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19  
 20 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 21 **SAN JOSE DIVISION**

22 *In Re Anthem, Inc. Data Breach Litigation*

Case No: 15-md-02617-LHK (NC)

23 **PLAINTIFFS' OPPOSITION TO MOTION OF**  
**OBJECTOR ADAM E. SCHULMAN TO**  
 24 **APPOINT SPECIAL MASTER**

25 Date: April 5, 2018  
 Time: 1:30 p.m.  
 Judge: Lucy H. Koh  
 26 Crtrm: 8, 4th Floor

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## INTRODUCTION

1  
2 The Court should reject Objector Adam Schulman's request that the Court take the  
3 extraordinary step of appointing a special master to determine the common fund attorneys' fees  
4 requested by Class Counsel here. Objector Shulman's ("Objector") proposal for satellite litigation  
5 entailing an extensive audit of Counsel's daily time records by a special master is contrary to the legal  
6 standards that apply to Plaintiffs' common fund fee request, and would result in unnecessary and  
7 unwarranted delay of a case that all parties and the Court have worked very hard to move swiftly to  
8 resolution. This Court is best equipped to apply the standards that govern Plaintiffs' fee motion on the  
9 basis of the record before it, and should not convert this motion into "second major litigation," *Hensley*  
10 *v. Eckerhart*, 461 U.S. 424, 437 (1983), appointing a special master to act as a "green-eyeshade  
11 accountant[]" seeking "auditing perfection." *Fox v. Vice*, 563 U.S. 826, 838 (2011).

12 Objector provides no justification for such an extraordinary additional process. He ignores the  
13 governing legal standards that apply to common fund requests. Rhetoric aside, he identifies no billing  
14 improprieties that would raise serious questions about Counsel's fee request and which might make the  
15 services of a special master useful to the Court.

16 Objector's repeated concern that the fee request in this case is somehow "excessive" in  
17 proportion to the settlement results is exactly the type of issue this Court is well-equipped to resolve  
18 upon review of the record, and in light of this Court's extensive experience managing this case. In  
19 service of his argument, Objector mischaracterizes the value of this settlement as only monetary,  
20 ignoring the value of the business practice changes to improve Anthem's cybersecurity and the value of  
21 the extended credit monitoring and fraud resolution assistance, all designed to protect class members'  
22 security and privacy into the future. Assessing the proportionality of the fee award with respect to the  
23 actual value of the settlement requires no assistance from a special master.

24 Objector uses this motion as an opportunity to amplify and reiterate objections that, like the  
25 issue of proportionality, require no detailed factual analysis that would justify the services of a special  
26 master. For example, the question of whether this Court should compensate Counsel for staff and  
27 contract attorney time as attorneys or as a cost is a *legal* issue. Similarly, this Court does not need a  
28 special master to determine customary market rates for attorneys, with which the Court is quite

1 familiar. Likewise, the issue of whether counsel have fee-sharing arrangements needs no  
2 “investigation;” there are no fee-sharing arrangements among Co-Lead Counsel and the Plaintiffs’  
3 Steering Committee firms (together, “PSC firms”) or between the PSC firms and the various MDL  
4 firms to which Co-Lead counsel assigned work on discrete tasks. *See* Declarations In Opposition  
5 (“Opp Decl.”) To Objector’s Motion For Appointment of Special Master of Eve H. Cervantez (¶2),  
6 Andrew N. Friedman (¶2), Michael W. Sobol (¶2), and Eric Gibbs (¶2), filed herewith.

7 Objector’s contention that Counsel’s detailed summaries of time and rates are insufficient is  
8 contrary to governing law and this Court’s published guidelines for class actions. His only specific  
9 argument for the alleged necessity to review detailed daily time records is speculation that Counsel  
10 might have churned time in this case by conducting discovery or document review in the three months  
11 after settlement. This Court can easily resolve that issue without a special master: Counsel confirms  
12 that no discovery or document review work continued post-settlement. Cervantez Opp. Decl. ¶5.

13 Objector’s criticisms of the amount of time spent on depositions, class certification, and  
14 settlement are divorced from the record and reality of this complex case, and the excellent result  
15 achieved through Counsel’s many thousands of hours of necessary work. This Court is far more  
16 familiar with the progress and requirements of this litigation than he is, and is more familiar with the  
17 litigation than any special master would be. In effect, Objector contends that Counsel should have  
18 litigated this case on the cheap, rather than devoting the resources (and taking the risks) necessary to  
19 litigate it well and protect the Class. The suggestion -- made with no empirical support whatsoever --  
20 that Counsel in this case performed any of the work at issue to run up bills rather than because the work  
21 was necessary to litigate this case *well*, is belied by the record before this Court.

22 Finally, this motion is improper and untimely. Objector Schulman has already filed timely  
23 objections, and should not be allowed a second bite at the apple (and a third, in the form of a reply).  
24 The motion was filed by an attorney employed by an organization dedicated to objecting to class  
25 actions and class action fee awards (represented by another attorney employed there), who was aware  
26 of and should have adhered to the carefully crafted schedule created by this Court, but did not. That  
27 schedule was imposed to ensure the swift resolution of the entire case. ECF 903 (objections due  
28 December 29, 2017; response due January 25, 2018; final approval hearing February 1, 2018). This

1 motion seeks to impose at least a two-month delay in final closure on this case (followed by further  
2 extensive delays during satellite fee litigation), when there is no apparent reason for objector's failure  
3 to include these arguments in his timely objection, to request leave to file a motion, or to file the motion  
4 by the objection deadline. Should the Court decide to consider this motion, Plaintiffs have provided  
5 herein substantive responses to the issues raised by Objector. However, Plaintiffs respectfully request  
6 that this motion be denied as untimely and moot in light of the Court's long-standing schedule for  
7 deciding final approval and attorneys' fees.

