# 18-2708

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: PETROBRAS SECURITIES LITIGATION

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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.*

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

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**Opening 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*

## Corporate Disclosure Statement (FRAP 26.1)

Pursuant to the disclosure requirements of Federal Rule of Appellate Procedure 26.1, William Thomas Haynes, as trustee for the benefit of W. Thomas and Katherine Haynes Irrevocable Trust for the benefit of Sara L. Haynes, declares that he is an individual and, as such, is not a subsidiary or affiliate of a publicly owned corporation and there is no publicly held corporation that owns ten percent or more of any stock issued by him.

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## Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction under 28 U.S.C. § 1331, because the complaint alleged, *inter alia*, violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Dkt. 342 ¶ 23.[1]

Following settlement of this class action, appellant class member William Thomas Haynes, as Trustee for the benefit of W. Thomas and Katherine Haynes Irrevocable Trust for the benefit of Sara L. Haynes ("Haynes") objected to, *inter alia*, the Rule 23(h) fee and cost request of appellees-plaintiffs. The district court awarded attorneys' fees and costs in an amount approximately $94.9 million less than plaintiffs requested. A-497; A-512; A-514. Haynes sought his own award of attorneys' fees based on the reciprocally increased benefit to the class. Dkt. 839. On August 15, 2018, the district court issued an Opinion & Order denying in part Haynes's fee motion. SPA-1. On August 21, 2018, Haynes filed a motion for reconsideration of this Opinion & Order and to defer ruling on Haynes's motion requesting attorneys' fees. Dkt. 871. On August 29, 2018, the district court denied Haynes's motion for reconsideration and to defer ruling on his motion. SPA-9. Haynes timely appealed under Fed. R. App. P. 4(a)(1)(A) and 4(a)(4)(A)(iv) on September 10, 2018. A-624.

This court has appellate jurisdiction under 28 U.S.C. § 1291, as this is an appeal from a final decision regarding attorneys' fees, issued after a resolution of the

[1] "A" stands for the joint appendix for this appeal. "SPA" stands for the special appendix in this appeal. "Dkt." stands for docket numbers in the underlying district-court case, No. 14-cv-9662 (S.D.N.Y.).

underlying case. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Blatt v. Dean Witter Reynolds InterCapital, Inc.*, 732 F.2d 304, 306 (2d Cir. 1984).

## Statement of the Issues

1. This Court holds that class action objectors who provide a material benefit to the class "are entitled to an allowance as compensation for attorneys' fees and expenses." *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974). The Supreme Court holds that "[w]here a plaintiff has obtained excellent results … the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Here, the district court acknowledged that objector-appellant Haynes "significantly contributed" to the class's recovery, "because a $46 million reduction in Class Counsel's fee award"—and commensurate increase in class recovery—"is directly attributable to Objector's argument." SPA-3. Yet it denied in large part Haynes' request for attorneys' fees by applying standards to Haynes' request for $199,490 that it had not applied to class counsel's request for $299 million. Did the district court err by (i) parsing Haynes's work on a legal brief argument-by-argument and page-by-page; (ii) excluding time spent on tasks required for Haynes to object at all to the settlement and fee request without providing an explanation of its reasons; and (iii) failing to consider the magnitude of the benefit conferred on class members by Haynes?

**Standard of Review**: A district court's decision to award or deny attorneys' fees is reviewed for abuse of discretion. *Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224, 229 (2d Cir. 2006). A court abuses its discretion to award attorneys' fees

"where the award is predicated on an error of law or a clearly erroneous factual finding or its decision cannot be located within the range of permissible decisions." *Hallingby v. Hallingby*, 453 Fed. App'x 121, 125 (2d Cir. 2012) (cleaned up). Whether the district court has applied a sound fee methodology is a question of law that is reviewed *de novo*. *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Pub. Employees Ret. Sys.*, 814 F.3d 652, 656-57 (2d Cir. 2016).

