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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 OBJECTOR ADAM E. SCHULMAN'S RESPONSE TO SPECIAL MASTER'S REPORT AND RECOMMENDATION** Date: June 14, 2018 Time: 1:30 p.m. Judge: Lucy H. Koh Crtrm: 8, 4th Floor

Table of Contents

Table of Authorities

Federal Court Cases

Federal Rules

Additional Authorities

I. INTRODUCTION

Objector Schulman and his attorney, employees of the Competitive Enterprise Institute's Center for Class Action Fairness, take aim at the Special Master's failure to "penalize" Class Counsel for achieving the largest ever data breach settlement. *See* ECF 1016 (Schulman Response to Special Master ("Schulman Response")) at 6, 13, 15. Schulman thus asks the Court to ignore controlling Ninth Circuit law and make a below-benchmark percentage-of-fund award because the settlement is large (a "megafund"). But the Ninth Circuit expressly rejects the notion that the percentage awarded necessarily decreases as the fund increases. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Rather, courts in the Ninth Circuit generally conduct a lodestar cross-check to prevent windfall profits. Here, Plaintiffs requested a *negative* multiplier—a far cry from a windfall.

Schulman makes two additional errors. First, even if he were correct that Counsel overbilled (and he is not), Class Counsel's requested fee award would still be appropriate on either a percentage-of-fund or lodestar basis because contingent counsel should normally receive a risk multiplier, such that the fee award exceeds the lodestar. *See Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016). Second, Schulman's percentage-of-fund calculations do not account for the more than $500 million in actual value of credit monitoring to class members who have submitted claims. Nor do they account for the requirement that Anthem triple its expenditures on cybersecurity and make critical improvements that directly address future threats to class members' personal information, even though the Ninth Circuit requires courts to consider the value of these non-monetary benefits when awarding fees on a percentage-of-fund basis.

It also bears emphasis that Schulman has presented absolutely no rebuttal evidence or authority to support his request to cut Counsel's lodestar based only on his gestalt impression. Such recommendations have no basis in the record or in Ninth Circuit law. Plaintiffs have provided the Court with the evidence and appropriate legal authority necessary to award the requested fees of $37,950,000 and costs of $2,005,068.59, and respectfully ask the Court to issue such an award.

II. ARGUMENT

A. The Percentage-of-Fund Calculation Supports Plaintiffs' Fee Request.

1. The Ninth Circuit Has Expressly Rejected The Argument That The Fee Should Decrease As The Settlement Increases.

Plaintiffs' work on this case generated a settlement fund of $115 million. This is the largest-ever settlement in a data breach case, even setting aside the actual value of credit monitoring, the additional investment that Anthem must make in cybersecurity, and the specified cybersecurity improvements. This is not solely, or even principally, attributable to the size of the class: numerous data breach cases with comparable class sizes have yielded far less favorable results. ECF 944-3 (Ex. B to Cervantez Reply Dec.).

To achieve this extraordinary outcome, Class Counsel expended extraordinary effort. Rather than reward either the result or the hard work that was necessary to produce it, Schulman argues that the Court should order a below-benchmark percentage-of-fund fee award because the settlement fund is so large. Schulman Response at 8-9. Schulman errs as a matter of law. The Ninth Circuit has expressly rejected the argument that fee awards must necessarily decrease as the fund increases. ECF 945 (Pls Reply Br.) at 8 (citing *Vizcaino*, 290 F.3d at 1047).[1] Courts in this circuit generally rely instead on the lodestar cross-check as the "best way to guard against a windfall" because it examines how much class counsel will receive for each hour invested in the case. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2016 WL 4126533, at *6 (N.D. Cal. Aug. 3, 2016).

[1] Even beyond the Ninth Circuit, many other "respected courts and commentators" agree that a court should not decrease the fee award simply because a settlement exceeds $100 million. *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) ("such a fee scale often gives counsel an incentive to settle cases too early and too cheaply") (alteration in original); *Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D. Fla. 2006) (awarding fees of 31.33% of $1.075 billion because "[w]hile some reported cases have advocated decreasing the percentage awarded as the gross class recovery increases, that approach is antithetical to the percentage of the recovery method . . . . By not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little"). *See also In re: Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 3:15-md-02672-CRB, ECF 2175-2 (Fitzpatrick Dec.) at ¶24 & n.26 (N.D. Cal. Nov. 8, 2016) ("Consider the following example: if courts award class counsel 30% of settlements if they are under $100 million, but only 20% of settlements if they are over $100 million, then rational class counsel will prefer to settle cases for $90 million (*i.e.*, a $27 million fee award) than $125 million (*i.e.*, a $25 million fee award). Such incentives are obviously perverse.").