## 8 ARGUMENT

### 9 **I. This Court Can Fulfill Its Usual Role of Assessing the Reasonableness of the Proposed** 10 **Common Fund Fee Award in this Case Without Taking the Exceptional Measure of** 11 **Appointing a Special Master to Review Time Records and Conduct Satellite Litigation.**

#### 12 **A. Objector Ignores the Standards this Court Should Apply to Determine the** 13 **Common Fund Fee Request.**

14 Objector argues at length that this Court has the discretion to appoint a special master (ECF 929  
15 at 8-9) ("Mot."), but Counsel do not dispute that Federal Rule of Civil Procedure 23(h) generally gives  
16 the Court discretionary authority to refer the approval of a fee award in a class action settlement to a  
17 special master or magistrate judge. The question is not whether a delegation is possible, but whether  
18 taking such unusual action is warranted here. Objector's argument that a special master is needed to  
19 engage in a close examination of detailed time records ignores the standard that this Court should apply  
20 to Plaintiffs' fee request.

21 As Plaintiffs explained in their opening fee brief, this Court should exercise its discretion to  
22 employ the percentage-of-the-fund method of assessing fees in this common fund case. ECF 916-7 at  
23 2-16 (Attorneys' Fees Brief); *See, e.g., In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942  
24 (9th Cir. 2011) (in common fund cases, courts may award "a percentage of the common fund in lieu of  
25 the often more time-consuming task of calculating the lodestar"). Courts favor using the percentage-of-  
26 the-fund method in part because it is administratively simpler and less burdensome than a lodestar  
27 analysis. *Id.*; *Perkins v. LinkedIn Corp.* 2016 WL 613255, at \*17 (N.D. Cal. Feb. 16, 2016) ("[I]t is  
28 well established that '[t]he lodestar cross-check calculation need entail neither mathematical precision  
nor bean counting'") (quoting *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 264 (N.D. Cal.



1 2015)); *Covillo v. Specialtys Cafe*, 2014 WL 954516, at \*6 (N.D. Cal. Mar. 6, 2014) (same); *Young v.*  
2 *Polo Retail, LLC*, 2007 WL 951821, at \*6 (N.D. Cal. Mar. 28, 2007) (“In contrast to the use of the  
3 lodestar method as a primary tool for setting a fee award, the lodestar cross-check can be performed  
4 with a less exhaustive cataloging and review of counsel’s hours”); *In re Thirteen Appeals Arising Out*  
5 *of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (“In complex litigation—  
6 and common fund cases, by and large, tend to be complex—the POF approach is often less burdensome  
7 to administer than the lodestar method... Rather than forcing the judge to review the time records of a  
8 multitude of attorneys in order to determine the necessity and reasonableness of every hour expended,  
9 the POF method permits the judge to focus on ‘a showing that the fund conferring a benefit on the class  
10 resulted from’ the lawyers’ efforts.”) (citations omitted). Thus, the percentage-of-the-fund method  
11 respects the Supreme Court’s admonition that “[a] request for attorney’s fees should not result in a  
12 second major litigation.” *Hensley*, 461 U.S. at 437; *In re NASDAQ Market-Makers Antitrust Litig.*, 187  
13 F.R.D. 465, 485 (S.D.N.Y. 1998) (percentage-of-the-fund’s “ease of administration” avoids “collateral  
14 disputes over billing” and thus “better respects” *Hensley*).

15 When employing the lodestar cross-check to ensure that the percentage of the fund is not  
16 grossly disproportionate to the amount of time counsel devoted to the case, it is well established that a  
17 rough approximation of the lodestar value is all that is required. See *Ellsworth v. U.S. Bank, N.A.*, 2015  
18 WL 12952698, at \*4 (N.D. Cal. Sept. 24, 2015) (“After applying the percentage method, courts  
19 typically *roughly calculate the lodestar* as a ‘cross-check to assess the reasonableness of the percentage  
20 award.’”) (emphasis added; citation omitted); *De Mira v. Heartland Employment Serv., LLC*, 2014 WL  
21 1026282, at \*4 (N.D. Cal. Mar. 13, 2014) (“In cases where courts apply the percentage method to  
22 calculate fees, it is common for courts to use a *rough calculation* of the lodestar as a cross-check to  
23 assess the reasonableness of the percentage award”) (emphasis added); *Fernandez v. Victoria Secret*  
24 *Stores, LLC*, 2008 WL 8150856, at \*9 (C.D. Cal. July 21, 2008) (“In cases where courts apply the  
25 percentage method to calculate fees, they generally also use a *rough calculation* of the lodestar as a  
26 cross-check to assess the reasonableness of the percentage award.”) (emphasis added); *id.* at \*14  
27 (“[T]he lodestar ‘cross-check’ need not be as exhaustive as a pure lodestar calculation.”); *Polo Retail,*  
28 2007 WL 951821, at \*6 (“In contrast to the use of the lodestar method as a primary tool for setting a fee

1 award, the lodestar cross-check can be performed with a less exhaustive cataloging and review of  
2 counsel’s hours.”); *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305-07 (3d Cir. 2005) (appropriate to  
3 use only an “abridged lodestar analysis” when cross-checking a percentage-of-the-fund award; “The  
4 lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.”); *In re*  
5 *Enron Corp. Securities, Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 752 (S.D. Tex. 2008)  
6 (precision not required; “Instead, the court can measure the claimed lodestar by its own familiarity with  
7 the case.”).

8 To require more exacting review would undermine the efficiencies that favor the percentage-of-  
9 the-fund method in the first place. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 867 (E.D.  
10 La. 2007) (“In recognition of the noted disadvantages of the lodestar method as the principle means for  
11 determining attorneys’ fees, such as the taxing of judicial resources by examining every time entry and  
12 billing rate for each attorney, a lodestar analysis which is rough and more abbreviated is appropriate for  
13 a cross check . . .”). As one court put it, “[w]hen the lodestar is used [as a cross-check], the focus is  
14 not on the ‘necessity and reasonableness of every hour’ of the lodestar, but on the broader question of  
15 whether the fee award appropriately reflects the degree of time and effort expended by the attorneys. . .  
16 . Such a results-oriented focus ‘lessens the possibility of collateral disputes [regarding time records]  
17 that might transform the fee proceeding into a second major litigation.’” *In re Tyco Int’l, Ltd.*  
18 *Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007) (quoting *In re Thirteen Appeals*, 56 F.3d at  
19 307) (second alteration in original).

