamp the fee request, nor should it simply adopt the special master's ultimate recommendation, which appears to be based on an unfortunately superficial review. *See* Response of Adam E. Schulman to Special Master's Report and Recommendation (Dkt. 1016) ("Schulman Response"). Instead, the Court acting as "fiduciary for the class," must award class counsel a more modest fee award based on the net fund produced for the class. Such fee award will allow millions of dollars of additional benefit to flow to class members, now that the parties modified their Settlement Agreement in line with how Objector Schulman contended it should have been construed to begin with.[1]

I. The special master failed to determine a reasonable lodestar.

Plaintiffs urge the Court to adopt imaginary findings supposedly reached by the special master. In particular, the special master did *not* find "Counsel's rates were reasonable." Response at 3. Instead, the special master remarked that "while not conclusive in themselves, [these combined rates] do not appear excessive to the Special Master." Report and Recommendation ("Report," Dkt. 1008) at 15. Although the special master summarizes four benchmarks of reasonable billing rates (*id.* at 10), he did not apply these benchmarks or otherwise find reasonable rates for counsel, which remains necessary to "calculate[e] the lodestar for the representation of the Class in this action." Order Appointing Special Master, Dkt. 985 at 2. Instead, the special master employed only a "rough" review of lodestar. Report at 15; Schulman Response at 3-5. That a combined billing rate with tens of thousands of heavily marked-up but relatively "cheap" rates between $245/hour and $495/hour equals $455/hour with dubious[2] calculation methodology is simply a function of the fact that nearly half of plaintiffs' claimed hours were expended on document review. Any gross gauge of

[1] *Compare* Dkt. 1007 *with* Dkt. 976 (Schulman Supplemental Objection arguing that Settlement should be interpreted as consistent with Rule 23(e)).

[2] The special master calculated a "combined" billing rate of $455/hour by averaging the blended billing rates of firms that billed over $100,000. This process yields a rate lower than the actual blended billing rate of $481.62/hour because firms that billed fewer hours tended to bill at higher blended rates.

blended lodestar fails to demonstrate that billers' individual rates are reasonable. In fact, many of the rates claimed by plaintiffs appear manifestly unreasonable and can be identified by even a cursory review. The Court should not find that the billing rates were reasonable; they are largely unreasonable and the special master did not find otherwise.

While the special master failed to look beyond the blended rate, Schulman's limited review reveals that many of the rates are preposterous:

- Paying clients would not pay between $285 and $345/hour for 12 different law students to work on their case, yet three of the Plaintiffs' Co-Lead Counsel and Plaintiffs' Steering Committee ("PSC") firms billed such summer associates at these rates. *Compare* Dkt. 987-1 at 2-4, 6-7, and 12, *with Rosenbfeld v. DOJ*, 904 F. Supp. 2d 988, 1002 (N.D. Cal. 2012) (approving $100/hour for student law clerk as within the typical range).
- It is improper to charge mid-level associate rates for document review and less complicated tasks. *See* Objection of Adam Schulman to Plaintiffs' Attorneys' Fee Request ("Schulman Obj.," Dkt. 924) at 20-22; Schulman Response at 7, 12.
- Putting aside the document review issue, rates for junior attorneys in this matter are abnormally inflated. Plaintiffs bill $500/hour for a second-year associate only admitted to the bar in the previous year. *See* Dkt. 987-1 at 27. Plaintiffs bill $400/hour for a contract attorney admitted to the bar one month before starting work on the matter. *See* Dkt. 987-1 at 37.[3] Twenty-five different first- and second-year associates (not contract attorneys) collectively billed about $2.5 million worth of lodestar in this case, and **all but three of these attorneys were billed at a rate of $340/hour or higher**. These rates are well beyond those suggested by the four

[3] This particular contract attorney also disproves Rubenstein's irrelevant assertion that paralegals could not do the work of contract attorneys. According to her publicly-accessible LinkedIn profile, she worked as a contract paralegal weeks before starting on this case. *See* https://www.linkedin.com/in/kshank/.

benchmarks the special master cited. Report at 10. The rates are also much higher than courts find normal in this and other expensive legal markets. *See* Ronald L. Burdge, *United States Consumer Law Attorney Fee Survey Report*, 2015-2016 ("Survey Report"), at 190, *available at* https://www.nclc.org/images/pdf/litigation/tools/atty-fee-survey-2015-2016.pdf (noting $250 average hourly rate for San Francisco consumer law attorneys with 1-3 years of experience); *Davis v. Hollins Law*, 25 F.Supp.3d 1292, 1299 (E.D. Cal. 2014) (collecting California district court where Consumer Report considered in determining prevailing rates); *Klein v. L. Offices of D. Scott Carruthers*, No. C15-00490 CRB, 2015 WL 3626946, at *3 (N.D. Cal. June 10, 2015) (reducing attorney's rate based on Survey Report); *Stephenson v. Neutrogena Corp.*, No. C 12-0426 PJH, 2013 WL 12310811, at *2 (N.D. Cal. Aug. 22, 2013) (citing Survey Report and reducing blended rate to $425 hour); *Garcia v. Resurgent Capital Servs., L.P.*, 2012 WL 3778852, at *4 (N.D. Cal. Aug. 30, 2012) (approving $300/hr rate to third year attorney who had prior trial experience and was serving as co-counsel, not as an associate); *Gonzalez v. Scalinatella, Inc.*, 112 F. Supp. 3d 5, 28 (S.D.N.Y. 2015) ("$250.00 for a third-year associate, $200.00 for a second-year associate, $175.00 for a first-year associate, and $125.00–$130.00 for paralegals—'are higher than the norm in this district.'").

