18-2708

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: PETROBRAS SECURITIES LITIGATION

WILLIAM THOMAS HAYNES, AS TRUSTEE FOR THE BENEFIT OF W THOMAS AND KATHERINE HAYNES IRREVOCABLE TRUST FOR THE BENEFIT OF SARA L HAYNES,
Objector - Appellant,
v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII, NORTH CAROLINA DEPARTMENT OF STATE TREASURER,
Plaintiffs - Appellees,

AURA CAPITAL LTD., DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., ON BEHALF OF ITS SERIES EMERGING MARKETS CORE EQUITY PORTFOLIO, EMERGING MARKETS SOCIAL CORE EQUITY PORTFOLIO AND T.A. WORLD EX U.S. CORE EQUITY PORTFOLIO, DFA INVESTMENT TRUST COMPANY, ON BEHALF OF ITS SERIES THE EMERGING MARKETS SERIES, DFA AUSTRIA LIMITED, SOLELY IN ITS CAPACITY AS RESPONSIBLE ENTITY FOR THE DIMENSIONAL EMERGING MARKETS TRUST, DFA INTERNATIONAL CORE EQUITY FUND, AND DFA INTERNATIONAL VECTOR EQUITY FUND BY DIMENSIONAL FUND ADVISORS CANADA ULC SOLELY IN ITS CAPACITY AS TRUSTEE, DIMENSIONAL FUNDS PLC, ON BEHALF OF ITS SUB-FUND EMERGING MARKETS VALUE FUND, DIMENSIONAL FUNDS ICVC, ON BEHALF OF ITS SUB-FUND EMERGING MARKETS CORE EQUITY FUND, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST,

TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL EQUITY & INCOME FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, EACH A SERIES OF ABERDEEN FUNDS; ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND AND ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, EACH A SERIES OF ABERDEEN CANADA FUNDS, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEEN EAFF PLUS SRI FUND, ABERDEEEN EMERGING MARKETS EQUITY FUND, AND ABERDEEN GLOBAL EQUITY FUND, EACH A SERIES OF ABERDEEN INTITUTIONAL C, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN WORLD EQUITY IN, ABERDEEN LATIN AMERICA EQUITY FUND, INC., ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST / ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAMPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF HOUNSLOW SUPPERANNUATION FUND, MACKENZIE UNIVERSAL SUSTAINABLE OPPORTUNITIES CLASS, MARSHFIELD CLINIC, MOTHER THERESA CARE AND MISSION TRUST, MTR CORPORATION LIMITED

RETIREMENT SCHEME, MYRIA ASSET MANAGMENT EMERGENCE, M, NATIONAL PENSION SERVICE, AND NPS TRUST ACTIVE 14, OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM, WASHINGTON STATE INVESTMENT BOARD, ABERDEEN LATIN AMERICAN INCOME FUND LIMITED, ABERDEEN GLOBAL EX JAPAN PENSION FUND PPIT, FS INTERNATIONAL EQUITY MOTHER FUND, NN INVESTMENT PARTNERS B.V., ACTING IN THE CAPACITY OF MANAGEMENT, NN INVESTMENT PARTNERS B.V., ACTING IN THE CAPACITY OF MANAGEMENT COMPANY OF THE MUTUAL FUND NN GLOBAL EQUITY FUND, NN INVESTMENT PARTNERS B.V., ACTING IN THE CAPACITY OF MANAGEMENT COMPANY OF THE MUITUAL FUND NN HOOG DIVIDEND AANDELEN FONDS, NN INVESTMENT PARTNERS B.V., ACTING IN THE CAPACITY OF MANAGEMENT COPMANY OF THE MUTUAL FUND NN INSTITUTIONEEL DIVIDEND AANDELEN, NN INVESTMENT PARTNERS LUXEMBOURG S.A., ACTING IN THE CAPACITY OF MANAGEMENT COMPANY SICAV AND ITS SUB-FUNDS, AND NN (L) SICA, FOR AND ON BEHALF OF NN (L) EMERGING MARKETS HIGH DIVIDEND, NN (L) FIRST, AURA CAPITAL LTD., WGI EMERGING MARKETS FUND, LLC, BILL AND MELINDA GATES FOUNDATION TRUST, BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM, TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP, DBA KAMEHAMEHA SCHOOLS, LOUIS KENNEDY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, KEN NGO, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, CITY OF PROVIDENCE, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED, HANDELSBANKEN FONDER AB, PUBLIC EMPLOYEE RETIREMENT SYSTEM OF IDAHO, PETER KALTMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, UNION ASSET MANAGEMENT HOLDING AG, JONATHAN MESSING, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED,

Plaintiffs,

v.

MARIANGELA MOINTEIRO TIZATTO, JOSUE CHRISTIANO GOME DA SILVA, DANIEL LIMA DE OLIVEIRA, JOSE SERGIO GABRIELLI, SILVIO SINEDINO PINHEIRO, PAULO ROBERTO COSTA, JOSE CARLOS COSENZA, RENATO DE SOUZA DUQUE, GUILLHERME DE OLIVEIRA ESTRELLA, JOSE MIRANDA FORMIGL FILHO, MARIA DAS GRACAS SILVA FOSTER, ALMIR GUILHERME BARBASSA, SERVIO TULIO DA ROSA TINOCO, PAULO JOSE ALVES, GUSTAVO TARDIN BARBOSA, ALEXANDRE QUINTAO FERNANDES, MARCOS ANTONIO ZACARIAS, CORNELIS FRANCISCUS JOZE LOOMAN, SANTANDER INVESTMENT SECURITIES INC., BANCO VOTORANTIN NASSAU BRANCH, PETROLEO

BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., JOSE RAIMUNDO BRANDA PEREIRA, CITIGROUP GLOBAL MARKETS INC., JP MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, STANDARD CHARTERED BANK, BANK OF CHINA (HONG KONG) LIMITED, BANCO BRADESCO BBI S.A., BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., PRICEWATERHOUSECOOPERS AUDITORES INDEPENDENTES, ITAU BBA USA SECURITIES, INC.,
Defendants.