20 To justify his request for a special master, Objector asks for auditing perfection, rather than the  
21 rough comparative calculation which is all that the law requires. For these reasons, *In re Johnson &*  
22 *Johnson Derivative Litigation*, 900 F. Supp. 2d 467 (D.N.J. 2012), upon which he relies (cited in Mot.  
23 at 11), is inapposite. In the context of that injunctive-only settlement, the court held that the  
24 percentage-of-the-fund analysis could not be applied and that, instead, a traditional lodestar analysis,  
25 with the court “engag[ing] in . . . [a] searching and thorough” examination of counsel’s time records,  
26 was required. *Id.* at 498; *id.* at 497 (acknowledging that, where used for cross-check purposes, “an  
27 abbreviated version of the traditional lodestar analysis” is appropriate); *see also Minor v. Christie’s,*  
28 *Inc.*, 2011 WL 902235 (N.D. Cal. Jan. 29, 2011) (cited in Mot. at 8) (post-trial fee dispute referred to

1 magistrate judge to calculate plaintiff's and defendant's competing fees using lodestar, not percentage  
2 of fund, method).

3 Even when a court determines that the circumstances of a case warrant employing the lodestar  
4 calculation used in fee-shifting cases, the Supreme Court has warned: "trial courts need not, and indeed  
5 should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is  
6 to do rough justice, not to achieve auditing perfection." *Fox*, 563 U.S. at 838 (emphasis added).  
7 Accordingly, the Ninth Circuit has repeatedly warned that with respect to either method of fee  
8 calculation: "[r]easonableness is the goal, and mechanical or formulaic application of either method,  
9 where it yields an unreasonable result, can be an abuse of discretion." *In re Coordinated Pretrial*  
10 *Proceedings in Petroleum Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997); *Stanger v. China*  
11 *Elec. Motor, Inc.*, 812 F.3d 734, 739 (9th Cir. 2016); *Fischel v. Equitable Life Assur. Society of U.S.*,  
12 307 F.3d 997, 1007 (9th Cir. 2002). And where this Court has previously determined that the lodestar  
13 method is appropriate (based on circumstances that do not apply to this case), it has ably conducted that  
14 analysis itself without resorting to outside help. *See, e.g., In re High-Tech Employee Antitrust Litig.*,  
15 2015 WL 5158730, at \*9 (N.D. Cal. Sept. 2, 2015).

16 Consistent with the governing legal standards, this District does not require that class counsel  
17 always submit daily time records to support a common fund fee request. *See* Northern District of  
18 California's Procedural Guidance for Class Action Settlements ("All requests for approval of attorneys'  
19 fees awards must include detailed lodestar information, even if the requested amount is based on a  
20 percentage of the settlement fund. Declarations of class counsel as to hours spent on various categories  
21 of activities related to the action, together with hourly billing rate information may be sufficient,  
22 provided that the declarations are adequately detailed."); *LinkedIn Corp.*, 2016 WL 613255, at \*17;  
23 *Polo Retail*, 2007 WL 951821, at \*6. Declarations from counsel without daily time records have  
24 frequently been approved as sufficient in the context of the lodestar cross-check. *See, e.g., LinkedIn*  
25 *Corp.*, 2016 WL 613255, at \*17 "[C]ourts may rely on summaries submitted by the attorneys and need  
26 not review actual billing records." (quotations and citations omitted); *id.* ("In sworn declarations, Class  
27 Counsel has provided detailed summaries of their time, demonstrating both the number of hours spent  
28 by specific individuals on the necessary work, and the nature of the work performed. Class Counsel's

1 submission, under the circumstances of this case, is sufficient for the Court to cross-check Class  
2 Counsel’s lodestar.”); *Polo Retail*, 2007 WL 951821, at \*6; *see also In re Immune Response Sec. Litig.*,  
3 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007) (“Although counsel have not provided a detailed  
4 cataloging of hours spent, the Court finds the information provided to be sufficient for purposes of  
5 lodestar cross-check”); 5 William B. Rubenstein, *Newberg on Class Actions* §15:86 at 331 (5th ed.  
6 2015) (explaining that “courts in nearly every circuit have held that, for the purposes of a cross-check,  
7 they need not scrutinize each individual billed hour, but may instead focus on the general question of  
8 whether the fee award appropriately reflects the degree of time and effort expended by the attorneys”);  
9 *id.* 331-32 n.13 (collecting cases). As this District recognizes:

10 All that should be required is sworn declarations from the attorney(s) in charge of billing  
11 records for the case attesting to (1) the experience and qualifications of the attorneys who  
12 worked on the case; (2) those attorneys’ customary billing rates during the pendency of the  
13 case; and (3) the hours reasonably expended (reduced if necessary in the exercise of  
professional billing judgment) by those attorneys in prosecuting the case.

14 *Polo Retail*, 2007 WL 951821, at \*6. Counsel provided that, and more. ECF 916-9 (Declaration of  
15 Eve H. Cervantez in Support of Plaintiffs’ Motion for an Award of Attorneys’ Fees) (“Cervantez Fee  
16 Decl.”) at ¶¶21-55 & Exs. 1-3.

17 Under the prevailing standards, where, as here, the Court is well-acquainted with the litigation  
18 and the time and effort Counsel have devoted to the successful conclusion of this case, the Court is  
19 perfectly suited to determine the appropriate fee award under either method of calculation. *E.g.*,  
20 *LinkedIn Corp.*, 2016 WL 613255, at \*13-17; *In re High-Tech*, 2015 WL 5158730, at \*9-14; *see also*,  
21 *e.g.*, *Rite Aid Corp.*, 396 F.3d at 308 (“[W]e entrust these matters to the sound discretion of Article III  
22 trial judges to know when they can adequately protect the class’s fiduciary interest or when they need  
23 an outsider to aid them in that role.”); *In re Enron Corp.*, 586 F. Supp. 2d at 811 (the “appointment of a  
24 guardian . . . or special master [is not] necessary here, since the Court’s personal oversight of all aspects  
25 of this case provides a strong basis for evaluating counsel’s fee request.”); *In re WorldCom, Inc. Sec.*  
26 *Litig.*, 2004 WL 2591402, at \*21 (S.D.N.Y. Nov. 12, 2004) (where the percentage of the settlement  
27 fund falls within the range of reasonable fee awards, “[t]here is certainly no need to retain an  
28 independent guardian to undertake a further review of Lead Counsel’s time records.”). There can be no

1 dispute that this Court carefully managed the progress of this MDL, and is very familiar with the effort  
2 made by Counsel to litigate this case quickly and well.