## Statement of the Case

This is an appeal from a post-judgment decision of Judge Jed S. Rakoff to deny in substantial part the attorneys' fee motion of objector-appellant William Thomas Haynes, as trustee for the benefit of W. Thomas and Katherine Haynes Irrevocable Trust for the benefit of Sara L. Haynes. SPA-1. The opinion is not reported.

### A. Plaintiffs bring a securities class action, and the parties settle.

Named plaintiffs Universities Superannuation Scheme Limited acting as sole corporate trustee for Universities Superannuation Scheme, North Carolina Department of State Treasurer, and Employees' Retirement System of the State of Hawaii along with other plaintiffs (collectively, "plaintiffs") brought a securities class action against Brazilian state-owned oil company Petróleo Brasileiro S.A. ("Petrobras") and related entities, underwriters of Petrobras's note offerings, Petrobras's independent auditor, and former officers and directors of Petrobras and its subsidiaries (collectively, "defendants"). *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 373 (S.D.N.Y. 2015); Dkt. 342. Plaintiffs alleged that defendants had made false and misleading statements regarding Petrobras's financial statements, business, and

operational and compliance policies in violation of federal securities laws in connection with an alleged multi-year, multi-billion dollar bribery and kickback scheme orchestrated by Petrobras. *Petrobras*, 116 F. Supp. 3d at 373, 375; *see e.g.*, Dkt. 342 ¶¶ 158-174. As the details of Petrobras's scheme emerged, the price of its securities slid downward. Plaintiffs alleged that Petrobras's worth declined from over $310 billion to $39 billion. Dkt. 342 ¶ 2.

The parties settled for $3 billion. A-474. The settlement class included all persons who (1) purchased Petrobras securities (defined to include Petrobras common and preferred equity traded under the ticker symbols PBR and PBR/A, respectively, and certain notes), and/or (2) purchased debt securities issued by Petrobras or its subsidiaries in certain transactions traceable to public offerings, during specified time periods. Dkt. 767-1 at 19, 25, 27. Plaintiffs estimated that the recovery represented approximately 22.3% of the likely recoverable damages suffered by the class. A-476.

Class counsel filed a motion requesting an award of attorneys' fees in the amount of $284.4 million, plus reimbursement of $14,515,235.24 in litigation expenses, for a total request of $299,015,235.24 from the settlement fund. Dkt. 787. Class counsel filed a nearly 200-page declaration in support of their motion, attaching twenty-five exhibits totaling more than 600 pages. A-197; Dkts. 789-1-789-25.

At the preliminary approval hearing, the district court questioned class counsel regarding the appropriateness of a fee award equal to 9.5% of the settlement fund "in a giant case like this" and stated that it would welcome submissions regarding fees in mega-fund cases. A-166:14-167:5. The district court also questioned class counsel

about how they "spen[t] [a lodestar of] $160 million in hourly rates." A-167:6-10. The district court stated that the issue of fees would not be decided "until the final hearing … because I'll need to hear from any objectors who wish to be heard." A-174:3-6. The court further observed that plaintiffs were justifying their 9.5% request by claiming "it's a reasonable multiple of Lodestar … [s]o calculating what the Lodestar really is" was a factor for the court to consider. A-191:1-6.

At the district court's request, counsel for defendants submitted an 11-page letter flagging certain issues and entries from plaintiffs' time sheets for the court's attention. Dkt. 793. (Notwithstanding Haynes' objection, class counsel's time sheets were made available to defendants but not to class members such as Haynes. *See* A-419.) Defendants made three "observations" with respect to the time sheets: (1) class counsel billed the class at rates up to $625 per hour for staff attorneys and contract attorneys; (2) class counsel billed the class for translations of documents by staff and project attorneys at rates of $325 to $625 per hour; and (3) there were a number of time entries in which attorney time may not have been "properly billed" or the entries lacked "enough information" for the court to assess whether they could be justified, including over a thousand hours on oppositions to motions after the case had been stayed. Dkt. 793 at 3, 8. Defendants did not observe that any of the staff or project attorneys were only admitted to practice in foreign courts or otherwise ineligible for admission in the district court, suggest more appropriate billing rates for any timekeepers other than for typical translation work, suggest the court refrain from applying a multiplier greater than the 1.78 multiplier requested by class counsel, or suggest that the 9.5% of the settlement fund requested as fees by class counsel was

excessive. Nor did defendants voluntarily indicate what they paid staff or project attorneys for similar work.