Plaintiffs' request for a fee that would apply a negative multiplier to their lodestar demonstrates that they are not seeking windfall profits. Indeed, the Ninth Circuit tallied dozens of class action fee awards from common funds of more than $50 million, and found that 54% of fee awards applied lodestar multipliers between 1.5 and 3.0, and 83% of them applied multipliers between 1.0 and 4.0. ECF 916-6 (Pls Opening Fee Brief) at 20-21 (citing *Vizcaino*, 290 F.3d at 1051 n.6). Plaintiffs' request for a negative multiplier falls well below the normal range. The lodestar cross-check thus confirms that Plaintiffs' fee request is a reasonable percentage of the common fund.

2. The Lodestar Cross-Check Demonstrates That Plaintiffs' Counsel Had No Economic Incentive to "Churn."

Plaintiffs' Counsel had no economic incentive whatsoever to "churn" excessive hours, as Schulman alleges. When Plaintiffs' Lead Counsel sought to be appointed to this case, they told the Court that they would seek a lodestar multiplier no greater than 1.75. ECF 190 at 10 (Application for Leadership). Accordingly, a lodestar of $21,685,714 would have supported Plaintiffs' fee request of $37,950,000. There was no reason for Counsel to work unneeded hours to earn their fee. Even assuming every one of Schulman's recommended cuts for allegedly "excessive" hours or rates were warranted (and none are), the resulting lodestar of $22,784,786 would have supported Plaintiffs' fee request with a multiplier of 1.66. *See* Schulman Response at 12-13.[2]

In other words, Plaintiffs' Counsel received no return on investment for the time Schulman alleges was excessive. Counsel could have worked only the time Schulman concedes was reasonable and then sought the very same fee award by seeking a higher (though still modest) multiplier. Counsel would have benefited, financially and personally, by working fewer hours on this case for the same fee, but they did not have that option: the complexity and immensity of this fast-paced litigation demanded that Counsel make a more substantial investment of time in order to secure a positive result for the class. Counsel willingly made that investment, and they should be rewarded, not penalized, for it.

The same analysis undermines Schulman's argument that Plaintiffs inflated their fee request by enlisting non-PSC firms to "churn" on the litigation. *See* Schulman Response at 4. The combined

[2] This number does not include Schulman's proposed ten percent "haircut" on top of numerous proposed specific cuts, which, as explained below, would constitute impermissible "double counting" in violation of Ninth Circuit law. See *infra* at 9.

lodestar of the four Lead/PSC firms – $24,425,721 – would support Plaintiffs' fee request with a modest multiplier of 1.55. *See* ECF 944-1 (Cervantez Reply Dec.) ¶18. That is, Lead Counsel/PSC could have requested the same $37,950,000 fee award for themselves alone, without including a single hour worked by non-PSC firms. They had no economic incentive to delegate unnecessary work to non-PSC firms. Lead Counsel asked non-PSC firms to assist when those firms were best-positioned to complete specific tasks and to help shoulder a high volume of work that was compressed into a short period of time. *See* ECF 916-8 (Cervantez Dec.) ¶¶26-27; ECF 944-1 (Cervantez Reply Dec.) ¶¶29-47; ECF 945 at 10-11; ECF 1017 (Pls' Response to Special Master) at 15; ECF 1017-5 (2nd Supp. Cervantez Dec.) Ex. 4 (chart showing non-PSC hours by month). Plaintiffs used these firms' assistance to benefit the class, even though using them would not increase Lead Counsel's "profit."

3. Schulman Significantly Understates The Value Of The Common Fund.

The Court should reject Schulman's argument that the common fund is less than it actually is. The cash value of the settlement fund is $115 million. That number is the baseline value of the common fund in this settlement. The true value is much higher. First, the actual value of the credit monitoring that class members have claimed is over $500 million, more than quadrupling the value of the common fund and drastically decreasing the percentage of the fund that Plaintiffs request in fees. ECF 945 at 4-5; ECF 944-1 ¶¶6-9.

Second, the $115 million figure does not take into account the very specific cybersecurity improvements that Anthem must undertake as part of the settlement. These would not have occurred but for this litigation (including, but by no means limited to, the commitment to invest a sum certain in cybersecurity for the next three years). ECF 916-4 (Pls Mot. ISO Final Approval) at 6-7; ECF 916-9 ¶¶11-12, 19; ECF 944-1 ¶¶10-11. Under Ninth Circuit law, Schulman was required to either add to the value of the common fund this direct and ascertainable benefit to the class, or treat the settlement-mandated cybersecurity improvements "as a relevant circumstance" warranting an upward adjustment to the percentage recovery. *See* ECF 916-6 at 5-6, ECF 916-7 at 5-6 (describing and valuing cybersecurity improvements); ECF 945 at 3 (same); *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) (explaining that court may either add ascertainable benefit to the common fund or consider the value of the relief obtained as a "relevant circumstance"); *Vizcaino,* 290 F.3d at 1049 (explaining that court must consider all

circumstances and affirming enhanced fee award where "the court found that counsel's performance generated benefits beyond the cash settlement fund"). It is legal error to ignore these benefits.