3 Against the overwhelming weight of authority, Objector argues only that “the lodestar ‘serves  
4 little purpose as a cross-check if it is accepted at face value.’” Mot. at 10. But no one is suggesting  
5 that this Court would or should accept Plaintiffs’ fee request “at face value” without any review or  
6 consideration of the various objections raised. *See also* Mot. at 14 (expressing fear that court will  
7 “rubber stamp” settlement or uncritically sign plaintiffs’ proposed order). As discussed below, the  
8 existing record is more than sufficient for this Court to be assured, upon its own review and based on its  
9 great familiarity with the case, that Counsel reasonably billed for time necessarily spent to litigate this  
10 case well for the benefit of the class.

11 **B. A Special Master Will Result in Inefficient Satellite Fee Litigation and Delay.**

12 Objector makes much of the 2003 amendments to Rule 23(h) (Mot. at 8), but fails to  
13 acknowledge the specific warning provided by the advisory committee in the notes to that Rule: “[i]n  
14 deciding whether to direct submission of such questions to a special master or magistrate judge, *the*  
15 *court should give appropriate consideration to the cost and delay that such a process might entail.*”  
16 Fed. R. Civ. P. 23, adv. comm. notes, 2003 amdts. (emphasis added); *see also* David F. Herr, *Manual*  
17 *for Complex Litig., Fourth* §21.727 (2017) (“Considerations of timing and costs . . . might affect a  
18 decision to refer the matter” to a special master); *In re Motor Fuel Temperature Sales Practices Litig.*,  
19 2016 WL 4445438, at \*13 n.34 (D. Kan. August 24, 2016) (appointment of a special master would  
20 “cause additional delay and expense to the parties, and would be inconsistent with the Court’s  
21 obligation to dispose of the fee issues in a just, speedy and inexpensive manner”); *In re Enron Corp.*,  
22 586 F. Supp. 2d at 812 (“[A]n appointment [of a guardian] would not only be redundant, but would  
23 further increase costs and delay distribution to the class.”).

24 These are not hypothetical concerns. If anything, *Johnson & Johnson*, 900 F. Supp. 2d 467,  
25 relied upon by Objector, is a cautionary tale. Mot. at 11. That referral to a special master resulted in a  
26 138-page report, which was not reviewed by the district court until over a year after the special master  
27 had been appointed. *See In re Johnson & Johnson Derivative Litig.*, 2013 WL 11228425 (D.N.J. June  
28 13, 2013); *In re Johnson & Johnson Derivative Litig.*, 2013 WL 6163858 (D.N.J. Nov. 25, 2013).

1 Comparable proceedings in this case would equal roughly 50% of the entire time spent litigating the  
2 merits of this case.<sup>1</sup>

3 And it doesn't end with the special master's report. A special master's conclusions of law are  
4 reviewed by this Court *de novo*, and, absent agreement to a more deferential standard, so are her  
5 findings of fact. Fed. R. Civ. P. 53(f)(3), (4). Objector thus asks the Court to delay resolution, first,  
6 pending hearing on this motion in April 2018, and second, pending the result of an extended secondary  
7 litigation over fees in front of the special master, and third, review *de novo* by this Court. Referral to a  
8 special master in these circumstances would undeniably require additional time and resources from  
9 both the parties and the Court.

10 The appointment of a special master to engage in the type of litigation advocated by Objector  
11 will also be expensive. He attempts to downplay the cost by arguing that the special master's fee may  
12 be taken from any fee award to Class Counsel (though acknowledging that this cost-shifting may later  
13 need to be modified, presumably if the Court fails to find that Counsel has engaged in any  
14 "unreasonable behavior"). Mot. at 16-17. Objector ignores the additional costs that will necessarily  
15 include the resources expended by this Court in supervising this extended collateral litigation, for  
16 which no party could compensate. It is not in the interest of the parties or the Court to delay final  
17 resolution of this case further than is absolutely necessary, and for all of the reasons set forth below in  
18 Section II, none of the general or specific objections raised here justify the additional satellite litigation  
19 Objector requests.

20 **II. No Exceptional Circumstances Warrant the Appointment of a Special Master to Perform**  
21 **a "Lodestar Accounting" of Counsels' Fee Request.**

22 Given the legal standard for approving common fund fee requests and the delay and cost that  
23 would be engendered by the satellite litigation suggested by Objector, only truly exceptional  
24 circumstances warrant appointment of a special master. Objector's general belief that district courts'  
25 supervision of the class action settlement approval process is insufficient to protect class member

26 <sup>1</sup> Indeed, Objector advocates not just appointing a special master to review the existing record, but  
27 extensive litigation before that individual, including additional factual investigation (Mot. at 9),  
28 appointing guardian(s) ad litem and additional "adversarial presentation." Mot. at 13-15. This level of  
auxiliary litigation is directly contrary to the Supreme Court's admonition that the resolution of a fee  
request *not* become second litigation with a life of its own. *Hensley*, 461 U.S. at 437.

1 interests -- which would apply according to Objector's logic to *every* class action -- is neither valid nor  
2 sufficient to trigger the appointment of a special master. Objector's motion (and earlier objection),  
3 while full of rhetoric about perceived "billing irregularities," fails to point to any actual "irregularities,"  
4 and offers no case-specific or factual justification for appointment of a special master here. Objector  
5 largely incorporates his prior objections, arguing that a special master is justified because of Plaintiffs'  
6 alleged "excessive lump sum fee request," and because Plaintiffs' billing evidence was purportedly  
7 insufficiently detailed, suggesting "lurking questions" about overbilling. Mot. at 9, 10. Plaintiffs  
8 explain below why the record before this Court is more than sufficient to dispose of all of Objector's  
9 concerns, which the Court is well-equipped to resolve in the proper context, namely, when ruling on  
10 Schulman's Objection to Plaintiffs' Attorneys' Fees Request (ECF 924).