### B. Haynes objects to the settlement and class counsel's Rule 23(h) request.

Appellant William Thomas Haynes, as trustee for the benefit of W. Thomas and Katherine Haynes Irrevocable Trust for the benefit of Sara L. Haynes ("Haynes") is a class member, as through his decision, the Trust purchased 55 shares of Petrobras common stock (PBR) during the class period. Dkt. 798 ¶ 4. Represented by the Competitive Enterprise Institute's ("CEI") Center for Class Action Fairness ("CCAF"), Haynes filed a timely objection challenging both certification of the settlement and class counsel's Rule 23(h) request. A-395.

Haynes objected to certification of the settlement on the grounds that there were intraclass conflicts between class members who purchased Petrobras securities in domestic transactions as defined by *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and those who purchased the securities by foreign transaction. This, he asserted, precluded a finding of adequate representation or predominance under Rules 23(a)(4) and (b)(3) respectively. A-405. Haynes further argued that the inadequacy of class counsel's representation was evidenced by an improper *cy pres* settlement provision that did not provide the "next best" compensation use because it was directed to a program with an inappropriately narrow geographic scope and had an inappropriately weak connection to the issue of securities fraud. A-410-411.

Haynes objected to the Rule 23(h) request on several grounds, asking the district court to substantially reduce class counsel's nearly $300 million request because:

(a) their lodestar was overstated by at least $96 million including (i) $27.9 million ($49.8 million with the requested multiplier) in legal fees for foreign attorneys not eligible to be admitted in the district court, (ii) another $68.2 million because the "Project Associates" charged exorbitant rates especially considering they performed non-legal work such as translating and coding documents; and (iii) another undeterminable amount because class counsel failed to provide objectors with sufficient billing summaries. Moreover, class counsel's lodestar demonstrated a lack of billing judgment evidenced by the excessive and misleading submission;

(b) after reducing the lodestar amount, the court should not apply more than the 1.78 lodestar multiplier requested by class counsel; and

(c) the 9.5% of the settlement fund requested by class counsel was excessive under Circuit precedent.

A-414-427.

The preliminary approval order and class notice required objecting class members to include a list and documentation of their transactions involving the Petrobras securities included in the settlement class definition as well as a complete list of other cases in which objecting class members or their counsel had appeared as objectors or counsel in the preceding five years. Dkt. 770 at 2; Dkt. 767-4 at 20. Accordingly, with his objection, Haynes filed a declaration stating that he had not previously filed an objection to a proposed class action settlement. The declaration

further stated that, as a result of Haynes's decision, the Trust had purchased 55 shares of PBR on March 4, 2010, and it continued to hold those shares. Dkt. 798 ¶ 4. Haynes attached to his declaration a TD Ameritrade statement evidencing the purchase of the 55 shares of PBR on March 4, 2010. Dkt. 798-1. Haynes's counsel, Theodore H. Frank, filed a 27-page declaration contemporaneously with the objection, detailing the dozens of class-action objections and appeals that he and the organization he founded, CCAF, had filed, and the outcomes of those cases, including appeals and any awards to CCAF. Dkt. 799. Haynes's counsel also filed another declaration containing tables detailing (i) the magnitude of the Brazilian project attorney overbilling, (ii) the magnitude of U.S. project attorney overbilling, and (iii) fee percentages in in-Circuit securities class actions, and attaching evidence supporting his argument that the project-attorney rates class counsel was billing to the class were multiples of the market rate. Dkt. 800.