On Appeal from the United States District Court
for the Southern District of New York, No. 14-cv-9662

**Reply Brief of Appellant William Thomas Haynes,
as Trustee for the benefit of W Thomas and Katherine Haynes
Irrevocable Trust for the benefit of Sara L Haynes**

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Katherine Haynes Irrevocable Trust
for the benefit of Sara L Haynes*

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Introduction

In the case below, plaintiffs sought an adjusted lodestar payment of $49.8 million ($900/hour) for Brazilian "project associates" that cost one sixteenth that amount. Appellant Haynes objected, and within hours was met with kitchen-sink discovery requests, which plaintiffs followed with personal attack-laden filings to the district court. But Haynes prevailed and provided absent class members an undisputed $46 million benefit for his "novel, well-researched" objection. SPA-7. Plaintiffs don't deny that the district court credited Haynes for creating this benefit. Nor do plaintiffs argue that the court appropriately considered this outstanding result in determining an award of attorneys' fees. (Their best argument is that the district court was "aware" of it. PB33.) Instead, plaintiffs file an invective-laden brief nickel-and-diming Haynes' $199,490 fee request for his *pro bono* counsel, which if granted would constitute 0.1% of plaintiffs' own fee award.

Plaintiffs go to great lengths to avoid the issue at the heart of this appeal: the district court's legally erroneous application of the lodestar analysis established by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Plaintiffs raise strawman arguments to knock down, such as suggesting that Haynes is challenging the district court's choice of the lodestar rather than the percentage-of-recovery analysis. PB37.[1] (Haynes made no such argument. OB24.) Plaintiffs also use eight pages of their brief

[1] "OB" and "PB" refer, respectively, to Haynes's Opening Brief and Plaintiffs-Appellees' Brief. "SPA" refers to the Special Appendix; "A" refers to the Joint Appendix, and "Dkt." refers to the docket below.

to lodge *ad hominem* attacks against Haynes and his counsel, the non-profit Center for Class Action Fairness ("CCAF"), that include false information (much of which Haynes addressed below[2]) and to nit-pick CCAF's litigation history.[3] PB5-13.[4] Whether Haynes's counsel was successful in *other* litigation is obviously irrelevant here, where his success is undisputed. But plaintiffs' focus on such irrelevancies reveals the type of vindictive attacks that Haynes was forced to fend off in the district court just to ensure his arguments received a fair hearing. As their opposition shows, settling parties have a tendency to make objecting as unpleasant as possible, adding to the public policy reasons for awarding fees to good-faith objectors who realize a pecuniary benefit for the class. *See* OB19-23.

Once one removes this intentionally distracting and misleading filler, plaintiffs' brief boils down to a selective and wrongheaded interpretation of *Hensley*. Plaintiffs

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[2] Haynes trusts this Court will disregard plaintiffs' attacks against him and his counsel and focus on the substance of the legal arguments; however, should the Court wish to review Haynes's rebuttal to similar attacks plaintiffs' counsel made in the district court, he respectfully refers the Court to Dkts. 799 and 830.

[3] Plaintiffs even oddly criticize Haynes's decision, consistent with his public-interest motive in objecting, not to seek an incentive payment for himself. PB13; PB47 n.15. Had he sought an award, they undoubtedly would have claimed that his purpose in objecting was unseemly personal gain. Moreover, it is unremarkable for a party to move for attorneys' fees, rather than the attorneys in their own name.

[4] In a decade of active litigation, there will naturally be losses in any firm's history. What plaintiffs fail to tell the Court, however, is that CCAF has been awarded fees in 17 out of its 19 fee petitions that it has filed in its ten-year history (excluding this case) and, during that time, has returned hundreds of millions of dollars to class members. *See* OB19.

argue that *Hensley* allows a court to award fees for work solely attributable to a successful claim, no matter how much benefit is conferred or how reasonable the other arguments are. This position is directly contradicted by both *Hensley* and this Circuit's precedent. And nothing in these decisions or plaintiffs' brief indicates that a fee analysis other than *Hensley* should apply to objectors. *See* Section I.A.1.

Plaintiffs' counsel then mischaracterize the record in their quest to salvage every penny of their own nearly $190 million fee. The record shows that Haynes's work involved arguments that were based on the same overlapping facts and law and that were part of his ultimate goal of protecting class members' recovery from dilution by class counsel's overreaching fee request and inadequate representation. *See* Section I.A.2. *Hensley* does not require Haynes to show that all of his arguments benefited the class. Rather, where a party achieves a favorable result, his attorneys' fees should not be reduced simply because some arguments were not successful; the question is whether the fee is reasonable for the benefit conferred. Here, all of Haynes's arguments were raised in pursuit of the same outcome, based on common underlying facts, such that he should recover a "fully compensatory fee." *Hensley*, 461 U.A. at 435. *See* Section I.A.3.