11 **A. Objector Has Identified No Evidence of Billing Impropriety or Any Other**  
12 **Infringement of Class Members' Interests, Because There Is None.**

13 There is absolutely no indication that Counsel's fee application here suffers from the perceived  
14 irregularities that have prompted some trial courts to enlist the assistance of a special master. Objector's  
15 suggestion that class member interests have not been protected is a hypothesis divorced from the reality  
16 of this case, in which Lead Counsel assigned and supervised all work performed for this complex case  
17 under tight deadlines, collected contemporaneously-kept billing records from counsel on a monthly  
18 basis, provided detailed summaries and task-by-task breakdown of the work performed and why it was  
19 necessary, and exercised appropriate billing judgment to exclude time and reduce rates. Cervantez Fee  
20 Decl. (ECF 916-9) at ¶¶44, 46-47. Indeed, prior to submitting the detailed time summaries to this  
21 Court, Co-Lead Counsel personally reviewed, twice, *all* of the day-by-day time records in this case, and  
22 cut substantial time, corrected errors, and reduced rates. *Id.* at ¶¶46-47; *see also* Cervantez Opp. Decl.  
23 at ¶6.

24 Objector contends that, because a special master was appointed to evaluate contract attorney  
25 rates in *State Street*, a special master is likewise required here for the same purpose, but Objector  
26 ignores the context of the special master's appointment in that case. Mot. at 11 (citing *Arkansas*  
27 *Teacher Ret. Sys. v. State Street Bank & Tr. Co.*, 232 F. Supp. 3d 189, 191-192 (D. Mass. 2017)). In  
28 *State Street*, the appointment of the special master followed class counsel's acknowledgement to the

1 court that the total attorney lodestar in their initial fee submission (which had been used solely for  
 2 lodestar cross-check purposes) inadvertently was over-stated due to mistaken double-counting of time  
 3 worked by certain contract or staff attorneys who were paid for or employed at different times by more  
 4 than one firm under a cost-sharing arrangement. *Id.* at 191-92.<sup>2</sup> The parties in *State Street* immediately  
 5 disclosed the error to the court once it was discovered shortly after the final approval hearing, and none  
 6 objected to the appointment of a special master. *See State Street*, D. Mass. Case No. 11-cv-10230-  
 7 MLW, Dkt. Nos. 128, 129, 131 (consenting to appointment of special master). Here, to the contrary,  
 8 there is no suggestion that Counsel duplicated any amount of the lodestar, inadvertently or otherwise.  
 9 With respect to appropriate contract attorney billing rates, as discussed below, this Court is familiar  
 10 with the customary market rates for attorneys and does not need a special master to determine those.<sup>3</sup>

11 Moreover, in other cases, there was no adversarial process for adjudication of the class action  
 12 fee request because there were no objectors. For example, in *In re Continental Illinois Securities*  
 13 *Litigation*, 962 F.2d 566 (7th Cir. 1992), upon which Objector relies for the proposition that referral to  
 14 a magistrate judge may be appropriate because a fee request is “non-adversarial,” the court noted that  
 15 because no class member had objected, “the lawyers had no opponent in the district court and they have  
 16 none here.” *Id.* at 573. Likewise, there were no objectors during the trial court’s initial evaluation of  
 17 the fee request in the *State Street* case heavily relied upon by Objector. *See* ECF 924-7 (Frank Decl.  
 18 Ex. 3) at 28:19. Here, however, Objector and others have commented on, supported, and objected to the

19 \_\_\_\_\_  
 20 <sup>2</sup> Class counsel in *State Street* had initially sought (and been awarded) the requested 25% fee upon  
 21 consideration of a previously calculated multiplier of 1.8, which rose to 2.0 once the duplicated  
 22 attorney lodestar was discovered and removed. *See State Street*, D. Mass. Case No. 11-cv-10230-  
 23 MLW, Dkt. No. 116 (November 10, 2016 letter from class counsel to court). Here, Class Counsel are  
 24 effectively seeking a *negative* multiplier. Cervantez Fee Decl. (ECF 916-9) ¶¶21, 49. In these  
 circumstances, any minor discrepancies in Class Counsel’s lodestar calculation would not provide a  
 basis for questioning the overall reasonableness of the fees requested. *See supra* at Section I.A  
 (discussing the appropriately “rough” calculus when conducting a lodestar cross-check).

25 <sup>3</sup> Moreover, as will be explained in Plaintiffs’ specific responses to Objector Schulman’s Objection in  
 26 their Reply Brief in support of their Motion for Attorneys’ Fees, Objector’s suggestion that the contract  
 27 and staff attorney rates at issue in either *State Street* or this case are not supported by Class Counsel’s  
 28 billing practices is simply wrong. In both cases, the undisputed evidence confirms that Lieff Cabraser  
 charges clients these rates. *See, e.g.*, ECF 916-31 (Declaration of Michael W. Sobol In Support of  
 Plaintiffs’ Motion for Attorneys’ Fees) at ¶24; ECF 924-7 (Frank Decl. Ex. 3, *State Street* Trans.) at  
 92:21-93:6.



1 settlement and fee request at issue — including through counsel. *See, e.g.*, Frank Decl. ¶¶5-8.

2 Objectors *have* voiced their concerns with respect to the fee request, ensuring that the fee proceedings  
3 are sufficiently adversarial.