### C. Class counsel demand discovery from Haynes hours after he filed his objection.

Less than three hours after Haynes filed his objection, class counsel sent a subpoena to Haynes' counsel demanding that he sit for a deposition and respond to eighteen document requests. A-537. The document requests were facially overbroad, boilerplate, and directed at topics irrelevant to the merits of Haynes's objection or settlement or fee approval. For example, the requests demanded "all documents" from Haynes relating to privileged communications with his counsel, documents showing the amount of his income from *all sources* over an eight-year period, and "all documents relating to [his] decision to invest in Petrobras Securities during the Class

Period." *See id.*; Dkt. 841-1 at 6-8. Another request demanded "[a]ll documents relating to any Objection or subsequent appeal filed in the last ten years by you … or any person or entity who is or has been involved or associated with the representation of you in the Petrobras Litigation," which, because of the expansion of the request to cover attorneys representing Haynes in the litigation, would have required production of tens of thousands of documents relating to over a hundred CEI and CCAF cases. Dkt. 841-1 at 7. (In another case, a class counsel who persisted with a similar "hammer and tongs" subpoena against CCAF as retaliation for a meritorious objection was sanctioned for $100,000. *In re Classmates.com Consol. Litig.*, No. 09-cv-0045-RAJ, 2012 WL 3854501 (W.D. Wash. June 15, 2012).)

Haynes's counsel responded with a detailed letter of objections and a request to discuss a mutually agreeable reciprocal discovery schedule and stipulation, and agreed to voluntarily produce a redacted retainer agreement and another brokerage statement showing the Trust had not sold its shares of Petrobras stock. A-537-538. Haynes's counsel, along with class counsel, defense counsel, and other objectors and their counsel, also participated in a lengthy conference call with the district court on May 15, 2018. While Haynes's counsel successfully advocated against enforcement of the subpoena, that did not end class counsel's quest to vex objectors. *Id.*

That same day, class counsel raised "concerns" about Haynes's class membership. Those concerns were based in large part on the purchase price of the shares shown on the brokerage statement, which class counsel apparently did not realize included the commission fees. A-537-538. In a good-faith effort to address the unfounded concerns, Haynes's counsel responded by letter the following day, and Mr.

Haynes undertook a diligent search to find additional nearly-decade-old documents to put any further concerns to rest. A-538. Not satisfied with this response, class counsel proceeded to bring the issue before the district court, submitting a letter in which they baselessly accused Haynes and his counsel of objecting to stifle class action litigation and gain favor with corporate interests. Dkt. 815. Haynes's counsel responded with a letter correcting the record and attaching a statement establishing beyond dispute that the Trust had purchased Petrobras securities during the class period. Dkt. 817. The district court subsequently ordered Haynes to produce all relevant Bear Stearns account statements reflecting the purchase of Petrobras stock, discovery sufficient to determine any compensation or perquisites Haynes had received from CEI or its donors from 2008 to the present, and the Trust's retainer agreement. A-537-538. Haynes produced additional documentary proof of the stock purchase, the retainer agreement, and a narrative response describing how his contributions to CEI exceeded the value of any benefits or payments he received from CEI or its donors and further reiterating his good-faith motive for objecting. *See* Dkt. 819; Dkt. 820. Haynes also filed an additional sur-reply (Dkt. 830) to rebut further baseless accusations from plaintiffs, *inter alia*, claiming that he and his counsel have a "corporate friendly," "anti-class action litigation agenda," claiming counsel violated standards of professional responsibility, and misrepresenting past court decisions. Dkt. 824 at 5, 7, 8, 10. In total, Haynes's counsel were forced to expend dozens of hours defending against and responding to class counsel's discovery requests and related attempts to undermine Haynes's objection through non-substantive tactics. *See, e.g.*, A-533 ¶ 11; A-534-35 ¶ 13.

### D. After a fairness hearing, the court approves the settlement and awards class counsel fees of nearly $95 million less than they requested.

On June 4, 2018, the district court held a fairness hearing, at which Haynes appeared through counsel. A-541. On June 25, 2018, the court issued an opinion and order approving the settlement and awarding attorneys' fees "reduced by roughly one-third" of class counsel's request. A-470.