Confronted with the court's error in excluding all of Haynes's time for litigation tasks that were necessary for him to participate in the litigation at all, plaintiffs attempt to reinvent the opinion below. Although the district court expressly stated otherwise, plaintiffs falsely claim that the court awarded Haynes's lodestar for the Brazilian contract attorney argument, plus an "enhancement" multiplier that they claim was intended to compensate Haynes for that time. PB55; *but see* PB29 (acknowledging the "court declined to apply a multiplier to the reduced [Brazilian contract attorney]

lodestar"). They also claim—with zero record support—that the district court disregarded such time because Haynes's time records were too vague, and that Haynes is to blame for the burdensome discovery that they initiated and continued to pursue without a good-faith basis. When a district court fails to provide reasons for a decision, it's an abuse of discretion, no matter how many *post-hoc* justifications plaintiffs can supply. *See* Section I.B; *Foman v. Davis*, 371 U.S. 178, 182 (1962). Plaintiffs also fail to provide a legally adequate response to Haynes's argument that the district court erred by failing to consider the magnitude of the benefit conferred or credit the risk involved in objecting in its fee decision. *See* Section I.C.

Throughout their brief, plaintiffs insinuate that Haynes is somehow less entitled to an award of attorneys' fees because his counsel is a non-profit organization. Nothing in the law allows a court to alter its fee award based on the non-profit or *pro bono* nature of an attorney or her representation. *See* Section II.

The district court's order partially denying Haynes's attorneys' fees misapplied the law and should be reversed, with remand for entry of an order granting Haynes's fee request.

Argument

I. The district court erroneously applied the law.

Plaintiffs don't dispute that objectors who improve the class's recovery are entitled to recover attorneys' fees. PB35. They don't dispute the district court's finding that a $46 million class benefit was directly attributable to Haynes' objection. PB25. Nor do they dispute that the district court awarded Haynes 10% of his lodestar based

on its determination that Haynes' beneficial argument constituted only 1.5 pages of his 25-page brief and, therefore, was a reasonable fee for Haynes to have put together this argument. PB29.

Plaintiffs try to justify the district court's fee award as a reasonable exercise of discretion and as consistent with *Hensley* and its progeny. This approach suffers from two fatal flaws. First, "a motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting with alteration *United States v. Burr*, 25 F. Cas. 30 (C.C. Va. 1807) (Marshall, C.J.)) (cleaned up). Second, the district court acted directly contrary to applicable legal principles. Plaintiffs selectively quote *Hensley* to try to cram the district court's decision within its legal framework. This effort fails.

A. Plaintiffs cannot overcome Haynes's showing that the district court erred by awarding fees based on a lodestar analysis that parsed Haynes's work for argument-by-argument success rather than taking a more holistic approach.

Plaintiffs' argument that the district court acted within its discretion when it parsed Haynes's work and lodestar for argument-by-argument success depends upon a selective misreading and misapplication of *Hensley* and a misinterpretation of this Circuit's decision in *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974).

1. Plaintiffs misinterpret the law.

Under *Hensley*, the focus for a fee award is "the significance of the overall relief obtained … in relation to the hours reasonably expended on the litigation." 461 U.S. at 435; OB24-26; *see* PB38 (acknowledging *Hensley*'s focus on the "results obtained"). No

one disputes either the district court's finding that Haynes increased the class benefit by $46 million, at a minimum, or the district court's failure to consider that result in determining a reasonable fee.[5] PB27; SPA-3. Instead, plaintiffs insist on arguing that the district court acted within its discretion when it parsed Haynes's lodestar and awarded fees only for work devoted exclusively to the Brazilian contract attorney issue. They base their argument on a passage from *Hensley* stating that in a suit involving "distinctly different facts and legal theories," where "counsel's work on one claim will be unrelated to his work on another claim," then "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." PB39 (quoting *Hensley*, 461 U.S. at 434-35).

Plaintiffs omit the language that follows, however, which makes clear that Haynes's work on this case does not fall in that category: In cases where the "claims for relief … involve a common core of facts or [are] based on related legal theories," then "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Hensley*, 461 U.S. 435. Therefore, instead of a claim-by-claim approach, "the district court should focus on the significance of the overall relief obtained … in relation to the hours reasonably

[5] Because the district court made this finding, cases in which the court denied or reduced fees because an objector created no or only *de minimis* benefit are not applicable. *See* PB41-43; PB59, citing *e.g.*, *Spark*, 289 F. Supp. 2d at 514; *Birchmeier v. Caribbean Cruise Line*, 896 F.3d 792, 797 (7th Cir. 2018); *Fraley v. Batman*, 638 F. App'x 594, 598 (9th Cir. 2016); *In re Polyurethane Foam Antitrust Litig.,* 169 F. Supp. 3d 719 (N.D. Ohio 2016); *In re Excess Value Ins. Coverage Litig.,* 598 F. Supp. 2d 380, 389 n.15 (S.D.N.Y. 2005); *Denney v. Jenkens & Gilchrist*, 230 F.R.D. 317, 354 (S.D.N.Y. 2005).

expended on the litigation." *Id.* The appropriate focus should have been: was the $46 million a reasonable result for the 231.7 hours expended by Haynes counsel?