4 Objector suggests throughout his motion that the mere objective amount of the fee request  
5 should trigger suspicion (the “excessive lump-sum fee request”). Mot. at 9.<sup>4</sup> But the size of a fee  
6 request is not “prima facie” evidence of *unreliability* or *impropriety*. It is only by ignoring the value to  
7 class members of the business practice changes to improve Anthem’s cybersecurity, and the credit  
8 monitoring services and fraud resolution services to protect them from any potential misuse of their  
9 personal information, and focusing *only* on the amount of monetary relief, that Objector describes the  
10 fee request as “excessive” (and even then he is wrong). But this is contrary to governing law, in which  
11 this Court should consider the whole value of the settlement to the class, which is in the billions. ECF  
12 916-7 at 3-7 (Fee Brief); 916-9 at ¶¶9-10, 12, 14-20 (Cervantez Fee Decl.). And, on the other side of  
13 the equation, the fee request in this case does not represent *any* compensation above work actually  
14 performed in this case (and in fact, reflects a negative multiplier).

15  
16 **B. Objector Repeats Objections That Are Not Fact-Intensive Inquiries Requiring the  
Assistance of a Special Master.**

17 Objector uses the motion for a special master to amplify and reiterate several of his objections  
18 to the fee request that do not require fact intensive inquiries to resolve at all, and therefore provide no  
19 justification for the request for a special master, even on his own terms. Mot. at 10.

20 Objector argues that contract and staff attorneys should be treated as “costs” rather than as  
21 attorneys, and that class counsel should recover no more than the amounts these attorneys were paid,  
22 regardless of skill level, experience, or even the overhead associated with employing them. Mot. at 10  
23 (citing Schulman Obj. at 18-23). This is a legal issue for the Court to decide, and requires no assistance  
24 from a special master. In any event, as Counsel will explain further in their Reply in support of the  
25 Motion for Attorneys’ Fees, courts routinely recognize the inclusion of contract attorneys in class  
26 counsel’s lodestar at the reasonable market rate for their services. *See, e.g., Charlebois v. Angels*

27  
28 <sup>4</sup> The use of “lump-sum” again ignores that the commonly used percentage-of-the-fund methodology  
could always be described as a “lump-sum.” *Supra*, at Section I.A.

1 *Baseball LP*, 993 F. Supp. 2d 1109, 1124 (C.D. Cal. 2012) (agreeing with “other courts [that] have  
2 found that the hours of contract attorneys — who . . . are not counsel of record—nonetheless merit  
3 inclusion in the lodestar hours”); *In re AOL Time Warner S'holder Derivative Litig.*, 2010 WL 363113,  
4 at \*26 (S.D.N.Y. Feb. 1, 2010) (“The Court should no more attempt to determine a correct spread  
5 between the contract attorney’s cost and his or her hourly rate than it should pass judgment on the  
6 differential between a regular associate’s hourly rate and his or her salary.”). For purposes of this  
7 motion, nothing about the resolution of this legal issue requires extensive work examining detailed  
8 daily time records rather than the existing detailed summaries already submitted by counsel.

9        Objector also contends that a special master is required to audit “hourly rates for document  
10 review time” (Mot. at 10 citing Shulman Obj. at 18-22). This Court is frequently called upon to  
11 determine reasonable market rates in assessing fee requests, and is very familiar with market rates in  
12 the Northern District of California. Moreover, Plaintiffs provided extensive firm-by-firm support for  
13 their requested rates (ECF 916-9, Cervantez Fee Decl. Ex. 3), and for their overall blended rate, which  
14 falls well below the blended rate found reasonable in other cases. ECF 916-7 at 20 (Fee Brief). In  
15 short, the reasonableness of rates is an issue well within this Court’s expertise and purview without  
16 involving a special master. *See, e.g., In re High-Tech*, 2015 WL 5158730, at \*9.

17        Objector also argues that a special master is necessary “to investigate any fee sharing  
18 arrangements between firms and to recommend an[] apportionment of the ultimate fee award.” Mot. at  
19 12. No “investigation” by a special master is necessary. There are no fee sharing agreements among  
20 Co-Lead Counsel, among Co-Lead/PSC members, or between Co-Lead/PSC members and any other  
21 Plaintiffs’ attorneys. Cervantez Opp. Decl. ¶2; Friedman Opp. Decl. ¶2; Sobol Opp. Decl. ¶2; Gibbs  
22 Opp. Decl. ¶2. There are thus no questions regarding incentives or conflicts of interest such  
23 arrangements in other cases have raised. *Cf. In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216 (2d  
24 Cir. 1987) (invalidating fee-sharing arrangement where counsel advancing funds for litigation expenses  
25 were entitled to threefold return on that investment); *see also In re: High Sulfur Content Gasoline*  
26 *Prods. Liab. Litig.*, 517 F.3d 220 (5th Cir. 2008) (rejecting lead counsel’s allocation plan where, among  
27 other things, it was approved in an *ex parte* hearing without notice to the other plaintiffs’ attorneys, the  
28

1 allocations were sealed, counsel were prohibited from disclosing their fees, and the fee award checks  
2 included a full release).

3 Where, as here, there is no plan of allocation that would give rise to any concerns and where  
4 there is no present dispute among Plaintiffs' counsel regarding the distribution of fees (indeed, final  
5 relative lodestars cannot yet be determined, Cervantez Opp. Decl. at ¶4), the question of allocation is  
6 premature, and courts routinely refuse to interfere. *See Motor Fuel*, 2016 WL 4445438, at \*6 n.16  
7 (rejecting objector Schulman's request that the court allocate attorney's fees among class counsel  
8 "absent an indication that plaintiffs' counsel are dissatisfied with their agreement regarding fee  
9 allocation"); *Murphy Oil*, 472 F. Supp. 2d at 867-70 ("The Court will leave the apportionment of this  
10 award up to the [Plaintiffs' Steering Committee] attorneys themselves. [Citations.] If they are unable  
11 to agree upon the apportionment, the Court will appoint a Special Master . . ."); *Batchelder v. Kerr-*  
12 *McGee Corp.*, 246 F. Supp. 2d 525, 534 (N.D. Miss. 2003) ("The award of attorneys' fees in this case  
13 is in an aggregate amount, with distribution among the various firms and attorneys to be made by  
14 agreement among class counsel. [citation omitted] In the event that class counsel cannot agree to an  
15 equitable distribution between themselves, the court can then appoint a Special Master . . . to make both  
16 a report to the court and recommendation as to how the funds should be distributed.").