- Additionally, plaintiffs' fee application bills $1.63 million of paralegal time with an *average* rate of $264/hour. This rate is significantly higher than "more accurate" rate for paralegals, which Rubenstein claims to be $196/hour in Washington D.C. (where many of the paralegals were located) or $212.91/hour in the Bay Area. Rubenstein 2d at 3. In fact, $264/hour is an excessive "Bentley rate[]." *Shane Grp v. Blue Cross Blue Shield*, 825 F.3d 299, 310 (6th Cir. 2016) (finding $228/hour paralegal average rate to be "more than $10 per hour higher than the rates charged by the top 1% of paralegals nationwide"); *see also Ulugalu v. Berryhill*, No. 3:17-cv-01087, 2018 WL

2012330, at *4 (S.D. Cal. Apr. 30, 2018) (citing Survey Report *sua sponte* and reckoning $100/hour market rate for paralegals in San Diego).

Plaintiffs and Rubenstein criticize the special master's inclusion of Laffey Matrix rates, but in doing so they only highlight their own failure to document their eyebrow-raising rates. While the Laffey Matrix may not perfectly reflect rates in the Northern District of California, plaintiffs pretend this relieves them from having to establish the reasonableness of their much higher rates. To the contrary, even if the proposed rates were in line with the Laffey Matrix, plaintiffs retain the burden of showing that such rates are not *excessive* in this district. *See J & J Sports Productions, Inc. v. Duong*, No. 13-CV-02002-LHK, 2014 WL 1478498, at *3 (N.D. Cal. Apr. 14, 2014) (rejecting fee application based on Laffey Matrix because plaintiffs provided no evidence "attesting to the prevailing rates in the Northern District of California for similar services by lawyers of reasonably comparable skill.").

As for plaintiffs' reliance on blended rates, these do not capture the market rate because this blended rate for this settlement includes 19,445 hours by contract and staff attorneys (Dkt. 977-3) and 34,262 hours on document review (Dkt. 944-7), which differentiates this settlement from smaller settlements that employed few, if any, temporary attorneys. If the contract attorneys here were billed at cost (as they are in the market), the blended rate would be $521/hour. *Derived from* Dkts. 977-3 & 960-6. And if document review time were excluded, the blended rate would be $548/hour. *Id.*

II. The market rate for contract attorneys is at cost.

Plaintiffs are correct that "rates charged for contract attorneys should be based on the reasonable market rates of their services." Response at 5. The market value is their cost to plaintiffs. Unlike the rates for contingency fee attorneys never retained by a paying client, the market rate of contract attorneys can be accurately ascertained—it is the rate they are actually paid by class plaintiffs and companies across the country.

Plaintiffs conflate *ex post*—and largely *ex parte*—fee awards with the market rate for legal services. A lodestar calculation depends upon the market rates, so the best authority for how

contract attorneys should be billed is the market itself. Too often though, "[w]ithout the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter." *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 WL 5560541, at *1 (E.D.N.Y. Sept. 21, 2015); *see also, e.g., In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560, 571 (9th Cir. 2014) (reversing settlement and few award where district court accepted class counsel's lodestar with "a few boilerplate recitations about the attorneys' skill and the risks of proceeding with the litigation"). That in turn, leads to "proposed orders masquerading as judicial opinions" and ultimately, an entire self-sustaining jurisprudence that has become "so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). There is no better time than now to break the deleterious cycle.

The Court should inquire with defendants' counsel about how they billed their clients for contract attorneys. When Judge Wolf posed this question to defendants' counsel at a hearing in *Arkansas Teacher Retirement System v. State Street Bank and Trust Co.*, No. 11-cv-10230 MLW (D. Mass.) ("*State Street*"), counsel replies that contract attorneys were paid directly with a cost to the client of $35/hour. *State Street*, 3/7/2017 transcript (filed at Dkt. 924-7) at 84. Evidence of how the plaintiffs' adversary litigates and how they bill is "certainly" "helpful" to the lodestar determination. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1214 (9th Cir. 1986).

The fact is that the outmoded precedents cited by plaintiffs do not capture reality of contract attorney billing, which is passed on to paying clients at cost. While many courts have approved higher rates for contract attorneys, they do this mostly *sub silentio* without awareness of the issue. Such rates were routinely approved without objection in *State Street* itself before the undersigned was quoted in an article about the billing practices in *State Street* by the *Boston Globe*. Judge Wolf observed that he and other judges have failed to appreciate the significance of marking up contract attorneys:

> I think the jurisprudence indicates that the rates -- the lodestar is supposed to be calculated on what lawyers are charging to paying clients in the community, however it's properly defined, not -- I think probably many other judges made the same mistake -- well, have understood the

> representations made the way I have for many years when we try to do that lodestar reasonableness check.

Id. at 94. The special master in *State Street* has worked nearly a year investigating the billing in that case, and a redacted version of the report is currently scheduled to be filed on May 31. When filed, this Court should take judicial notice of it as especially relevant in this case because three contract and staff attorneys happen to have been billed in both this case and *State Street*.

In the marketplace, contract attorneys are billed differently from associates because they *are* different. Paying clients would not tolerate marking up temporary employees in the way plaintiffs proposed to charge the absent class. Imagine if plaintiffs decided to bill Uber drivers (and their trips to and from depositions) as "contract paralegal" fees at ten times the firm's cost. Or imagine expert consultants, technical assistance, or word processing billed in this way. After all, plaintiffs bill the class $295/hour for a computer systems director (Dkt. 960-5 at 9), so what in principle would prevent them from billing research and technical costs the same way as they bill contract attorneys and contract paralegals other than insufficient chutzpah?

A paying client would not tolerate extensive markup on temporary employees because such workers are fundamentally different from law firm associates, who require ongoing investment, benefits, and salary from the firm whether work is plentiful or scarce. Firms must develop their associates, so they select them carefully from among the most qualified applicants. Firms retain associates only when they exhibit superior motivation, work ethic, judgment, and quality; law firm associates are intrinsically costly and they represent the most promising attorneys in their cohort. Contract attorneys, in contrast, are hired to an expressly limited engagement and may be terminated within hours when no longer needed. While they are hired based in part on their past experience reviewing documents, and contracting firms gain no benefit from further developing them. So contract attorneys receive no professional development investment, and frequently do not even get health insurance or other benefits. *See Down in the Data Mines A Tale of Woe from the Basement of Legal Practice*, 94 ABA J. 32 (Dec. 2008).