Third, Schulman attempts to distort the percentage-of-fund calculation by subtracting notice and administrative costs from the settlement fund. Schulman Response at 11-14. The investment in notice and administrative costs provided direct benefits to the class and helped to increase awareness of, and participation in, the settlement. ECF 945 at 7-8. Absent this investment, the participation rate would likely have been lower – indeed, the notice campaign yielded a participation rate in this settlement that is many times higher than in other recent large data breach cases which relied primarily on less-expensive email notice, rather than more expensive notice by U.S. mail as was used here. ECF 1007-1 (Cervantez April Amendment Dec.) ¶¶12-17. The Ninth Circuit has rejected Schulman's attorney's argument that the percentage award must be calculated against the net settlement fund, and this Court should do the same. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015); ECF 945 at 7-8.

4. "Overbilling" Is Not Part of the Common Fund Analysis.

The Court should dismiss Schulman's argument that a downward deviation from the benchmark is warranted because of "categorical overbilling." Schulman Response at 10. Plaintiffs did not overbill, but more importantly here, overbilling is not one of the factors courts consider when deciding whether to depart from the 25% benchmark. *See Vizcaino*, 290 F.3d at 1048-50 (discussing factors). To consider alleged "overbilling" would make no sense in this context, because one of the reasons for using the percentage-of-fund method is to align class counsel's interests with those of the class in achieving the largest settlement possible, irrespective of the number of hours worked. *Nunez v. BAE Sys. San Diego Ship Repair Inc.*, 292 F.Supp.3d 1018, 1055 (S.D. Cal. 2017). The "most critical factor in granting a fee award" is the overall result and benefit to the class, *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008), and the other factors to consider include the skill of counsel and quality of work, the risk of the litigation, the contingent nature of the case, and awards in similar cases, *Vizcaino*, 290 F.3d at 1048-50. Each of these factors supports an award above the benchmark. ECF 916-6 at 2-16.

* * *

At bottom, Class Counsel's fee request is warranted regardless of how it is calculated. It would be reasonable to award 33% of the $115 million cash component of the settlement with an upward departure

from the 25% benchmark to account for the value to the class of the cybersecurity improvements. Similarly, it would be appropriate to award the requested fees as under 25% of the combined value of the cash settlement fund and the additional funds that Anthem has committed to its cybersecurity budget for the next three years. Finally, the requested fees may be justified as less than 8% of the more than $500 million value of credit monitoring services claimed by class members.

B. The Lodestar Calculation Supports Plaintiffs' Fee Request.

If the Court chooses to apply the lodestar method rather than the percentage-of-fund method to determine the fee award, Plaintiff's fee request is just as reasonable.

Plaintiffs have provided evidence supporting their rates, including charts and declarations referencing court-approved rates or comparable rates for every law firm. ECF 916-12 (chart); ECF 916-8 (Cervantez Dec) ¶¶87-88; ECF 916-29 (Friedman Dec.) ¶7; ECF 916-30 (Gibbs Dec.) ¶16-17; ECF 916-31 (Sobol Dec.) ¶24; ECF 944-1 (Cervantez Reply Dec.) ¶¶51-55, 69 & Ex. L; ECF 945 at 11-15 (Reply Br.); ECF 945-1 (Friedman Reply Dec.) ¶¶2-3 & Ex. A. "[R]ate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990). Accordingly, the Special Master correctly found that Plaintiffs' overall rates were reasonable. ECF 1008 (Special Master's Report ("Report")) at 15.

Plaintiffs have provided charts showing the time that each firm and each individual timekeeper billed to each of 14 task codes (which Plaintiffs describe in detail, *see* ECF 916-8 (Cervantez Dec.) ¶52), along with each timekeeper's job title, law school graduation year (if applicable), historical and 2017 rates, and total lodestar. ECF 960-5, ECF 960-6. Plaintiffs have also produced the detailed time records for every firm and timekeeper. ECF 1002–1004-37.

Although the Special Master identified a few categories in which he believed that Plaintiffs expended too many hours, Report at 16-17, the Special Master did not find that the evidence warranted a cut of more than 10%. Report at 27-28. The Special Master was not required, as Schulman asserts, to review every single one of the tens of thousands of time entries to arrive at his findings and recommendations. *Cf.* Schulman Response at 3-5. Courts are not required to achieve "auditing perfection" in evaluating a fee request, *Fox v. Vice*, 563 U.S. 826, 838 (2011), and they should not convert

a fee request into "a second major litigation," as Schulman is attempting to do here.[3] *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). While Plaintiffs disagree with some of the Special Master's conclusions, as detailed in their objections to those conclusions (ECF 1017 at 7-16), there should not be any question that he based those conclusions on appropriately detailed information. Of course, if the Court believes there is a need for further analysis of Class Counsel's lodestar beyond that conducted by the Special Master, Class Counsel respectfully offers to provide the Court with any assistance the Court deems appropriate.