17 **C. None of Objector's Expressed Concerns Regarding "Overbilling" Warrants**  
18 **Review by a Special Master of More Detailed Daily Time Records.**

19 Objector apparently believes that the Court should view with skepticism any large fee request,  
20 because, he believes, it is not possible that experienced counsel should have spent this much time  
21 litigating this case. This Court is in a far better position to understand the complexity of this case and  
22 the work required to bring it to successful resolution than Objector and his counsel or a special master.  
23 There is no reason to appoint a special master to audit daily time records, as compared to this Court's  
24 review of Plaintiffs' detailed summaries of those records (all that is required by this Court's rules and  
25 relevant precedent).

26 **1. Class Counsel's billing evidence is sufficiently detailed for the lodestar cross-check.**

27 As discussed above, Objector's argument that a special master needs to review more detailed  
28 time records because Class Counsel's lodestar submissions are not sufficiently detailed misconstrues

1 the purpose of the lodestar calculation in Class Counsel’s fee request. Mot. at 10-12; ECF 929 at 11;  
 2 *supra* at Section I.A. In their fee request, Counsel met the prevailing requirements by providing the  
 3 Court with detailed summaries and charts that eliminate any need to inundate the Court with detailed  
 4 daily time records in this very large and complex case. The summary charts submitted showed the  
 5 name of each billing professional, the year they graduated from law school, their job title, their billing  
 6 rate, the hours reasonably expended, their individual lodestars, and the firm website address with  
 7 further information about the experience and expertise of each firm. ECF 916-9 Exs. 1, 3 (Cervantez  
 8 Fee Decl.).<sup>5</sup> Class Counsel provided additional information beyond what was required by showing the  
 9 number of hours that each firm billed under fourteen separate task codes. *Id.* Exs. 2-3; *see also id.* ¶52  
 10 (describing each task code); ¶¶ 21-43 (describing work performed and why it was necessary for the  
 11 effective litigation and resolution of the case).<sup>6</sup>

12 There is no basis for Objector’s argument that, in addition to the detail already provided,  
 13 Counsel had to identify *when* specific tasks were performed over the life of this case. Mot. at 10.  
 14 Objector’s cases demonstrate the opposite. For instance, in *Dyer v. Wells Fargo Bank, N.A.*, 303  
 15 F.R.D. 326, 333 (N.D. Cal. 2014), after counsel failed to provide sufficient information for the court to  
 16 conduct a proper lodestar cross-check, the court ordered the parties to submit more specific records of  
 17 the hours worked on the case. The court explained that it “did not require actual billing statements, but  
 18 asked Plaintiffs’ counsel to at least provide[] summaries of hours worked on particular categories of  
 19  
 20

21 <sup>5</sup> As explained in the Opposition Declaration of Eve Cervantez submitted herewith, Counsel have  
 22 discovered three inadvertent clerical/typographical errors in Exhibits 1 and 3 to the Cervantez Fee  
 23 Declaration: (1) Hal Cunningham, a senior associate at Scott + Scott, was incorrectly identified as a  
 24 contract attorney; (2) Lief Cabraser Heimann & Bernstein staff attorneys were incorrectly listed as  
 25 “contract attorneys”; (3) The rate for one associate was listed at \$595 per hour instead of \$495 per  
 26 hour. Cervantez Opp. Decl. at ¶6. Plaintiffs will submit corrected exhibits with their Reply Brief in  
 27 support of Motion for Attorneys’ Fees.

28 <sup>6</sup> Further, Co-Lead Counsel’s declaration accompanying the fee request silences any unsupported  
 suggestion that Counsel withheld time records for the purpose of hiding the precise nature of its work.  
 Co-Lead Counsel forthrightly explained that “[t]he fee records are available to be submitted to the  
 Court, at the Court’s request,” but noted that it would take “several staff members working full time for  
 at least two weeks to review the time entries line by line in order to redact all the material that would  
 need to be redacted before the detailed time records could be publicly filed.” *Id.* ¶55.

1 tasks so that the Court could evaluate whether the hours worked were reasonable.” *Id.* That is  
2 precisely what Class Counsel has done here.<sup>7</sup>

3 Importantly, Objector’s *only* specific concern regarding the timing of Counsel’s work is  
4 whether unnecessary work was done after the case was already settled. Mot. at 10. Counsel confirms  
5 that no document review occurred after settlement was reached at the end of May 2017. Cervantez  
6 Opp. Decl. ¶5. In fact, affirmative fact discovery ended in December 2016 according to the schedule  
7 ordered by this Court (absent the remaining authorized substantial work defending Plaintiffs against  
8 Defendants’ discovery into their computers), as did document review, except for that relevant to  
9 meeting court deadlines related to expert discovery, discovery motions, class certification, and related  
10 *Daubert* motions. *Id.* There is no need whatsoever to appoint a special master to review *daily* time  
11 records from throughout this litigation to ensure that Class Counsel’s attestation to this Court that no  
12 time was spent on discovery or document review post-settlement is correct.

13 **2. Class Counsel’s lodestar does not include duplicative or wasteful billing.**

14 There is no basis for Objector’s assertion that one of the alleged “irregularities” requiring  
15 further examination by a special master is purported “duplication of effort” by Counsel. Mot. at 10  
16 (citing Schulman Obj. at 15-18). Plaintiffs will address the argument – which chiefly revolves around  
17 Objector’s argument that Co-Lead Counsel should not have delegated work to Plaintiffs’ firms outside  
18 the PSC – in more detail in opposition to Schulman’s Objection to the Fee Request. All assignments  
19 were made in accordance with this Court’s “Order Re Assignment of Tasks,” which clarified that “Co-  
20 Lead Plaintiffs’ Counsel may assign discrete tasks to counsel for other plaintiffs in this MDL for  
21 resource-intensive tasks such as identifying plaintiffs for the Consolidated Amended Complaint and  
22 reviewing discovery.” ECF 286. In particular, as explained in great detail in the Cervantez Fee

23 \_\_\_\_\_  
24 <sup>7</sup> Objector largely relies on cases that required greater detail from counsel when applying the lodestar  
25 method as the *primary* method of analysis, not as a cross-check. Mot. at 11 (*citing Johnson & Johnson*,  
26 900 F. Supp. 2d 467). In *Nwabueze v. AT&T*, 2013 WL 6199596 (N.D. Cal. Nov. 27, 2013) (Mot. at  
27 10), counsel justified their fee request under both the lodestar and percentage-of-recovery methods. *See*  
28 *also id.*, Doc. 197 (Aug. 12, 2013). After requesting additional detail from counsel, the court analyzed  
the fee request using the lodestar method with a percentage-of-recovery cross-check. *Id.*, Doc. 262  
(Jan. 29, 2014). *See also Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1126 (9th Cir. 2002) (Mot. at 10)  
(holding that objecting counsel had to submit detailed time records to justify their fee request using the  
lodestar calculation as the primary method of analysis).