For this reason, knowledgeable clients have long paid contract attorneys at cost, often making their own relationships with staffing agencies as the defendant in the *State Street* did. *See State Street*, 3/7/2017 transcript (filed at Dkt. 924-7) at 84-85; *see generally* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 Minn. J.L. Sci. & Tech 151, 163-64 (2011).

In short, the marketplace compensates contract attorneys differently than associate attorneys because they *are* different in terms of cost, investment, overhead, type of work, skill level, and experience. The plaintiffs and Rubenstein cannot change this reality by pretending that the market compensates all attorneys linearly based on their year of graduation.

Case law reflects this practice among paying clients. When sophisticated corporate clients are entitled to fee shifting from each other, they only seek—and are awarded—contract attorney time at or near the cost of such time. *See*, *e.g.*, *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-cv-07098-AB, 2015 WL 1746484, at *16 (C.D. Cal. Mar. 24, 2015) (awarding defendant in copyright infringement action requested $100/hour for contract attorney time); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846-LHK, 2012 WL 5451411, at *3 (N.D. Cal. Nov. 7, 2012) (party submitted hourly rate of $125 for contract attorney time in connection with Rule 37 sanction); *4Kids Entm't, Inc. v. Upper Deck Co.*, No. 10-cv-3386, 2012 WL 2426569, at *7 (S.D.N.Y. June 21, 2012) (setting $50/hour rate for contract attorney time); *Tampa Bay Water v. HDR Engr., Inc.*, 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *15 (M.D. Fla. Nov. 2, 2012) (awarding $85/hour for contract attorneys). Class counsel here seek to subject absent class members to fees that corporations do not bear.

A few Courts to assess the propriety of billing contract attorneys as associates have appropriately refused. *See, e.g., State Street*, 232 F. Supp. 3d 189 (D. Mass. 2017); *In re Weatherford Intern. Securities Litig.*, No. 11-cv-1646, 2015 WL 127847, at *1 (S.D.N.Y. Jan. 5, 2015) (refusing to allow markup on staff attorneys); Schulman Obj. 18-20 (citing other cases).

III. The Rubenstein declarations are unhelpful and unreliable.

The Rubenstein declarations consist mostly of legal argument that should be excluded because they are unreliable and because the late disclosure to the class of these new arguments violates *Mercury Interactive*, 618 F.3d at 993-95.

While the Rubenstein clothes his declarations in language like "data sets" and "averages," these numbers simply aggregate cherry-picked fee requests reported in case law. For example, Rubenstein includes only cases where the plaintiffs' fee request was *approved* (Rubenstein 1st at 16), typically *ex parte*, and so completely omits cases where, for example, $350/hour rates for contract attorneys were criticized and reduced. The declarations epitomize garbage in/garbage out methodology: Rubenstein averages questionable fee requests and then concludes that the pending fee request conforms with this fanciful "market rate." The Rubenstein declarations consist of legal argument masquerading as statistics in violation of Rule 702.

The Court soundly instructed the Special Master to review the record and "determine the hours reasonably expended" (Dkt. 985 at 2), a fact-intensive inquiry not aided by gross assertions that other settlements have approved with even higher rates and even more extensive staffing than requested in plaintiffs' fee motion. The Court did not instruct the plaintiffs or the special master to compare the present fee request to other fee requests, but to determine reasonable hours and rates based on the facts of *this case*. To the extent plaintiffs contend that case law supports their original 329-biller fee request, they should present arguments in the form of legal briefs—not as a page-limit-evading declaration by an attorney paid an undisclosed fee (Rubenstein 1st at 7) for legal argument based on case law.

A. Plaintiffs' new arguments violate *Mercury Interactive*.

As an initial matter, the Rubenstein declarations violate *Mercury Interactive* because they constitute new argument in support of the fee request not provided to class members prior to the objection deadline (December 29, 2017).

In *Mercury*, the Ninth Circuit held that "the district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in setting the objection deadline for class members on a date before the deadline for lead counsel to file their fee motion." *Id.* at 993. The Ninth Circuit reasoned that "[t]he plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed." *Id.* at 993-94. As a result of the district court's action, the objectors "could make only

generalized arguments about the size of the total fee because they were only provided with generalized information [in the preliminary notice]." *Id.* at 994. This "denie[d] the class an adequate opportunity to review and prepare objections to class counsel's completed fee motion." *Id.* at 994-95.[4]

Indeed, class members "could not provide the court with critiques of the specific work done by 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" until class counsel submitted their fee motion. *Mercury*, 618 F.3d. at 994. Because the deadline for submitting objections has long since passed, belatedly considering new purported facts denies absent class members an "adequate opportunity to review and prepare objections to class counsel's completed fee motion." *See id.* at 994-95.

Plaintiffs might argue that their belated bases for attorneys' fees should be relied upon because Objector Schulman is responding to them, but this is mistaken as a matter of law. "[T]he district court must give the entire class—and not just the Objectors[]here—the opportunity to review class counsel's completed fee motion and to submit objections if they so choose." *Allen v. Bedolla*, 787 F.3d 1218, 1226 (9th Cir. 2015). Because the class has been provided no notice of plaintiffs' belated rationalization of their fee request, much less an opportunity to respond, new arguments advanced for the first time in the Rubenstein declarations cannot support plaintiffs' motion for fees.

B. Most of the Rubenstein declarations consist of inadmissible legal opinion, which does not assist the Court.

While Federal Rule of Evidence 702 provides for the liberal admission of expert testimony regarding factual matters, "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transport Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). Whether the fee request is reasonable under case law is a decision left for the Court; the

[4] The Seventh Circuit reached the same conclusion. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014) ("Class counsel did not file the attorneys' fee motion until after the deadline set by the court for objections to the settlement had expired. That violated [Rule 23(h)].").

expert should not be permitted to "usurp" the court's role in this determination. *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). It is well established that "that expert testimony by lawyers, law professors, and others concerning legal issues is improper." *The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005). Such legal opinions invade this Court's province as the "sole arbiter of the law." *Waikiki Galleria, LLC v. DFS Group, L.P.*, No. 07-cv-00293, 2007 WL 3195089, at *5 (D. Haw. Oct. 30, 2007). Legal testimony should be excluded, and this principle "holds just as true when the finder of fact is the court, if not more so; the court is well equipped to instruct itself on the law." *Stobie Creek Invs., LLC v. United States*, 81 Fed. Cl. 358, 364 (Ct. Fed. Cl. 2008), aff'd 608 F.3d 1366 (Fed. Cir. 2010).