Schulman also objects to the Special Master's findings because he did not implement the arbitrary and unsubstantiated cuts that Schulman had proposed in his objection and that he again proposes in his Response. Plaintiffs have addressed all but one of Schulman's proposed cuts in prior briefing and do not belabor the point here. Rather, Plaintiffs reiterate only in summary form why the Court should reject each of Schulman's proposed cuts:

> ***Contract attorney rates:*** Schulman's argument that the Court should cut $6.2 million from Plaintiffs' lodestar by reducing contract attorney billing rates to "cost" runs afoul of Ninth Circuit precedent requiring that courts refer to the prevailing market rate for attorneys of similar skill, experience and reputation to determine the reasonableness of rates. *Stetson v. Grissom*, 821 F.3d 1157, 1166 (9th Cir. 2016); ECF 945 at 12-14; ECF 1017 at 4-7. Plaintiffs have presented evidence establishing that they billed at or below the prevailing market rate for contract attorneys doing the type of sophisticated document analysis and review required in this case (which is far different than the "sorting" work typically performed by defense-side contract attorneys).[4] Schulman therefore has the

[3] Schulman suggests that *Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992) requires courts to engage in a line-by-line analysis of time records rather than a "rough" check when calculating the lodestar. *Gates* does not require anything of the sort, even in the fee-shifting context. In fact, *Gates* says the opposite: "[I]n cases where a voluminous fee application is filed in exercising its billing judgment the district court is not required to set forth an hour-by-hour analysis of the fee request." *Id.* at 1399 (citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 237-38 (2d Cir. 1987) ("[N]o item-by-item accounting of the hours disallowed is necessary or desirable."")). *Gates* requires only that a district court articulate "the reasons for its findings regarding the propriety of the hours claimed or for any adjustments it makes either to the prevailing party's claimed hours or to the lodestar," and that it review any rebuttal evidence that has been submitted (Schulman has provided none) and the claimed hours that are the subject of the rebuttal evidence. *Gates*, 987 F.2d at 1398, 1401; *see also McGrath v. Cnty. of Nevada*, 67 F.3d 248, 255 (9th Cir. 1995).

[4] ECF 944-1 (Cervantez Reply Dec.) ¶¶51-53, 69; ECF 944-13 (Rubenstein Dec. in *In re: Volkswagon*) ¶¶31-35; ECF 945 at 11-14; ECF 945-1 (Friedman Reply Dec.) ¶¶ 2-3 & Ex. A; ECF 1017-3; ECF 1017-7; ECF 916-29 ¶7 (Friedman Dec.) (citing *Nitsch v. DreamWorks Animation SKG, Inc.*, No. 14-cv-04062-LHK, 2017 WL 242361, at *9 (N.D. Cal. June 5, 2017)); *Nitsch*, Dkt. 331-4 (Small Dec.) ¶10

burden of submitting rebuttal evidence. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 980 (9th Cir. 2008). He has not done so.

Hours billed by non-PSC firms: Plaintiffs used non-PSC firms to fulfill specific functions for which they were better suited, either because of their relationship to clients or geography, and to provide additional resources during the most intense months of the litigation. ECF 945 at 10-11; ECF 1017 at 12-16. A court may not *assume*, without evidence, that the use of non-lead firms necessarily results in inefficient or duplicative billing. *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994); ECF 1017 at 12-16. Plaintiffs have submitted evidence showing that the hours these firms contributed were reasonable and necessary to securing a positive result for the class. ECF 916-8 ¶¶26-27; 31; ECF 944-1 ¶¶29-40. Schulman thus bears the burden of submitting rebuttal evidence showing that the hours were not reasonable. *Camacho*, 523 F.3d at 980. He has provided none, opting instead for blanket statements based on speculation. Arbitrarily deducting $4.6 million (half the non-PSC fees) attributable to these firms, as Schulman advocates, would violate Ninth Circuit precedent. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008).

Document analysis and review. Plaintiffs' decision to use associates and partners to assist in document review and analysis was well-founded and necessary to the proper representation of the class. ECF 916-8 ¶31; ECF 944-1 ¶¶51-55; ECF 945 at 11-15. Schulman has provided no evidence to the contrary. *Camacho*, 523 F.3d at 980. Arbitrarily reducing these fees by $700,000 is contrary to the Ninth Circuit's direction not to second guess a firm's staffing decisions. *Pollinator Stewardship Council v. U.S. Envt'l Prot. Agency*, -- F.3d --, 2017 WL 3096105, at *15 (9th Cir. 2017).

Deposition, class certification, settlement-related, and post-settlement billing: Plaintiffs have shown that the investment of time on these tasks was reasonable and necessary in this highly complex litigation. *See, e.g.*, ECF 916-8 ¶¶29-43; ECF 944-1 ¶¶39-46; ECF 945 at 10-11; ECF 1017 at 7-12. Schulman offers no evidence to the contrary. *See Camacho*, 523 F.3d at 980. Schulman's proposal to arbitrarily cut each of these categories by between 40% and 50% thus violates Ninth Circuit precedent. *Moreno*, 534 F.3d at 1112.