Plaintiffs also latch on to a single line from *White* to suggest that a different lodestar standard applies to objectors such as Haynes—even while admitting that the same lodestar analysis applies universally. PB39 n.12 ("this Court's case law does not suggest that there are two different lodestar methods"); *see also* PB49 (claiming "no double-standard"). Plaintiffs argue that *White*'s statement that an objector is entitled to fees only where he makes a "proper showing … that the settlement was improved as a result of [his] efforts" means that district courts should determine which objections added value to the settlement and then tally up and award fees only for the hours specifically dedicated to the successful objection. PB40. This proposed interpretation finds no support in the language of *White*, directly contradicts *Hensley*, and is entirely impractical for parties researching and litigating multiple issues with a common legal or factual core.[6]

Plaintiffs cite *Spark v. MBNA Corp.* as supposedly supporting their reading of *White*. *Spark* is consistent with *Hensley*, however, holding that "the court will award fees which reflect the value the objectors conferred upon the class." 289 F. Supp. 2d 510, 513 (D. Del. 2003). In other words, just as *Hensley* holds, the court is to look at the total *value* of the benefit conferred through objectors' work and award fees that correspond

[6] While plaintiffs cite *In re Visa Check/MasterMoney Antitrust Litig.*, 2005 WL 8158401 (E.D.N.Y. Oct. 5, 2005), for this point, the case was wrongly decided. The district court simply affirmed the special master's determination when, even after the master's request, the applicants failed to show how lodestar hours were connected to their successful claim.

to the magnitude of that benefit. *Spark* does not even hint that it is proper for a court to undertake a line-by-line accounting of the hours devoted exclusively to the argument that achieved that benefit. Instead, *Spark* denied an objector's fee award entirely because *even the objectors* "concede[d] that their input 'did not increase the amount of relief paid to the class.'" *Id.* at 514. The line quoted by plaintiffs—that objectors "will not be awarded fees for all of their work conducted in the course of the litigation" where they have failed to benefit the class—is not relevant to this appeal, where Haynes's conferral of tens of millions of dollars in benefits to the class is not in dispute.

Finally, plaintiffs respond to *Hensley*'s instruction that courts should not reduce a fee award where a party "has obtained excellent results" "simply because the [party] failed to prevail on every contention raised" by relying heavily on the abuse of discretion standard applicable to fee awards. 461 U.S. at 435. But "reviewable for 'abuse of discretion' is not the equivalent of 'unreviewable.'" *Gierlinger v. Gleason*, 160 F.3d 858, 876 (2d Cir. 1998). When, as here, the fee "award is predicated on an error of law," the question is reviewed *de novo* and an error of law constitutes abuse of discretion. *Hallingby v. Hallingby*, 453 F. App'x 121, 125 (2d Cir. 2012). Further, any proper exercise of discretion must be supported; a decision without reasoning—even when a party attempts to fill in reasons—is an abuse of discretion. *Foman*, 371 U.S. at 182; *Powers v. Eichen*, 229 F.3d 1249, 1256-58 (9th Cir. 2000).

2. Plaintiffs mischaracterize the district court decision and the nature of Haynes's work.

Plaintiffs claim that *Hensley* allows the district court to make a "straight percentage" cut. However, even if that were allowed, that's not what happened here.

Rather, the district court impermissibly awarded an amount of fees it believed equivalent to a reasonable lodestar for a single argument. The district court made no finding that the argument involved distinctly different facts and legal theories in pursuit of a different objective than Haynes's other arguments. *See* Section I.A.1. "[T]he degree of success obtained" remains the "critical factor" for fee awards. *Hensley*, 461 U.S. at 435-36.

The cases cited by plaintiffs in which courts addressed the overall benefit conferred and made across-the-board reductions because the overall benefit was minimal or involved distinctly different claims are thus inapplicable. *See* PB36; PB51, citing *e.g.*, *Lobur v. Parker*, 378 F. App'x 63, 65 (2d Cir. 2010) (affirming award of 50% of lodestar where objection "arguably resulted in no increase" to class recovery); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00-CV-6689, 2003 U.S. Dist. LEXIS 21322, at *2-*3 (S.D.N.Y. Nov. 24, 2003) (reducing lodestar award by 50%-66% where hours were unreasonable in light of the "boilerplate and routine" nature of the objections and limited benefit to the class); *Luciano v. Olsten Corp.*, 109 F.3d 111, 117 (2d Cir. 1997) (affirming 15% across-the-board reduction for unnecessary contentious conduct the court estimated wasted 30% of total hours); *Kirsch v. Fleet St. Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998) (reducing lodestar due to vague billing descriptions and for separate ADEA claim); *Wal-Mart Stores, Inc. v. Buholzer*, 156 F. App'x 346, 347 (2d Cir. 2005) (affirming reduced award where objectors' contributions were minimal).

Plaintiffs claim that it was only because Haynes's timesheets were "nondescriptive" and "opaque" with respect to the amount of lodestar time attributable to the overbilling of Brazilian attorneys that the district court resorted to computing the

precise mathematical portion of Haynes's brief and awarding a "straight percentage" of his lodestar to approximate the reasonable time spent on that argument. PB47; PB50. But attorney recordkeeping need not be so detailed as to delineate which time expenditures are attributable to which particular arguments. Fee applicants only need "specify, for each attorney, the date, the hours expended, and the nature of the work done." *N.Y. State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983). Haynes's counsel's timesheets satisfy this standard. *See* A-629-636.