Here, the plaintiffs' expert seeks to usurp the Court's role by examining case law to conclude that that class counsel's billing rates are "appropriate" and the staffing levels reasonable. *See* Rubenstein 1st at 2-3. The Rubenstein declarations predominantly analyze *case law*, not facts. Rubenstein does not even provide a factual analysis of the billing at issue, admitting that he has not "review[ed] the plaintiffs' lodestar line-by-line," and indeed he has not seen any billing description. *See* Rubenstein 1st at 3; Ex. B (considered only redacted versions of detailed billing contained in Dkt. Nos. 961-1 to 963-33, which fully redacted all billing descriptions). Instead, Rubenstein opines that plaintiffs' staffing and billing rates purportedly resemble those granted in certain other class action fee awards. Rubenstein 1st at 10, 14-16.

Plaintiffs may protest that the Rubenstein declaration presents factual "empirical data" as they characterized it, Dkt. 991 at 1, but the declarations consist of little more than improper legal opinion dressed up as statistics, yet derived exclusively from case law. Citations to case law remain legal argument when the case law is averaged, and this is especially true when the averages are stretched into dubious legal conclusions. For example, the first declaration purports to average the lodestar rates awarded for contract attorney work in 13 other cases, and from this concludes: "Class Counsel employed appropriate billing rates." Rubenstein 1st at 3. But this legal opinion cannot follow from the observation that other courts—most of which did not even recognize the issue and

instead approved unopposed fee requests—have sometimes awarded highly marked-up rates for contract attorneys.

Rubenstein merely does what lawyers do every day in our common law legal system: compare this case with previous cases to argue that plaintiffs' request complies with the law. Arguing the case law is the job of a party's counsel, and should not be submitted under the guise of "expert opinion." In *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, the court admonished that the expert's report included improper legal opinions regarding the merits of plaintiffs' case: "an expert is not supposed to be doing the work of counsel; an expert must 'bring to the jury more than the lawyers can offer in argument.'" 525 F. Supp. 2d 558, 654 (S.D.N.Y. 2007).

Cherry-picking case law with similar numbers of law firms and eye-popping rates for contract attorneys is not an appropriate subject for expert testimony. "Expert testimony" which simply surveys the law ought to be excluded under Rule 702. *See Lukov v. Schindler Elevator Corp.*, No. 5:11-CV-00201-EJD, 2012 WL 2428251, at *2 (N.D. Cal. June 26, 2012) (excluding putative expert opinion based on "survey of state laws"); *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp. 2d 1241, 1260 (C.D. Cal. 2003) (striking expert opinion consisting of "interpretations of case law"); *Stobie Creek Invs.*, 81 Fed. Cl. at 359 (striking report that spent pages surveying, examining and discussing cases).

Indeed, another court has remarked about Prof. Rubenstein's testimony that "the testimony of an expert on matters of domestic law is inadmissible for any purpose" even if it is "disingenuously" proffered in support of "'factual'" arguments. *In re Am. Intl. Group, Inc. 2008 Securities Litig.*, No. 08-CV-4772, 2015 WL 13648082, at *1 n.2 (S.D.N.Y. Mar. 19, 2015) (scare quotes in original).

Furthermore, the Rubenstein declarations constitute particularly unreliable legal argument. The declarations should be excluded for the independent reason that they utilize unreliable cherry-picked case law to reach their conclusions.

C. Rubenstein's "averages" are meaningless numerical representations of arbitrarily-selected case law.

Even if calculating averages could convert legal testimony into fact testimony, the numbers reported by Prof. Rubenstein are completely meaningless because they suffer from pronounced selection bias. In other words, Prof. Rubenstein has averaged atypical cases to yield conclusions supportive of plaintiffs' position.

For example, in defending the extraordinary number of law firms that submitted billing in this matter (53), Rubenstein selects ten cases in which enormous numbers of firms submitted billing. Rubenstein openly admits that "[t]hese data points are not a representative, much less exhaustive, sample," Rubenstein 1st at 2, yet he proceeds to offer averages from this arbitrary selection of cases, *id.* at 16. Pointing to other cases as "big case examples" constitutes ordinary legal argument. Offering preposterous numerical averages of such "examples" is nothing more than camouflaging legal argument as factual testimony. Objector Schulman could cite far more than ten cases that employed *one* law firm, and the average number of law firms in such cases is one—but the average of an arbitrary data set is likewise arbitrary.

As another example of selection bias, the Rubenstein assumes exorbitant rates for $50 contract attorneys are "appropriate" by simply discarding contrary authority. In answering whether contract attorneys have been billed at customary market rates, the Rubenstein entirely omits consideration of billing practices by paying clients, which generally reimburse contract attorneys as a pass-through expense with perhaps some slight markup for overhead. *See* Section II, *supra.* Instead, Prof. Rubenstein purports to calculate the average rate for contract attorneys by only considering "court-approved billing rates"—that is, by omitting cases where plaintiffs were awarded with reduced fee awards, and further discarding one case because "the contract attorneys simply staffed a call center." Rubenstein 1st at 16. Such methodology assumes the conclusion that hefty markups are customary by entirely omitting cases where these bills were criticized in favor of cases where such markups were scarcely scrutinized. In fact, there is "nothing persuasive from which to conclude that this sort of markup [$375 to $395 per hour] is reasonable." *In re Weatherford Intern. Securities Litig.*, No.

11-cv-1646, 2015 WL 127847, at *1 (S.D.N.Y. Jan. 5, 2015). Of course, *Weatherford*, among others, was not included in Rubenstein's arbitrary average.