In an over twelve-page analysis, the district court ultimately rejected Haynes's objection to the class settlement certification. A-478-490. On the *cy pres* issue, the district court stated that it would permit further briefing "if and when the question becomes ripe for consideration." A-492. The court went on to approve the settlement for the certified class, and Haynes did not appeal this decision, though other objectors did.

With respect to class counsel's fee request, the district court awarded $186,544,000 in fees and $17,563,838.24 in expenses, for a total award of approximately $204.1 million. A-510; A-514. In reaching this amount, the court noted that "Class Counsel do not address the case law cited by Haynes or identify cases supporting their position" regarding the multi-hundred dollar-per-hour rates charged by 27 non-U.S. licensed foreign attorneys. A-502. "Accordingly," the court concluded, "the full amount billed by these individuals must be deducted from Class Counsel's lodestar," though class counsel could seek reimbursement of the actual cost they paid the attorneys. *Id.* That amount turned out to be $3,048,603—approximately one-sixteenth of the amount class counsel tried to bill to the class. A-514.

With respect to staff and contract attorneys more broadly, "the Court agree[d] with objectors that a reduction is appropriate to account for the considerable time spent by these attorneys on low level document review." A-502. The Court reduced staff and contract attorney time by 20% and further reduced amounts billed by these attorneys for translating documents by another 50%. A-503. After making these adjustments to class counsel's lodestar, the district court applied the original 1.78 multiplier requested by class counsel, rejecting class counsel's evolving argument that a 2.7 multiplier was warranted. A-504-505.

### E. Haynes requests attorneys' fees for the benefit he conferred on the class.

Haynes filed a motion requesting $199,400 in attorneys' fees, to be awarded out of class counsel's fee award, based on the pecuniary improvement to the class of approximately $94.9 million. Dkt. 839. Haynes's fee request equaled 0.21% of that benefit to the class. Haynes argued that he was responsible for this result—or at the very least, achieved a $46 million reduction in fees attributable to the Brazilian project attorneys and contributed materially to the additional $49 million reduction. Dkt. 840. No other objector requested attorneys' fees.

Haynes identified the following arguments he had made as contributing to the $94.9 million benefit to the class:

(1) The $49.6 million ($27.86 million x 1.78 lodestar multiplier) in fees that class counsel requested for non-U.S. licensed project attorneys should be rejected, with the cost of their work allowed only as an expense;[2]

(2) The $82.2 million requested for U.S. project associates should be significantly reduced due to (i) the excessive billing rates charged generally, and (ii) the excessive billing rates charged for non-legal work such as translating documents specifically;

(3) The court should not apply a lodestar multiplier higher than the 1.78 requested by class counsel after making these reductions to the lodestar; and

(4) The more than 9% of the fund requested by class counsel was out of step with Circuit law regarding mega-fund securities cases and should be reduced accordingly.

Dkt. 840 at 3 (citing Dkt. 797 at 12-25).

His lodestar, which he provided as a crosscheck for his requested percentage-of-the-benefit award was $117,316.50. A-536. The lodestar did not include any time billed after June 4, 2018, the date of the fairness hearing, any time spent on his motion requesting attorneys' fees, any time traveling to or from the fairness hearing that did not involve substantive work, or any of the many hours that Haynes personally devoted to the objection and responding to discovery requests. A-537.

[2] After class counsel demonstrated approximately $3 million in expense reimbursements attributable to Brazilian project attorney time, the benefit conferred here equaled $46 million.

Class counsel opposed Haynes's fee request. They argued that Haynes had not provided a benefit to the class but rather his work was cumulative of concerns already raised on the record by the court and defense counsel or focused on arguments against certification that the court rejected. Dkt. 845 at 4. They further argued that the number of hours billed was too high and that any fee award should exclude time spent on arguments other than Haynes's objection to class counsel's billing for non-U.S.-licensed Brazilian attorneys. *Id.* at 7-9.

After briefing on the motion was complete, the district court requested Haynes's timesheets showing his lodestar, which Haynes provided. A-629.