Indeed, the very reason that the timesheets isolated only a few hours for Haynes's work on that argument underscores the district court's error under *Hensley*. *All* of Haynes's work on the litigation arose directly out of a single set of motions—plaintiffs' motion for final approval of the settlement and motion for an award of attorneys' fees. *See* A-395. Those motions were so closely related that class counsel filed a single declaration in support of both, A-197; the motion requesting fees was premised on the court's approval of the settlement; and the court held a single hearing to decide both motions. Haynes's work on the Brazilian contract attorney argument required overlapping legal research and significant review of the same parts of the docket as his other arguments regarding class counsel's fee request.

Moreover, the ultimate goal of Haynes's involvement in the litigation was to protect the recovery of the damaged class members: Haynes' arguments against settlement approval sought to protect class members with stronger claims from having their recovery diluted by those with weaker claims, while his arguments relating to the excessive fee request sought to protect class members from having their recovery diluted by class counsel seeking to maximize their personal recovery from the litigation.

See A-395. As such, and due to the nature of drafting a single brief with supporting declarations, all of these arguments required linked preparation and strategy.

Class counsel themselves appeared to view their motions and opposition to Haynes as one holistic effort—at least prior to Haynes's fee request. Class counsel did not ask for separate fees for the Brazilian contract attorneys; instead, they lumped all of the timekeepers together in one omnibus fee request. *See* Dkt. 787. Only by delving into a chart listing the hundreds of attorneys' "information" and charts showing the hours worked (filed as an exhibit separate from the attorneys' information), both of which were attached to a nearly 200-page declaration with 25 exhibits, and by conducting legal research into appropriate class action fee awards could Haynes's counsel identify and brief this issue.[7] *See* Dkt. 789-16; Dkt. 789-23.

Plaintiffs can't establish that Haynes's objection should "be viewed as a series of discrete claims" under *Hensley*, 461 U.S. at 435, and the district court made no such finding. "[T]he district court should [have] focus[ed] on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* Plaintiffs' attempt to use out-of-context quotes from *Hensley* to excuse the district court's failure to do that must fail. 461 U.S. at 435 (party's lodestar should not be reduced—whether on a line-by-line or "straight percentage" basis—"simply because [he] failed to prevail on every contention"); *see also Gierlinger*, 160 F.3d at 877 (prevailing party "should be compensated even for work done in connection with an

[7] In class counsel's narrative declaration, these attorneys were referred to only as "Project Associates fluent in Portuguese," with no mention that they were not admitted to practice in the United States.

unsuccessful claim if that claim was intertwined with the claim on which she succeeded").

3. Plaintiffs fail to show that Haynes's other arguments were unreasonable, in pursuit of a distinctly different result, or otherwise not recoverable.

To recover his full lodestar, Haynes was not required to show that he prevailed on every argument. "The relevant issue … is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). If so, then he should have been compensated for them based on the excellent results he obtained. *Hensley*, 461 U.S. at 435; *see also Gierlinger*, 160 F.3d at 877. The record shows it was reasonable for Haynes to spend time working on these other arguments in his objection—all of which were deeply intertwined and devoted to protecting the class from over-reaching attorneys and many of which were consistent with the court's fee decision, even if the court did not credit Haynes for the ultimate result.

Plaintiffs argue that Haynes should not receive credit for the district court's decision to slash the fee award from the 9.48% request because the court "simply did not need Haynes's input." PB42. Plaintiffs do not identify any place in the record where the district court expressed anything more than a handful of general comments regarding their excessive fee request. PB42 (citing only generalized question by court regarding 9.5% fee). The district court did not suggest that it intended to reduce the fees by any particular amount or on what grounds it might base such a reduction, and

the fact that it expressed an interest in hearing from objectors shows that the court had not yet decided on an appropriate fee award. *See* OB4-5. Indeed, plaintiffs' suggestion that their fee request was so obviously excessive that Haynes's involvement was unnecessary begs the question: Why did they bill the class members so unreasonably to begin with? The fact is, there was no guarantee the district court would cut the fee at all, *see* OB20, much less by the nine figures necessary to achieve Rule 23(h)'s reasonableness standard and ensure class members recovered their rightful share of the settlement. By removing the Brazilian contract attorney time, Haynes substantially reduced plaintiffs' underlying lodestar and thus further established that a fee equaling nearly 9.5% of the fund was unduly excessive.

Plaintiffs make similar arguments regarding Haynes's other points of objection. But they don't establish that any of his arguments were unreasonable or distinctly separate from his pursuit of protecting the class from excessive fees and inadequate representation. The district court didn't make that finding either.

With respect to defendants' letter identifying certain overbillings, defendants focused on specific entries from plaintiffs' timesheets, which the district court did not allow any absent class members to view despite Haynes's objection. *See* A-419-420. Defendants did not undertake the extensive factual and legal analysis that Haynes provided in his objection, nor did they make specific proposals (as Haynes did) from which the court could make its own discretionary adjustments. *See* OB5; A-416-419. Instead, defendants blandly concluded that "[t]he Court may wish to inquire into" contract attorney hours and billing rates. Dkt. 793 at 4. It was reasonable for Haynes to fill this void with proposals for specific market- and precedent-based billing figures and

other cuts to assist the court. While the court settled on different bottom-line numbers, the district court ultimately—and expressly—"agree[d] with objectors that a reduction is appropriate to account for the considerable time spent by these attorneys on low level document review," as well as translation services. A-502.

On the issue of *cy pres*, the district court's very decision to defer the issue until later in the litigation and to allow class members to provide input before *cy pres* is permitted or a recipient selected is a benefit to the class. *Contra* PB45 n.14. At the fairness hearing, the court indicated that it initially was considering returning any excess funds to the defendants, rather than for *cy pres*, revealing that Haynes's advocacy on this point was effective. *See* A-564 ("I don't see why it shouldn't just go back to the company."). That *other* objections raised frivolous arguments on the issue of *cy pres* says nothing about Haynes's argument. *See* PB45 n.14.