No neutral fact finder would have use for the questionable methodology used to present legal opinion in the Rubenstein declarations. If the Court nevertheless relies on the Rubenstein declarations, it should take steps to reduce prejudice to the class. The Court should allow Objector Schulman time to discover and review the purported bases of the Rubenstein declarations, depose Prof. Rubenstein, and prepare a rebuttal report. The non-disclosed bases of the Rubenstein declarations include:

- a data set on blended billing rates in reported cases (Rubenstein 1st at 1);
- a data set of 10 "nationwide class actions," which are also not representative (*id.* at 2);
- search results comprising 31 cases involving contract attorneys, from which a data set of 13 of these cases was selected to support plaintiffs' position (*id.* at 16);
- and a similar "data set" pulled from 13 cases, 12 of which are different from above (*id.* at 17).

Schulman requires time to review this information, particularly because his counsel, a non-profit *pro bono* law firm he is employed by, lacks resources to engage multiple "research assistants" to prepare its legal arguments. *See id.* at 9. To be clear, Schulman finds it inappropriate under Rule 702 for supposed fact experts to submit testimony consisting almost entirely of data plucked (cherry-picked) from case law. But if plaintiffs are allowed to use such testimony in support of their fee motion, Schulman should be provided normal adversarial discovery and given the same opportunity.

IV. Plaintiffs' purported lodestar remains excessive in numerous respects.

As explained in his response, Objector Schulman believes that the Court should award class counsel based on a reasonable percentage of the net fund they created. Schulman Response at 11. For contingency work, this is the standard method of billing legal services, and for a fund approaching $100 million, a fee less than the Ninth Circuit's benchmark 25% is appropriate. *Id.* at 11-14. This is because the Ninth Circuit recognizes that a sliding scale is appropriate to award for

increasingly large funds. *See*, *e.g.*, *Oracle Securities Litigation*, 132 F.R.D. 538, 541, 548 (N.D. Cal. 1990) (selecting bid with a sliding contingency fee scale providing 30% of the first million, 25% of the next $4 million, then 20% of the next $10 million, and 15% of everything above $15 million); Schulman Obj. at 5. Sophisticated clients for contingency legal work know that a $100 million settlement does not require ten times more work than a $10 million settlement, so would agree to a sliding scare for increasingly large settlement. Thus, Courts have recognized that this approach best approximates the hypothetical *ex ante* market for contingency legal fees. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 976 (7th Cir. 2003) ("*Synthroid II*") (affirming fees based on "30% of the first $10 million recovered by that class, 25% of the next $10 million, 20% of the third $10 million, 15% of the fourth $10 million, and 10% of the remaining $48 million). While the *ex ante* market approach has not been adopted by the Ninth Circuit, employment of the *Synthroid II* sliding scale on the $92 million net settlement fund here would equal a fee award of $14.2 million—very close to the 15% ($13.8 million) fee award Objector suggests is reasonable. Schulman Response at 11.

That said, for the purposes of conducting a lodestar cross-check, the court must also approximate fair market lodestar billing in this case. The special master unfortunately failed to perform this task, but he did at least accurately identify categories of overbilling evident from plaintiffs' fee motion: (1) excessive time billed to depositions, amounting to over 71 hours per deposition, which is "excessive on its face"; (2) misuse of high-rate attorneys in document review; (3) excessive 3,300 hours billed for class certification; (4) excessive hours billed for settlement; (5) a "virtual army of billers was contrary to the letter and spirit of the Court's appointment orders regarding lead counsel," leading to waste. Report 16-18. While the special master correctly surmised plaintiffs billed excessive time on these tasks, plaintiffs are correct that the special master failed to quantify it. Schulman Response at 7. However, as explained below, each category of overbilling remains problematic, and plaintiffs' rationalizations fall flat.

The Court should reject plaintiffs' suggestion to assume the billing was reasonable. "Giving counsel the benefit of the doubt even in light of apparently improperly claimed hours…runs counter to the rule…that the burden to submit detailed records justifying hours reasonably expended falls

upon the claiming attorneys." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1126 (9th Cir. 2002). The lodestar "serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013).

A. Contrary to plaintiffs and Rubenstein, the deposition expenses are unreasonable.

Plaintiffs attempt to rationalize the extraordinary amount of time categorized as depositions by misrepresenting the nature of this work and emphasizing the large amount of travel time billed. In fact, the deposition category was rife with waste and paying clients would compensate attorneys at their full rate for pure travel time.

Rubenstein rationalizes the extraordinary time coded as depositions with false assertions. He says that "some were complex depositions of experts . . ." Rubenstein 1st at 6, but the detailed billing suggests otherwise. In fact, time spent preparing for, taking, and defending expert depositions was generally coded to Category 7 (experts),[5] as Prof. Rubenstein would know if he had reviewed any of the billing, which he admits he has not. Rubenstein 1st at 6. The average time spent on fact depositions is therefore even greater than 71 hours per deposition. In fact, a majority of the depositions—106 out of 194—were defending named plaintiffs. While plaintiffs say that the work preparing for such depositions could not be "cloned" from client to client, in fact every witness was necessarily deposed with similar issues for certification. Contrary to Rubenstein, these depositions generally did not take the full 7 hours. *See, e.g.*, Dkt. 1003-1 at 163. In several instances, the same attorneys took or defended two named plaintiff depositions in a single day. *See id.*; Dkt. 1017-4 at 7, 8, 9.

More fundamentally, plaintiffs' defense of their deposition time sidesteps the extraordinary waste directed by the PSC. Attorney Cervantez said that the lead firms "were not going to go out and find plaintiffs from 50 states." Dkt. 974 (2/1/18 Tr.) at 24. Rubenstein opined that "the requirement that Class Counsel seek clients in more than 50 jurisdictions throughout the country entailed involving a lot of partners in various jurisdictions as part of the lodestar." Rubenstein 1st at

[5] *See, e.g.*, Dkt. No. 1004-1 at 34-35, 58, and 82.