Summer law clerk billing rates:[5] Plaintiffs submitted evidence with their Opening Fee Brief that included citations to several court approvals of law clerk rates at between $285 and $330 per hour in this district. *See, e.g.*, ECF 916-31 (Sobol Dec.) ¶24 (citing *In re High-Tech Employee Antitrust Litig.*, No. 11-cv-02509-LHK, 2015 WL 5158730, at *9 (N.D. Cal. Sept. 2, 2015) (order approving law clerk rates between $295 and $330)); *see also id*, ECF 719-8 at 2 (Mar. 5, 2014) (identifying rates); ECF 916-1 ¶88 (citing *Spicher v. Aidells Sausage Co., Inc.*, No. 3:15-cv-05012-WHO (N.D. Cal. May 31, 2017) (order

(Sept. 15, 2015) (identifying rate information); ECF 916-12 at 81 (citing *In re Google Adwords Litigation*, No. 5:08-cv-03369, Dkt. 384 at 12 (N.D. Cal. Aug. 7, 2017); *id.*, Dkt. 375-1 at 9 (May 8, 2017) (identifying hourly rates); ECF 916-12 at 48 (citing *In re Capacitors Antitrust Litig.*, No. 3:14-cv-03264, Dkt. 1714 (N.D. Cal. Oct. 30, 2017); *id.*, 1458-6 (Johnson Dec.) Ex. A (Jan. 30, 2017) (providing rate information)).

[5] This is a new issue not previously raised in Schulman's original objection.

finding 2017 rate of $285/hour for law clerk reasonable)). These court approvals constitute "satisfactory evidence of the prevailing market rate" for law clerks in this district. *United Steelworkers of Am.*, 896 F.2d at 407. It is therefore Schulman's burden to rebut that evidence with his own evidence, *Camacho*, 523 F.3d at 980, but he provides no support for his arbitrary proposal to reduce these rates to $150 per hour.

Additional 10% haircut: Schulman provides no authority for his proposal to penalize Plaintiffs with an additional "10% billing judgment haircut to deter class counsel from inflating billing in other cases." *Moreno* did not endorse the use of a haircut for deterrence purposes, but rather allowed courts to cut hours that appear duplicative without providing a more specific explanation. 534 F.3d at 1112. Further, Schulman's proposal to cut plaintiff's lodestar in specific categories, and then to apply an additional haircut for alleged general overbilling is exactly the kind of "double counting" that the Ninth Circuit rejected in *Moreno*. *Id.* at 1115. Further, Counsel did not inflate their billing here, and would have had no economic incentive to do so.

* * *

In short, the evidence Plaintiffs have submitted substantiates a lodestar exceeding $38 million as of December 31, 2017, with additional work on final approval and settlement administration since then. In common fund cases, courts generally apply a multiplier to a lodestar-based award, at least to account for the contingent nature of the representation and degree of risk borne by class counsel. *See Stanger*, 812 F.3d at 741 (abuse of discretion not to award risk multiplier). Here, even though such a positive multiplier is warranted, Plaintiffs request a fee award that would apply a negative multiplier to their lodestar. Accordingly, the record here fully warrants a lodestar-based fee award of $37,950,000.

C. Schulman And His Attorney Have Conflicts of Interest That Fail To Put Class Members First.

"When assessing the merits of an objection . . . courts consider the background and intent of objectors and their counsel[.]" *Kumar v. Salov N. Am. Corp.*, No. 14-cv-02411-YGR, 2017 WL 2902898, at *4 n.4 (N.D. Cal. July 7, 2017) (quoting *Dennis v. Kellogg Co.*, 2013 WL 6055326, at *4 n.2 (S.D. Cal. Nov. 14, 2013)) (noting Frank, counsel for objector Schulman here, and their employer, the Competitive Enterprise Institute, frequently object to class settlements, raising arguments rejected by courts). This inquiry is important because the Court is not only "the guardian of the class," but "also the guardian of the judicial system's integrity"; and an "objector . . . cannot expect this Court to abandon one role for the other." *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F.Supp.2d 942, 975 (E.D. Tex. 2000).

In this case, the private interests of Schulman, his attorney (Frank), and the Competitive Enterprise Institute conflict with the interests of the class. First, Schulman is an attorney employed by the

Competitive Enterprise Institute's Center for Class Action Fairness, and his attorney in this case, Frank, is not only the Director of that firm, but Schulman's supervisor. *See Kumar*, ECF 157-1 (Frank Dec.) at 5 ¶20 (May 2, 2017) ("Through CCAF and CEI, I have represented clients or myself, or supervised CCAF and CEI attorneys[.]"). Courts hold that an employment relationship between class counsel and a named plaintiff destroys adequacy of representation under Fed. R. Civ. P. 23(a)(4), because the named plaintiff has an incentive to put counsel's interest above the interests of the class. *See Miller v. Mercedes-Benz USA LLC*, No. 06-05382-ABC, 2009 WL 1393488, at *2 & n.3 (C.D. Cal. May 15, 2009) (finding inadequate proposed class representative employed as paralegal by putative class counsel due to potential conflicts); *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1375 (11th Cir. 1984) (affirming inadequacy of named plaintiff employed by class counsel even though ineligible to share in fee award). That same relationship exists for Schulman, Frank, and the Competitive Enterprise Institute, and the same class protections against conflicts-of-interest should govern their conduct. Beyond Schulman's obvious interest in maintaining his employment, Schulman has a "clear financial stake" in the Competitive Enterprise Institute's Center: it "pays [his] salary." *See Miller*, 2009 WL 1393488, at *2 n.3.