Again showing the lengths plaintiffs will go to pinch every last penny of their fee award, plaintiffs are demonstrably wrong that they "did not request a higher multiplier" than 1.78. PB44. In their response to defendants' letter identifying billing discrepancies and other problems with their timesheets, plaintiffs excised some of their lodestar time, and they discussed the effect of reducing the billable rates of their project attorneys. Dkt. 814 at 29. For both scenarios, plaintiffs maintained that they were entitled to their full fee request, attempting to justify higher lodestar multipliers ranging from 1.79 to 2.73 as still "well within the range of awards in this Circuit." *Id.* Given this moving target, it was entirely reasonable for Haynes to object to the district court adopting such higher multipliers, particularly in the light of the excessive billing he expounded upon

in his objection. The district court mentioned and expressly rejected plaintiffs' argument that a higher multiplier was justified. A-504-505.[8]

Having argued that they would be entitled to a multiplier as high as 2.73, even though they asked for 1.78, plaintiffs' reference to CCAF once voluntarily requesting a lower fee than it might have been entitled to is odd. *See* PB45 (noting CCAF's voluntary discount of its fees as reason to uphold reduction here). As an initial matter, CCAF didn't represent Haynes in that case, and the strategy his counsel took in an unrelated case should not be used against him. In any event, here, Haynes also requests a fraction of what would have been reasonable: a mere 0.21% of the benefit conferred. While the decision not to seek millions of dollars more than appropriate may seem foreign to class counsel, modest fee requests are not unusual for CCAF.

Finally, plaintiffs barely argue that Haynes's objection to class certification was unreasonable. Acknowledging that the district court took his concerns very seriously, plaintiffs note only that the district court acted within its discretion to deny fees attributable to his lodestar on this issue. PB46. The court's discretion was cabined by precedent, however, which holds that Haynes's lodestar should not have been reduced simply because he did not succeed on every issue.

* * *

[8] Plaintiffs' generic citation to *In re Currency Conversion Fee Antitrust Litigation*, fails to help them because, once again, it is a case in which the objectors provided *no* tangible benefit. The "modifications were entirely on the Court's initiative and devised by the Special Master and the parties." 263 F.R.D. 110, 132 (S.D.N.Y. 2009).

As this Court noted in *White*, it would be "unfair to counsel, when, seeking to protect his client's interest and guided by facts apparent on the record, he spends time and effort to prepare and advance an argument which is openly adopted by the court, but then receives no credit therefor because the court was thinking along that line all the while.'" 500 F.3d at 829 (quoting *Green v. Transitron Elec. Corp.*, 326 F.2d 492, 499 (1st Cir. 1964)). *See also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 ("objectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge"). Here, the result is not just unfair. It is also unlawful. This appeal is not analogous to any of the cases relied upon by plaintiffs because, unlike the requesting parties in those cases, Haynes *did* achieve a substantial pecuniary benefit for the class. He is not asking for fees because he simply "sharpened the issues." *See* PB46. And unlike *Birchmeier*, for example, PB42, "[p]laintiffs' motion itself" did not discuss the grounds for a fee reduction. 896 F.3d at 797. Instead, Haynes identified specific factual and legal arguments that were not in the record at the time he filed his objection, and his objection undeniably increased the class recovery by tens of millions of dollars. *Contra, e.g.*, *Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d at 393; *Batman*, 638 F. App'x 594 (finding *de minimis* benefit).

4. Plaintiffs' proposed double standard for objectors is unworkable and bad public policy.

Finally, the district court's legal error is underscored by the double-standard it applied to Haynes. Plaintiffs are demonstrably wrong that the district court "applied the same method" to their fee request. PB49. While the district court reduced class counsel's fee request by one-third, it did not undertake the sort of argument-by-

argument approach that it applied to Haynes. It didn't even subject class counsel to a comparatively more forgiving motion-by-motion approach. If it had, the court would have removed all the lodestar time that plaintiffs devoted to their many unsuccessful arguments and motions and the briefs they never even filed. *See* OB29-30. Instead, the court adjusted class counsel's lodestar based on established legal precedent that forbids billing the class at excessive hourly rates or excessive percentages of the fund, billing unadmitted foreign attorneys at excessive domestic attorney rates, and related issues. (In contrast, with respect to Haynes, the district court accepted his attorneys' billing rates reasonable. SPA-7.) The district court then considered the benefit achieved by class counsel and adjusted the lodestar to reflect the overall result—a step the district court never took with respect to Haynes's fee award.