10. But this is not what happened. We know this because plaintiffs had no representatives from 8 states—neither in their complaint, nor at any deposition. *See* Third Consolidated Amended Complaint ("Complaint," Dkt. 537-3), at 4 (missing AK and AR), 17 (HI), 40 (ND), 42 (OR), 44 (SD), 46 (VT), 49 (WY); Dkt. 1017-4 (no depositions of clients from these 8 states, nor from AL, IA, or MT). As a matter of trial strategy, it is completely senseless to proceed with over 111(!) named plaintiffs, causing plaintiffs to defend depositions of 10 clients from California, 7 from Missouri, and 3 from Idaho (Dkt. 1017-4), yet have absolutely no representatives from Oregon, a state where plaintiffs alleged state law causes of action (Complaint at 264) and believed to have twice as many class members as Idaho. *Id.* at 127.

The deposition of 106 named plaintiffs was a consequence of a trial strategy where named plaintiffs were selected as a jobs program for non-PSC counsel in tacit exchange for their past and future support of PSC members rather than because of their ability to represent specific subclasses. *See* Schulman Obj. at 15-16. The benefit of these depositions accrue primarily not to the class, but to the firms billing hours for each deposition and as goodwill toward the PSC for spreading such work to so many firms. Likewise, plaintiffs' excuse that they needed to reach out to so many other firms due to their limited resources (Response at 15), makes no sense considering the very limited time most of the 49 non-PSC firms billed. Again, any rational client would instruct the use of contract attorneys or perhaps a *small* number of other firms with attorneys available to shoulder lots of work efficiently. Instead, the PSC distributed work widely to most of the other firms representing clients consolidated before the court.

Next, plaintiffs and Rubenstein argue that the profligate depositions required "significant travel time" (*id.* at 8; Rubenstein 2d at 6), but this is yet another example of overbilling. Paying clients do not pay unproductive travel time at full hourly rates such as a partner billing 10.5 hours with the description "Travel from NYC to LAX for depositions." Dkt. 1002-8 at 112. This is "because travel time is widely recognized as less productive than regular time." *Automobile Club of New York, Inc. v. Dykstra*, No. 04-cv-2576 SHS, 2010 WL 3529235, at *3 (S.D.N.Y. Aug. 24, 2010) (reducing travel time rates by 50%); *see also Wash. Pub. Power Supply Sys. Secs. Litig.*, 12 F.3d 1291,

1298-99 (9th Cir. 1994) ("*WPPSS*") (affirming 50% reduction for all travel time). Moreover, travel time further undermines the excuse of employing 49 other firms. Most depositions with noted travel time were taken in New York, Los Angeles, Orange County, Indianapolis, New York, Boston, Chicago, and other places where the 49 firms were located. *See* Dkt. 1017-4. Again, the use of these 49 firms was not a prudent time management as plaintiffs suggest, but an intentional effort to spread work.

Finally, plaintiffs' claim that more attorneys appeared for defendants than plaintiffs at depositions (Response at 9; Rubenstein 1st at 13), but this unverified assertion does not suggest that the deposition billing was reasonable. According to Rubenstein, Class Counsel provided a list of attorneys who appeared in the deposition transcripts. *Id.* at 11. In the first place, plaintiffs have not provided the underlying data and their summary of it appears inaccurate.[6] Second, the comparison between plaintiffs and defendant deposition staffing makes no sense when one realizes that depositions included at least witnesses from 14 separate corporate entities not owned by Anthem. Dkt. 1017-4. Unsurprisingly, some of the corporations retained separate outside counsel and had their own corporate attorneys attend. *Id.* Besides the Anthem-affiliated entities, many of these independent corporations were involved with only one or a handful of depositions, so it's no surprise that their various general counsels sent an in-house lawyer to attend them. And obviously key depositions were attended by attorneys from different outside law firms representing separate defendants with separate interests in the litigation. *Id.* at 17. Finally, Rubenstein's opinion fails to appreciate that the extraordinary hours billed for depositions were mostly not billed at the depositions themselves. The excess billing arises from lengthy travel time, duplicative preparation, and document review categorized as depositions.[7]

[6] The table does not appear to list all attorneys who actually attended each deposition for plaintiffs. *Compare* Dkt. 1017-4 at 18 (indicating only one plaintiffs' attorney attended the deposition of defendants' expert Kent Van Liere on February 10, 2017) *with* Dkt. 1004-1 at 9 (billing description for another attorney to "Attend Van Liere deposition.").

[7] Rubenstein goes even further astray when he extrapolates from the inaccurate deposition table to conclude plaintiffs did not overstaff the case in general. He analyzes attorney appearances by the defense firms and assumes that three associates worked on the case for every defense-side

B. Contrary to plaintiffs and Rubenstein, the document review time is unreasonable.

Plaintiffs argue that the Rubenstein declarations show that their billing for document review is reasonable (Response at 4 n.4), but Rubenstein's rationalization is completely divorced from reality reflected in the billing records. While Rubenstein paints a romantic picture of seasoned attorneys personally reviewing PACER dockets (Rubenstein 2d at 5), this does not resemble the billing plaintiffs have submitted.

A total of 34,262 hours of document review time has been submitted in this case, and the vast majority of this time was billed by attorneys who performed no other type of work on this case. *See* Dkt. 960-6. Indeed 42 attorneys *exclusively* billed under the document review category. *Id.* A total of 56 attorneys billed 90% or more of their time under document review, and it appears most of the other hours were also document review, though coded as deposition-related. *Id.*; *e.g.*, Dkt. 1002-18 at 11 (biller who billed 96% of time under document review code billed under depositions for "Batch 2514: Summarized docs useful for Mellinger depo and sent to E. Kafka"). These 56 billers billed 30,538.2 of the document review hours. *See* Dkt. 960-6. Had Rubenstein reviewed the billing, or even the summary charts, he would realize that attorney time in this category was not generated by senior attorneys conducting occasional first-hand document review, but by a platoon of attorneys spending hours reviewing documents at rates up to $500/hour. Paying clients do not tolerate such pricey churn, whether by contract attorneys or designated associates.[8]

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partner to conclude that perhaps "184" or "somewhere between 150-200" attorneys billed for defendants. Rubenstein 1st at 13. If this figure were helpful, it would be much more accurate to simply discover it from defendants. In any event, Rubenstein's analogy between plaintiffs' and defendants' representation seems baseless considering that more partners than associates were staffed on plaintiffs' side, casting doubt on the hypothesized 3:1 ratio. Notably, Rubenstein can only make the attorney headcounts similar by assuming an army of 90 unseen associates for defendants.