Furthermore, Frank and the Competitive Enterprise Institute also have financial and professional interests at stake: they "can only raise charitable donations necessary to remain afloat by demonstrating success," *see* ECF 924-4 (Frank Dec.) ¶24, and thus "deriv[e] value from creating a reputation through repeated" objections to class action settlements. *See* John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 Fla. St. U. L. Rev. 865, 881 (2012).

Although the Competitive Enterprise Institute's Center claims to receive "dozens of requests for *pro bono* representation," ECF 924-4 ¶24, it relies almost entirely on its own employees to file objections.[6] In the last nine years, their attorneys have filed at least 24 objections and taken 13 appeals in

[6] Having an attorney at the Center represent a colleague as an objector is an end-run around the rule that a *pro se* attorney objector to a class action settlement may not be awarded attorneys' fees for representing the interests of the class. *See In re Texaco Inc. Shareholder Derivative Litig.*, 123 F.Supp.2d 169, 172-74 (S.D.N.Y. 2000) (denying *pro se* attorney objector's request for attorneys' fees after successfully objecting to the attorneys' fees awarded pursuant to a settlement of a shareholders derivative action because the objection implicated the interests of other shareholders and objector was not entitled to receive fees for that representation); *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 817–18 (E.D. Wis. 2009) (denying *pro se* attorney objector's request for attorneys' fees; "considerable authority" states that a *pro se* attorney litigant may not recover fees because doing so creates a disincentive to obtain independent counsel, and "[t]his reasoning also applies to a *pro se* attorney objector

cases in which their *only* client(s) were Competitive Enterprise Institute employees and a board member. *See* Appendix A. Not only are these employee-objectors beholden to the Competitive Enterprise Institute and its Center, but the organization contractually prohibits them from independently controlling their objections. Decl. of Frank ¶18, filed in *In re Capital One Tel. Consumer Protection Act Litig.*, No. 15-1490 (7th Cir. June 10, 2015) (ECF 56-2 at 33) (noting the Center "when possible[ ] uses Center attorneys or board members who are class members to object" and "do[es] not represent clients who do not agree" that they cannot settle objections or that "retaining the Center might deprive clients of the most financially advantageous outcome"). Objections to class action settlements should be brought by class members *qua* class members, not by employees of a purported "public-interest objector" seeking to promote the interests of their organization rather than the best interests of the class.[7] *Cf.* Stephanie Mencimer, *The Supreme Court Is About to Hear the Case That Could Destroy Obamacare: Here are the unusual plaintiffs behind it*, Mother Jones, Feb. 9, 2015 (documenting questionable efforts by "libertarian Competitive Enterprise Institute, a think tank funded by big pharmaceutical firms, oil and gas outfits, the Koch brothers, Google, tobacco companies, and conservative foundations" to "recruit plaintiffs" to challenge the Affordable Care Act).[8]

That Frank and Schulman are advancing an ideology independent of the interests of the class is apparent in their latest filing. In attacking the Special Master, they contend that class representatives should have been provided minimal preparation for depositions, a reckless suggestion given the overall importance of a class representative's deposition and its intimidating nature, which for many laypersons may be their only encounter with the legal system. Here, for instance, Defendants deposed over a hundred

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in a class action settlement"). Whether representing each other or appearing *pro se*, the employment relationship and financial interests of the attorney-objector and the Competitive Enterprise Institute's Center ensure that the objector is not represented by independent counsel.

[7] Frank claims to be "a public-interest objector," ECF 924-4 (Frank Dec.) ¶24, but federal law permits no such thing. *See* Alon Klement & Robert Klonoff, Class Actions in the United States and Israel: A Comparative Approach, 19 Theoretical Inquiries L. 151, 174 (Jan. 2018) (observing that, unlike U.S. law, Israeli law affords public-interest groups standing to object to class settlements). Rather, only individuals with a direct stake in a class action settlement – class members themselves – have standing to object to that settlement. *See Low v. Trump Univ., LLC*, 881 F.3d 1111, 1117 (9th Cir. 2018). But here Schulman's stake in the litigation is tainted by the financial and professional interests of his employer, the Competitive Enterprise Institute, and his boss, Frank.