Plaintiffs are wrong that *Lonardo v. Travelers Indemnity Co.*, somehow condones the application of different standards to class counsel and objectors. *Lonardo* refers to the court's discretion to apply the lodestar or percentage analysis to an objector's fee request, regardless of which approach it applied to class counsel's request. 706 F. Supp. 2d 766, 814 (N.D. Ohio 2010) (awarding CCAF nearly $40,000 in fees; the argument criticized as "policy-oriented" was later adopted by the Seventh and Ninth Circuits and

remains sound precedent).[9] Again, Haynes is not challenging the district court's decision to apply the lodestar analysis.[10]

Affirming the district court's decision would impose significant burdens on attorneys and the courts. Attorneys would face the unworkable, previously unprecedented task of accounting for their time on an issue-by-issue basis, even when working on a single brief or preparing for a single hearing in a case involving overlapping facts and arguments. The burden would be particularly heavy for good-faith class-action objectors, who already lose money on nearly every objection they file but who play an important role in reintroducing adversarial proceedings at the settlement stage. *See* OB19-23. For their part, courts would have to review every page of every motion or opposition brief filed by the party seeking fees to determine which

[9] *Central States Southeast & Southwest Areas Health & Welfare Fund v. Merck-Medco Managed Care*, 504 F.3d 229 (2d Cir. 2007) similarly does not support different fee analyses for objectors. An unusual case, an attorney representing an opt-out plaintiff (not an objector, as plaintiffs asserted) was compensated for 804.4 hours by *quantum meruit* for reviewing the proposed settlement prior to submission to the court, resulting in unspecified improvements. *In re Medco Health Solutions, Inc.*, No. 03 MDL 1508, 2004 U.S. Dist. LEXIS 28606, at *45 (S.D.N.Y. May 25, 2004). Had the client not opted out, counsel "could have participated in the overall fee." *Id.* at *40. As it was, her client-directed work could be later compensated on a contingency basis in that continuing litigation. *Id.* at *46. Obviously, such future fee award is not available to Haynes, who is bound by the settlement. All of Haynes's work was successfully directed to the benefit of the entire class.

[10] Plaintiffs—who themselves sought a fee of 9.48% of the settlement fund—oddly attack the "backward-looking" 0.21% percentage fee that Haynes requested. As a necessity of considering the benefit conferred upon absent class members, fee requests are almost by definition backward-looking, as their own request shows. It is unclear to Haynes how that is relevant to the present appeal.

arguments not only were successful but which ones the court would not have agreed with absent the party's filing, and then sort through counsel's timesheets to determine how many hours counsel devoted to those discrete issues. This approach might even result in objectors and other parties who are eligible for fee awards subconsciously (or consciously) deciding not to raise arguments that lack substantial precedent. The law would stagnate, a result that is particularly undesirable because common-benefit-based fees and statutory fee shifting are common in civil rights cases, cases involving litigants without the means to pay an attorney, and other public-interest litigation. Paying clients do not demand the unrealistic level of argument-specific time recording that the district court's imposed on Haynes *post-hoc*, and it should not be demanded of *pro bono* objector attorneys either.

B. Plaintiffs cannot substitute their own reasoning after the district court gave no reason for disregarding Haynes's "all-inclusive time."

Plaintiffs make two primary arguments as to why the district court was correct to refuse to count time spent on work necessary to Haynes's involvement in the litigation as compensable.

First, they argue that Haynes's argument must fail because "he makes no attempt to quantify" the time or amount of fees attributable to such activities. PB53. This argument is another instance of plaintiffs' setting up a strawman to knock down. The district court did not omit the "all-inclusive" time from Haynes's fee award because he did not quantify it. In fact, Haynes submitted to the court detailed timesheets that set forth tens of hours of entries specifically and exclusively relating to discovery activities, declarations necessary for Haynes's involvement, and hearing preparation and

attendance. *See, e.g.*, A-633-634; *contra Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1126 (9th Cir. 2002) (time entries consisted of two or three abbreviated words and some appeared unrelated to objection) (cited at PB53). The court's decision was not based on a failure of proof by Haynes but on a misapplication of the lodestar analysis. *See* Section I.A.

Haynes's appeal is thus not analogous to *Independent Energy Holdings* cited by plaintiffs. The reason the district court awarded objectors 50% and 66% of their respective lodestars there was that this amount was appropriate based on the overall results they achieved. The district court found that the hours spent on the objection were excessive given the benefit the objectors conferred, particularly because the court "would likely have reached the same result" without the "boilerplate and routine" objections, and this conclusion was bolstered by one attorney's failure to provide "a detailed summary of his work." *Indep. Energy Holdings*, 2003 U.S. Dist. LEXIS 21322, at *2, *6. Here, the district court expressly stated that Haynes was directly responsible for a $46 million benefit to the class, did not consider that benefit in determining a reasonable fee award, and did not find that the hours that Haynes spent on the litigation were unreasonable or insufficiently detailed such that a reduction was warranted. *See* SPA-7.

Second, plaintiffs again inaccurately blame Haynes for their scorched earth litigation tactics against objectors, in their quest to take $100 million more from class members' recovery than Rule 23 permits. But, again, that's not why the district court denied Haynes fees for this work. And the record shows that plaintiffs are wrong to put the blame on Haynes. As detailed in Haynes's opening brief, plaintiffs initiated discovery, in the form of an 18-item facially overbroad subpoena, less than three hours

after Haynes filed his objection. They did so even though Haynes's objection complied with all the formalities demanded by the settlement notice and preliminary approval order. They continued their push for unnecessary documents well after Haynes had established his standing beyond dispute, and went so far as to ask the court to sanction Haynes for daring to object in the first place. OB8-10. Haynes successfully defended against plaintiffs' subpoena, and informed plaintiffs that he would voluntarily produce available documents sufficient to address their misunderstandings about the initial stock purchase. *Id.* Even after Haynes had provided documents that conclusively showed his standing to object, plaintiffs applied to compel discovery that they claimed related to "conflicts of interest" that had no relation to the substance of his objection. In reality, they were on a fishing expedition and hoped to find information they could use to lob more *ad hominem* attacks at Haynes and his counsel.[11]