[8] Schulman's limited review of the detailed billing suggests there may be additional staff or contract attorneys misclassified as associates. Two purported associates at Keller Rohrback billed 1605.3 and 1466.2 hours respectively between July 25, 2016 and May 30, 2017, usually billing *precisely* 40 hours over a calendar week. Dkt. 960-6 at 35. Each and every one of their billing descriptions says nearly verbatim: "Per E. Cervantez, performed substantive review of defendants' document production." *E.g.*, Dkt. 1003-39 at 11. One of these attorneys also has a LinkedIn page indicating that he worked as a contract attorney and aspiring screenwriter between 2011-17, although he

C. Contrary to plaintiffs, class certification time includes unreasonable charges.

Plaintiffs creatively argue that the 3,300 hours spent on class certification were justified because the briefing also went to the merits of the case. This rationalization makes little sense because certification "will frequently entail overlap with the merits" in a putative class for monetary damages. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (internal quotation omitted). The theory of damages must apply to all class members in common, or the class is kaput. *Id.* at 36

Plaintiffs also oddly argue they had to do a lot of research because no court has certified a data breach class. Yet the PSC firms were selected, in part, due to their experience briefing certification in data breach actions. Dkt. 284 1t 3. If plaintiffs argue the Court was correct to quip it was a "mistake" to select the PSC firms (Dkt. 974, Tr. at 22), they should stop seeking appointment in similar actions. In any event, paying clients reasonably expect that "[t]he higher the hourly rate charged by an attorney based upon his or her skill and experience, the shorter the time it should take the attorney to perform a particular task." *Maurer v. Shiva-Egg Harbor, Inc.*, 2014 WL 6474052, at *2 (D.N.J. Nov 18, 2014).

Next, plaintiffs assert that their hours for certification were high because work on *Daubert* motions was coded under certification—a billing category separate from pleadings, experts, depositions, and document review. This argument appears to be contradicted by the hours that plaintiffs deigned not to redact.[9] It appears work drafting the *Daubert* motions were predominantly coded under 6 (pleadings and briefs), not 10 (class certification). *See* Dkts. 1004-1 at 53.

appears to have regular employment with Keller Rohrback at this date. Nonetheless, the Court may inquire as to these attorneys' employment terms in 2016-17, and also require disclosure their cost if they were indeed contract or staff attorneys.

[9] While Schulman obviously cannot review the redacted time entries, it appears that redactions are much more extensive than the attorney-client and work-product redactions that this Court found to "be a legitimate bases to sealing." Order, Dkt. 995 at 5.

D. The hours billed under "settlement" likewise appear excessive.

Plaintiffs also misrepresent the nature of billing when attacking the special master's conclusion that 2,821 hours spent for settlement appear excessive.[10] While plaintiffs emphasize time spent "revising several versions of class notice; soliciting and vetting bids for settlement administration services" and so forth (Response at 12), many of the hours in this category appear to have been consumed sending "five attorneys from Plaintiffs' Co-Lead Counsel and Steering Committee firms; travel to New York City and San Francisco" for three mediations dates where they each billed 9-12 hours and often similar times for travel to and from each mediation. *Id.*

(Thank goodness eight firms were not selected for the PSC or presumably at least 8 partners would have attended these mediation events.)

Plaintiffs also claim that time spent "drafting motions for preliminary and final approval of the settlement and supporting materials" was necessary to secure their "exemplary" settlement. *Id.* Even if this were true, plaintiffs fail to exclude time squarely directed to securing their own fee award, time which is not compensable. *WPPSS*, 19 F.3d at 1999. Plaintiffs propose to bill the class for time spent, among other things, "review[ing] and revis[ing] time sheets for fee motion" (Dkt. 1004-1 at 1), and on a declaration of Eric Gibbs directed entirely to securing attorneys' fees (Dkt. 1003-23 at 4).[11]

E. Excess staffing led to unreasonable hours.

Plaintiffs correctly state that reasonable hours may be compensated from multiple firms, but they elide the central problem of billing through 53 different law firms: that overstaffing *leads to*

[10] Plaintiffs recite the figure of 2500 hours that the special master uses, but the special master was using plaintiffs original fee request, which only went through September 2017. Report at 17. Plaintiffs' more recent request runs through December 29, 2017 and includes 2823.1 hours in the "Settlement" category, including essentially all hours billed since August 2017.

[11] Eve Cervantez has declared that time spent on plaintiffs' fee motion has been excluded. Dkt. 944-1, ¶ 22. Schulman does not doubt she intended to exclude such time. However, the persistence of time entries like these demonstrates why class counsel cannot be trusted to scrutinize their own billing as a knowledgeable paying client would. The special master was mistaken to rely on class counsel's own review, which supposedly shaved 3400 hours (4%) of hours off the lodestar. Response at 15. Contra plaintiffs, the Court should not treat such an internal review as authoritative.

inefficiency. Paying clients do not tolerate billers who work for a handful of hours and are never again seen on the case because they know that contributions from that individual are dwarfed by the time they and other team members brought them up to speed. In this case, plaintiffs bill for 189 different individuals who spent less than 50 hours on this case.

Several of plaintiffs' excuses for the number of firms do not withstand scrutiny. Plaintiffs trot out the excuse that they needed to interact with and depose 106 named plaintiffs, but as explained in Section IV.A, the number of named plaintiffs was a strategy calculated to produce hours for many different firms—not to efficiently certify a national class. While the plaintiffs are correct that the special master did not eliminate any duplicative hours (Response at 13), it does not appear that the special master determine the hours reasonably expended, as this court contemplated. *See* Schulman Response at 2. That said, plaintiffs' *ipse dixit* that they've removed duplication does not disprove it. The detailed billing records tend to confirm Court's intuition that the large number of billing led to inefficiencies that would not have plagued a more compact team.