### F. The court awards 10% of Haynes's lodestar.

The district court awarded Haynes attorneys' fees in the amount of $11,731.65, an amount equal to 10% of his lodestar, to be paid from class counsel's fee award. SPA-7. The district court found that Haynes "significantly contributed to one aspect of the class's recovery, because a $46 million reduction in Class Counsel's fee award is directly attributable to [Haynes's] argument that Class Counsel's expenditures on Brazilian attorneys should be classified as costs rather than attorneys' fees." SPA-3. The district court further recognized that "Objector [Haynes] was the only one to raise this argument and … the Court referred specifically to Objector [Haynes] as having raised the issue and having identified the relevant case law." *Id.* Despite concluding that Haynes was entitled to attorneys' fees because his work "improved the overall amount of the settlement awarded to the class" by $46 million, the district court made a substantial reduction to the amount of fees Haynes requested because

"the remainder of Objector[ Haynes's] arguments … failed to benefit the class or otherwise assist the court in framing the issues for the settlement or affect the outcome as to fees." SPA-3 (cleaned up). That "substantial reduction" excluded 90% of Haynes's lodestar on the grounds that "only 1.5 pages of Objector's 25-page brief" addressed the Brazilian contract attorney overbilling. SPA-7. The Court stated that "25 hours of research, drafting and editing at a junior level, billed at $375, and 6.7 hours of review at a more senior level billed at $465" was "a reasonable lodestar" for that issue. *Id.* The Court did not explain why a "reasonable lodestar" excluded the dozens of hours that Haynes's counsel spent opposing and responding to class counsel's burdensome discovery requests, drafting the declarations providing information required of objectors by the preliminary approval order, appearing at the fairness hearing, or similar tasks required for him to participate in the litigation as an objector. *Id.*

Haynes timely appealed this decision. A-624.

**G. Other objectors appeal the settlement approval and fee award.**

Two sets of objectors appealed the settlement approval and fee award to class counsel. Dkt. 849; Dkt. 850. (Another set of objectors filed a notice of appeal that they subsequently withdrew. Dkt. 842; Dkt. 907.)

Class counsel cross-appealed the adverse fee ruling minutes before midnight on the 30th day after final judgment. Dkt. 851. Class counsel ultimately moved to dismiss Appeal No. 18-2324 with prejudice. *In re Petrobras Securities Litig.*, No. 18-2324, Dkt. 64 (2d Cir. Nov. 15, 2018). That motion is pending.

With respect to the appealing objectors, plaintiffs filed motions requesting sanctions that would run into the 6- and 7-digits and an appeal bond in the amount of at least $3,030,000. Dkts. 856, 859, 862. Haynes requested leave to file an opposition because such motions, seeking such large amounts, could have a "'chilling effect' on objectors generally." A-622. The district court denied his request. *Id.*

The district court imposed an appeal bond of $5,000 and sanctions of $10,000 against counsel for one objector. Dkt. 896 at 31. The court found that he had "made repeated misrepresentations of both the facts and the law" to the court with "[t]he only likely motive" being "to extort a payment from Class Plaintiffs." *Id.* at 16. The district court favorably cited *Pearson v. Target Corp.*, 893 F.3d 980 (7th Cir. 2018), a case brought by CCAF to help protect the class from bad-faith objectors. Dkt. 896 at 2. In their briefs, plaintiffs contrasted the objector's position with Haynes's, referencing CCAF's role of protecting class members from *cy pres* abuse as represented by their Supreme Court case *Frank v. Gaos*, No. 17-961. Dkt. 860 at 16; Dkt. 857 at 9. The court declined to impose sanctions against the other set of objectors who raised an objection to settlement certification similar to Haynes's because that issue, while rejected by the court, was "not frivolous and not unlike the kind of argument the Court would expect from a serious objector motivated by concerns for class welfare," *i.e.*, CCAF and Haynes. Dkt. 896 at 23. The district court granted an appeal bond of $50,000 with respect to those objectors. *Id.* at 30.