Finally, plaintiffs again falsely claim that Haynes's fee award "reflects a 'multiplier' of 1.67" and that this "enhancement" compensates Haynes for "at least some of the 'all-inclusive' litigation time" associated with his objection. PB55. But this assertion is contradicted by the district court's order, which expressly states, that it "f[ound] no justification for granting [Haynes] a multiplier." SPA-7. Instead, after noting that the Brazilian contract attorney argument constituted 1.5 pages of Haynes's 25-page brief (6%), the court stated that 10% of the lodestar is "reasonable" for

[11] While plaintiffs suggest that Haynes could have "sought appropriate relief" if their discovery was truly abusive, PB54 n.17, the most rational and least resource-intensive course for his non-profit counsel was to oppose the abusive requests and produce the more limited discovery permitted by the court, as they did.

research, drafting, and editing—as the context makes clear—the "novel, well-researched" Brazilian contract attorney issue at the rates billed by Haynes' counsel. *Id.* Even under plaintiffs' attempt to stretch the meaning of that passage without textual support, the district court did not reference any time spent on discovery or the fairness hearing or other all-inclusive activities, putting the kibosh on their theory. In short, the district court's unreasoned exclusion of this time violates *Hensley*.

C. Plaintiffs cannot excuse the district court's failure to consider the magnitude of the benefit conferred or risk involved in objecting.

Even assuming plaintiffs are correct that the court was "well-aware of the benefit to the Class," PB58, such "awareness" does not excuse the court's failure to apply the lodestar analysis correctly. As the plaintiffs' description reveals, the court awarded fees tied only to the "*work performed* that produced that [$46 million] benefit." PB62. The court utterly failed to consider the magnitude of the benefit conferred, both in the initial instance and with respect to a multiplier, as required under *Hensley*.

Plaintiffs' willful blindness to Haynes's argument that his objection entailed risk cannot whitewash the district court's failure to acknowledge either that risk or the magnitude of the benefit he conferred. *See* PB34; PB60; PB61. Haynes has consistently contended there was risk. *See* OB37 n.7; A-539. Plaintiffs asked the court to impose sanctions on CCAF based on nothing more than their false descriptions of CCAF's First Amended-protected litigation positions and unsupportable claims that CCAF violated standards of professional responsibility. *See* Dkt. 824 at 10; OB37 n.7.

This created a risk of out-of-pocket financial loss and reputational harm, in additional to the risk of nonpayment. CCAF attorneys have billed thousands of hours

in dozens of cases in which no fees were paid, even when CCAF was successful on appeal. *See* A-539. The risk of non-payment in every CCAF objection is enormous because it can only seek payment when an objection improves class benefits after a court further approves a fee request. *Id.* Even in these cases, the risk of substantial nonpayment looms large—as the district court's award of *one tenth* of Haynes's lodestar illustrates.

Contrary to plaintiffs' suggestion, Haynes doesn't argue that the multiplier for objectors must equal that applied to class counsel's lodestar. *See* PB61. And plaintiffs' unreasoned assertion that *Rodriguez v. West Publishing Corp.*, 602 F. App'x 385 (9th Cir. 2015), is inapplicable makes little sense. The Ninth Circuit's determination that a fractional lodestar award was not justified based on the district court's erroneous finding of little risk is analogous here, where the court awarded a fractional lodestar award and also refused to apply a multiplier based on the incorrect determination that Haynes faced no risk. Haynes maintains that the district court erred by failing to consider whether the exceptional results warranted a multiplier and by finding that he did not face risk in the litigation. *See* SPA-7.

II. CCAF's non-profit status is irrelevant to this appeal.

Plaintiffs suggest that it is improper for CCAF to obtain fees because the "purpose" of such awards is intended "to assure reasonable compensation" only to attorneys who represent clients on a contingent-fee basis—in other words,

themselves.[12] OB12-13. Plaintiff provide no support for this self-interested opinion and, in fact, there is a long history of non-profit law firms recovering attorneys' fees for their work. *E.g.*, *In re Primus*, 436 U.S. 412, 429-31 (1978) (ACLU and NAACP); *Blum v. Stenson*, 465 U.S. 886, 894-95 (1984) (*pro bono publico* representation not grounds for reducing fees).

"The reasonableness of a fee award does not depend on whether the attorney works at a private law firm or a public interest organization." *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 522 F.3d 182, 184 n.2 (2d Cir. 2008). The availability of fee awards, as well as the amount, thus are untethered to the identity of the lawyer's employer or client. The district court rightly excluded such considerations from its fee award, just as plaintiffs' arguments on this point should be disregarded here.

Conclusion

Given the undisputed enormous benefit to the class Haynes's objection created, Haynes's fee request for a tiny percentage of the common benefit is reasonable as a matter of law. This Court should reverse the district court's partial denial of Haynes's attorneys' fee request and remand for the entry of an order granting his fee request.

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[12] Plaintiffs appear to take particular umbrage that CCAF attorneys are paid from what they falsely claim are "corporate contributions to CEI." PB13. While CEI, which is much larger than CCAF, does take a percentage of its donations from corporate donors, CCAF is not aware of any "corporate contributions" that were earmarked for CCAF during the three years it was part of CEI. On February 1, CCAF left CEI and joined the newly-formed Hamilton Lincoln Law Institute ("HLLI"). Both before its merger with CEI and after it left CEI and joined HLLI, CCAF has not taken or solicited money from corporate donors. *See* Dkt. 799 ¶¶ 29-30.

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Respectfully submitted,

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