[8] Available at https://www.motherjones.com/politics/2015/02/king-burwell-supreme-court-obamacare/.

Named Plaintiffs, reflecting not only the difficulty of the process but also its high stakes. And, when it came to their clients, defense counsel did not hamstring themselves through minimal preparation, nor stint on the number of counsel meeting with and defending each of their witnesses. Providing zealous representation to those willing to undergo personal scrutiny in order to represent the interests of absent Anthem class members is exactly what is required of class counsel, and it is exactly what counsel did.

That Schulman and Frank are prioritizing their employer's ideology over Anthem class members is also apparent in another way: As this Court's process unfolds, Frank is publicly equating judicial inspection of a fee request with a finding of wrongdoing by counsel. *See* Ted Frank (@tedfrank), Twitter (May 12, 2018, 9:34 AM) ("Anthem hasn't taught some attorneys anything: $100M of overbilling in Petrobras class action settlement"). Such advocacy not only calls into question the integrity of the Rule 23(g) process in this high-profile case, it undermines class actions generally and negatively affects the public reputation of judicial proceedings. It is little wonder, then, that in lambasting the Special Master, Schulman and Frank continue to ask the Court to penalize Plaintiffs' Counsel, even though the Special Master, while disagreeing with certain aspects of Plaintiffs' fee request, found no misconduct.

All told, the Center-Donor-Frank-Schulman attorney-client representation poses a conflict of interest that is "indicative of a motive other than putting the interest of the class members first." *Kumar*, 2017 WL 2902898, at *4 n.4 (quoting *Dennis.*, 2013 WL 6055326, at *4 n.2 (citations and quotations omitted)). On its face Schulman's representation by his employer and supervisor taints his opposition to the Special Master's Report (as well as his overall objection), requiring that the Court take into consideration both Schulman and Frank's motives when evaluating their arguments and completing its review of the fee application. *Id.*

That they focus on reducing attorneys' fees, rather than the settlement itself, should not minimize the required level of judicial scrutiny—particularly when the Competitive Enterprise Institute may use its employee to appeal this Court's rulings on attorneys' fees, thus delaying important and valuable settlement benefits to the class. An independent, adequate objector or objector's counsel is obligated to weigh the value *to the class* of providing immediate relief against the risks and delays *to the class* of further litigation. But *this* objector and his attorney are conflicted and cannot fairly and adequately speak for the class.

III. CONCLUSION

Plaintiffs' Counsel devoted a significant, but necessary, amount of time to achieve an excellent result for the settlement class in this complex and risky case, and request a fee award commensurate with that effort, risk, and result. Under either the percentage-of-common fund or lodestar method, Plaintiffs should be awarded $37,950,000 in fees; $2,005,068.59 in reimbursement of litigation expenses, and a cost reserve of $132,000.

Respectfully Submitted,

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Dated: May 22, 2018

By: /s/ *Eve H. Cervantez*
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Plaintiffs' Steering Committee

Appendix A

Appendix

Competitive Enterprise Institute ("CEI") Employees and Board Members
(*In Alphabetical Order*)

Frank Bednarz, (attorney); John Berlau (senior fellow); William Chamberlain (attorney); Theodore Frank (director); Daniel Greenberg (attorney); William Haynes (board chairman of CEI); Melissa Holyoak (senior attorney); Sam Kazman (general counsel of CEI); Ryan Radia (research fellow, CEI); Adam Schulman (attorney); Erin Sheley (attorney); Anna St. John (attorney).

Objections and Appeals Filed by CEI Attorneys Solely on Behalf of CEI Employee or Board Member Clients
(*In Reverse Chronological Order, By Filing Date of Objection*)

- *In re Petrobras Securities Litig.*, No. 1:14-cv-09662-JSR, Dkt. 797 (S.D.N.Y. May 10, 2018) (St. John representing Haynes);
- *Cannon v. Ashburn Corp.*, No. 1:16-cv-01452-RMB, Dkt. 57 (D.N.J. Feb. 16, 2018) (Schulman representing Radia);
- *Ma v. Harmless Harvest, Inc.*, No. 2:16-cv-07102-JMA, Dkt. 18 (E.D.N.Y. Sept. 29, 2017) (Schulman representing St. John);
- *Campbell v. Facebook Inc.*, No. 4:13-cv-05996-PJH, Dkt. 243 (N.D. Cal. June 27, 2017) (Frank and Chamberlain representing St. John);
    - Appeal to Ninth Circuit, Dkt. 259 (Sept. 15, 2017) (Frank, St. John, and Schulman representing St. John);
- *Kumar v. Salov North America Corp.*, No. 4:14-cv-02411-YGR, Dkt. 157 (N.D. Cal. May 2, 2017) (Frank and Chamberlain representing Frank);
    - Appeal to Ninth Circuit, Dkt. 174 (Mar. 1, 2017) (Frank, Holyoak, and St. John representing Frank);
- *Saska v. The Metropolitan Museum of Art*, No. 650775/2013, Dkt. 137 (N.Y. Super. Ct. Jan. 27, 2017) (St. John representing herself);
- *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, No. 1:12-md-02358-SLR, Dkt. 171 (D. Del. Dec. 20, 2016) (Schulman representing Frank);