1 Declaration (ECF 916-9), Co-Lead Counsel assigned the following four discrete tasks to other  
2 Plaintiffs' firms to further efficiency and to ensure that all necessary work was done on the tight  
3 schedule set by the Court: (1) identification of plaintiffs; (2) discovery of more than 100 Named  
4 Plaintiffs, including deposition defense; (3) document analysis and review; and (4) taking certain Non-  
5 Anthem Defendant depositions, generally based on geographic proximity. ECF 916-9 at ¶¶23, 27-29,  
6 31, 36 (Cervantez Fee Decl.). The Court can easily review the 36-page Cervantez Fee Declaration and  
7 Exhibits 1-3 thereto, particularly paragraphs 21 to 43, and determine that assigning these tasks to other  
8 Plaintiffs' counsel fostered efficiency rather than duplicating efforts (*i.e.* each deposition had to be  
9 defended or taken) and was in the best interests of the Class, particularly in light of the short 14-month  
10 window for completing all fact discovery.

11 Objector similarly attempts to cast doubt on the number of hours that Counsel spent on  
12 settlement and class certification, ignoring that the Cervantez Fee Declaration already demonstrates that  
13 Plaintiffs' counsel who were not from Lead Counsel or PSC firms spent very little time on issues  
14 related to class certification or settlement. ECF 916-9 at ¶¶39, 43 & Ex. 2 (Cervantez Fee Decl.). The  
15 time that Class Counsel invested in these, and other, tasks was not duplicative or wasteful – it was  
16 necessary to the effective litigation of this case. To put it simply, the lodestar in this case reflects first-  
17 rate lawyering that yielded a first-rate result, something this Court is well equipped to rule upon.

18 **III. This Court Should Not Appoint a Guardian Ad Litem for Any Satellite Fee Litigation.**

19 This Court need not reach the issue of whether to appoint a guardian *ad litem* to represent class  
20 members before a special master, because, for all the reasons stated above, there is no basis for  
21 appointing a special master to assist the Court with Plaintiffs' fee request in this case. Moreover, as  
22 noted above, this is not like the cases upon which Objector relies, in which the settlement and fee  
23 approval process was non-adversarial because there were no objectors. Rather, this is just an argument  
24 for yet more inefficient and unnecessary satellite litigation. Indeed, Objector's brief makes clear the  
25 excess to which Objector wants the Court to go: He wants "two sets of eyeballs" – the special master  
26 and the guardian ad litem (Mot. at 15) – plus objectors (three sets of eyes) – in addition to the Court's  
27  
28

1 *de novo* review of any special master's report (four sets of eyes).<sup>8</sup> This is precisely what the Supreme  
2 Court warned against in *Hesley*. 461 U.S. at 437.

3 **IV. Objector's Motion Is Improper and Untimely.**

4 As explained above, Objector has largely used this motion to repeat his objections to the Fee  
5 Request. Objections in this case were due by December 29, 2017, a deadline of which Objector was  
6 aware, because he filed his objections by that date. ECF 924. Any additional argument requesting a  
7 special master should have been included in his objections. He should not be provided here with a  
8 second attempt to object (nor with the unique opportunity to file a reply in support of his motion and  
9 objections).

10 Objector Schulman is an attorney employed by the Center for Class Action Fairness represented  
11 by another attorney within that organization, and by his own admission, is a repeat class action  
12 objector. ECF 924-1, 924-4. Whatever more generous considerations could apply to *pro se* class  
13 member objectors with respect to strictly complying with this Court's scheduling orders do not apply  
14 here. Objector and his attorney were well aware of, and chose not to comply with, this Court's  
15 schedule for the filing of objections, by filing this additional motion after the objection deadline. ECF  
16 903 (August 25, 2017). Objector noticed the motion for hearing on April 5, 2018, two months after this  
17 Court's long-scheduled hearing on final approval and consideration of counsel's fee application. *Id.*  
18 Objector has not and cannot provide any reason for this late filing, given the availability of the relevant  
19 papers from Class Counsel, and Objector's awareness of the Court's schedule. This motion should be  
20 denied as an untimely attempt to circumvent this Court's reasonable procedures for considering class  
21 member objections, or in the alternative, should be denied as moot upon this Court's timely resolution  
22 of final approval and Plaintiffs' request for attorneys' fees.

23 **CONCLUSION**

24 For all the reasons stated above, Plaintiffs respectfully request that this Court deny Objector's  
25 Motion to Appoint a Special Master in its entirety.

26 \_\_\_\_\_  
27 <sup>8</sup> In the *State Street* matter upon which he heavily relies, Objector's counsel Theodore Frank sought to  
28 have himself appointed as the guardian ad litem of the class there. Frank Decl. Ex. 3 (ECF 924-7) at  
20:15-21:19. Despite appointing a special master nearly a year ago, the court has appointed no  
guardian ad litem in that case. See *State Street*, D. Mass. Case No. 11-cv-10230-MLW, Dkt. Nos. 172  
& 173.

1 Respectfully Submitted,

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2  
3  
4  
5  
6 Dated: January 18, 2018

By: /s/ Eve H. Cervantez  
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**SIGNATURE ATTESTATION**

Pursuant to Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of this document has been obtained from the signatories shown above.

Date: January 18, 2018

/s/ Eve Cervantez  
Eve Cervantez