V. Other adjustments by the special master are reasonable.

Plaintiffs assert that the special master's alternative recommendations—to award fees based on 25% of the fund or apply a 10% "haircut" to adjusted lodestar—misapply Ninth Circuit law. *See* Response at 19. While the special master failed to calculate a proper lodestar and did not consider the sliding scale for percentage fees awarded in megafund settlements, it is perfectly permissible to apply a 10% across-the-board adjustment to generally excessive billing. Additionally, as the special master alternatively proposed, this Court can and should award fees based on a reasonable percentage of the *net* fund.

Plaintiffs grumble that lodestar fee calculations are entitled to "a strong presumption that the lodestar figure represents a reasonable fee." Response at 21 (quoting *Morales v. City of San Rafael*, 96 F.3d 359, 363 n.8 (9th Cir. 1996)). But the special master failed to provide a lodestar calculation; he determined neither "the number of hours the prevailing party reasonably expended," nor the "reasonable hourly rate" for any biller except the 317% markup proposed for contract attorneys. *Morales*, 96 F.3d at 363. The special master ought to have determined reasonable rates and hours

before applying any "haircut" adjustment to the bill, but a haircut after the final accounting is appropriate.

Plaintiffs fault the special master for deducting costs from their fee award, and if awarding fees on a lodestar basis it would indeed be unusual to deduct lump sums from what should be a calculation of reasonably-expended hours and market rates. Perhaps the special master perceived that there were at least another $2 million dollars' worth of unreasonable fees, but did not have time to precisely calculate them. In fact, a rough calculation of the excessive billing suggests it exceeds $13 million. Schulman Response at 13; Schulman Obj. at 15. That said, awarding a lump sum of fees and expenses does *not* violate common fund principles and indeed is a typical best practice. *See, e.g., Moore v. Verizon Comms., Inc.*, 2014 WL 588035, at *16 (N.D. Cal. Feb. 13, 2014) (comparing the gross fee and cost award to the 25% benchmark); Schulman Obj. 10-11 (citing cases). To the extent that lumping in costs with a lodestar fee is inappropriate, the Court may remedy it by awarding fees instead on a percentage of fund basis.[12]

Plaintiffs argue that the special master should not have applied a 10% "haircut," but this adjustment is justified by precedent and plaintiffs' brazen and persistent attempt to bill contract attorneys at 9.6 times cost. The special master did not sneakily double-deduct. He transparently recommended that contract attorneys be billed at "only" 4.17 times their cost, deducted plaintiffs' costs first, then applied a 10% haircut on the remaining charges. The haircut removed from the net bill, not the $38 million gross bill. The special master's error came in not first articulating specific redundancies and excessive rates. Schulman Response 4. Ten percent is the limit for unexplained gut-feeling reductions; a satisfactory explanation for deeper reductions need not "be elaborate, [but] it must be clear." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Thus, the Court can deduct hours for duplication, and then adjust other parts of the bill for general waste from excessive staffing. *Moreno* itself is an example (albeit one where the district court did not adequately explain its various cuts).

[12] Objector Schulman agrees that service awards should not to be deducted from fees.

The bases of this haircut should not be, as the special master suggested, to approximate waste—the Court should articulate more specific findings of excessive billing and rates. Instead, the haircut deters future overbilling. Plaintiffs are right that a "haircut" amounts to imposition of a fractional lodestar, but this is an appropriate response to class counsel overinflating their lodestar. If the only consequence from trying to claim excess billing is that class counsel gets what they would have been entitled to if they had filed a fair petition in the first place, there is no incentive to be forthright with a court in the original request. Schulman Obj. 25 (citing authorities). "Extreme shearing is appropriate where the proposed billing embodies extreme overreaching." *Munger v. First Nat'l Collection Bureau, Inc.*, 2016 WL 3964813, at *5 (E.D. Mich. July 25, 2016).

For this reason too, class counsel is mistaken that they are entitled to a risk multiplier and an upward deviation of this circuit's 25% benchmark. Contrary to class counsel (Response 20 n.15), multipliers are not granted as a matter of course. *E.g. In re Hyundai and Kia Fuel Economy Litig.*, 881 F.3d 679, 706-07 (9th Cir. 2018) (doubting propriety of a 1.22 multiplier); *MagSafe*, 571 Fed. Appx. at 564 (remanding where a 1.5 multiplier was applied without an explanation of why it was "necessary to adequately compensate class counsel"). A lodestar multiplier is especially not justified in case where counsel sought most benefit for themselves and had to be pressured by the Court to allow fee reductions to revert to the class rather than *cy pres*.

Plaintiffs' similarly err in contending that the injunctive relief provides "mathematically ascertainable benefits to the class" justifying an upward departure. Response at 21. The benefit of the injunction is dubious (Schulman Obj. at 10), and the settling parties "bore the burden of demonstrating that class members would benefit from the settlement's injunctive relief." *Koby v. ARS Natl. Services, Inc.*, 846 F.3d 1071, 1079 (9th Cir. 2017). Even if the money Anthem spends really would not be spent but for the settlement, mere expenditure does not correspond with class benefit, let alone a "mathematically ascertainable" benefit. *Id.* at 1080. Thus, no reason exists for the Court to deviate upwards from the typical sliding scale percentage of a large net common fund—let alone to 38.9% of the common fund net expenses, as plaintiffs propose. Schulman Obj. at 5.

CONCLUSION

The Court should set a Rule 23(h) award to class counsel of $13,800,000 in fees and expenses (15% of net recovery), which would increase relief to class members by over $26 million. In conducting a lodestar cross-check of such award, the Court should bill contract attorneys at market rate—that is, their cost. Further, the Court should roughly adjust for the overbilling the special master identified in the categories of depositions, document review, class certification, and settlement. Further, the court should also estimate some reasonable adjustment (perhaps a 10% haircut) for overstaffing, which would also serve as a deterrent for class counsel obscuring their billing from the Court and overinflating their rates.

Dated: May 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

DATED this 22nd day of May, 2018.

/s/ Theodore H. Frank
Theodore H. Frank