- Appeal to Third Circuit, Dkt. 174 (Mar. 1, 2017) (Frank and Schulman representing Frank);

- *Allen v. Similasan Corp.*, No. 3:12-cv-00376-BAS, Dkt. 215 (S.D. Cal. July 1, 2016) (Frank representing Bednarz);

- *In re: Subway Footlong Sandwich Marketing and Sales Practices Litig.*, No. 2:13-md-02439-LA, Dkt. 51 (E.D. Wisc. Dec. 15, 2015) (Schulman representing Frank);

  - Appeal to Seventh Circuit, Dkt. 68 (Mar. 24, 2016) (Frank representing himself);

- *In re Walgreen Co. Stockholder Litig.*, No. 1:14-cv-09786, Dkt. 53 (N.D. Ill. Nov. 5, 2015) (Holyoak representing Berlau);

  - Appeal to Seventh Circuit, Dkt. 75 (Dec. 17, 2015) (Holyoak and Frank representing Berlau);

- *In re Colgate-Palmolive Softsoap Antibacterial Hand Soap Marketing and Sales Practices Litig*., No. 1:12-md-02320-PB, Dkt. 100 (D.N.H. Aug. 10, 2015) (St. John representing herself);

  - Appeal to First Circuit, Dkt. 109 (Dec. 14, 2015) (St. John representing herself);

- *Wolf v. Red Bull GMBH*, No. 1:13-cv-08008-KPF, Dkt. 63 (S.D.N.Y. Apr. 3, 2015) (Frank representing himself);

- *In re Motor Fuel Temp. Sales Practices Litig.*, No. 2:07-md-1840-KHV, Dkt. 4808 (D. Kan. Mar. 23, 2015) (Frank representing himself, Schulman, and Holyoak);

  - Appeal to Tenth Circuit, Dkt. 4864 (Sept. 25, 2015) (Frank representing himself, Schulman, and Holyoak, with regard to their March 2015 objection);

- *In re Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809-EJD, Dkt. 70 (N.D. Cal. Aug. 8, 2014) (Frank representing himself and Holyoak);

  - Appeal to Ninth Circuit, Dkt. 87 (Apr. 27, 2015) (Frank and Schulman representing Frank and Holyoak);

- *Delacruz v. Cytosport, Inc.*, No. 4:11-cv-03532-CW, Dkt. 79 (N.D. Cal. Mar. 12, 2014) (Frank representing himself);

- *Poertner v. The Gillette Company*, No. 6:12-cv-00803-GAP, Dkt. 126 (M.D. Fla. Feb. 27, 2014) (Schulman representing Frank);

  - Appeal to Eleventh Circuit, Dkt. 172 (Sept. 15, 2014) (Schulman representing Frank);

- *Berry v. LexisNexis*, No. 3:11-cv-00754, Dkt 71 (E.D. Va. Aug. 16, 2013) (Schulman representing himself);
    - Appeal to Fourth Circuit, Dkt. 133 (Sept. 22, 2014) (Schulman representing himself);
- *Pearson v. NBTY, Inc.*, No. 1:11-cv-07972, Dkt. 95 (N.D. Ill. Aug. 1, 2013) (Holyoak and Bednarz representing Frank);
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    - Appeal to Seventh Circuit, Dkt. 308 (Oct. 4, 2016) (Holyoak representing Frank);
- *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. 310 (N.D. Cal. May 2, 2013) (Frank representing himself and Kazman);
    - Appeal to Ninth Circuit, Dkt. 445 (Mar. 27, 2014) (appealing denial of Frank's fee request) (Frank representing Kazman);
- *Pecover v. Electronic Arts*, No. 4:08-cv-02820-CW, Dkt. 404 (N.D. Cal. Dec. 10, 2012) (Frank and Holyoak representing Frank);
- *In re Pampers Dry Max Litig*., No. 1:10-cv-00301-TSB, Dkt. 60 (S.D. Ohio Aug. 29, 2011) (Schulman and Frank representing Greenberg);
    - Appeal to Sixth Circuit, Dkt. 75 (Oct. 20, 2011) (Schulman and Frank representing Greenberg);
- *In re: HP Laserjet Printer Litig.*, No. 8:07-cv-00667-AG, Dkt. 233 (C.D. Cal. Jan. 22, 2011) (Frank representing himself);
- *Ercoline v. Unilever United States, Inc*., No. 2:10-cv-01747-SRC, Dkt. 31 (D.N.J. Dec. 20, 2010) (Frank representing himself);
- *Lonardo v. The Travelers Indemnity Company*, No. 1:06-cv-00962-KMO, Dkt. 191 (N.D. Ohio Mar. 3, 2010) (Frank representing Greenberg).