## Summary of Argument

This Court recognizes the important role that objecting class members play in the class-action settlement process, where, without them, there is rarely any adversarial presentation of the issues. *White v. Auerbach*, 500 F.2d 822, 829 (2d Cir. 1974). That recognition includes the right to recover attorneys' fees where objectors provide a material benefit to the class. *Id.* Here, through his objection, Haynes increased the class recovery by $95 million or, at the least, $46 million. The district court recognized this "substantial cost savings to the class" was brought about by Haynes's objection. SPA-7. But it went on to award him a mere 10% of his lodestar based on its determination that that amount represented a reasonable lodestar for the "only 1.5 pages of [his] 25-page brief" that he devoted to the issue that resulted in the $46 million reduction. SPA-7. In doing so, the court disregarded longstanding precedent requiring a district court to consider the overall result achieved by a litigant. Instead, the court parsed Haynes's work, and the underlying lodestar, for argument-by-argument, page-by-page success, and it excluded from the fee award any compensation for the general litigation tasks required for Haynes to participate in the litigation at all, without providing any explanation for doing so. Each of these errors is independently reversible under *Hensley*, 461 U.S. 424.

Reversal of the district court's order awarding fees is consistent with legal precedent and also sound policy. Class members who step forward to object in good faith, reintroduce an adversarial element to the settlement proceedings, and confer a concrete benefit upon the class should be permitted to recover their attorneys' fees and expenses. They should not be treated as second-class litigants. Class counsel

already have an "incentive to punish successful objectors by withholding fees." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 201 n.17 (3d Cir. 2005). The decision below exacerbates this problem by further encouraging class counsel to burden good-faith objectors with significant discovery and other litigation costs without risk to counsel's own pocketbook. In this regard, it is notable that the analysis the district court applied to Haynes's fee application was markedly different to that the court applied to class counsel's fee award. There, for example, it did not deduct fees for time spent on unsuccessful or even never-filed motions or oppositions. Because even the wealthiest institutional investors will not find it cost-effective to pay attorneys to investigate fee requests except on a contingency basis, upholding the district court's ruling chases future good-faith objectors away from creating a common benefit for the class—making it more likely that future class counsels will attempt the sort of billing abuses exposed here at the expense of absent class members.

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 awarding Haynes his fee request.

## Preliminary Statement

Attorneys with the Center for Class Action Fairness, which became part of the non-profit Competitive Enterprise Institute ("CEI") on October 1, 2015, and will become part of the new non-profit Hamilton Lincoln Law Institute in 2019, bring objector Haynes's objection and appeal. (Mr. Haynes previously served as chairperson of the board of CEI during the time of the objection, though he is no longer affiliated

with CEI.) The Center's mission is to litigate on behalf of class members against unfair class-action procedures and settlements, and it has won hundreds of millions of dollars for class members. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016); *see also, e.g.*, Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12 (calling Frank "the leading critic of abusive class action settlements"); Editorial Board, *The Class-Action Con*, Wall St. J. (Feb. 11, 2018); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (praising the Center's work); *In re Classmates.com Consol. Litig.*, 2012 WL 3854501, at *11 (same); Decl. of Theodore H. Frank, Dkt. 799 (documenting dozens of successful objections as required by preliminary approval order). This appeal is brought in good faith to establish correct principles of Rule 23 fee jurisprudence.

## Argument

### I. Good-faith objectors protect the class from the recognized incentive problem of class-action settlements and may recover fees when they provide a benefit to the class.

Unlike settlements in bilateral civil litigation, class-action settlements and fee awards require court approval pursuant to the standards set out in Federal Rule of Civil Procedure 23. Among the safeguards that Rule 23 provides to absent class members is the right of class members to object to a proposed settlement or request for attorneys' fees. Fed. R. Civ. P. 23(e)(5). The need for court approval as an additional layer of review, during which the court acts as a fiduciary of the class and class members may present their objections, arises from the self-interested incentives

inherent in the representative nature of class actions. *Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982).

The potential for conflict in class-action settlements is structural and acute because every dollar reserved to the class is a dollar defendants cannot pay class counsel. "Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it,' and 'the allocation between the class payment and the attorneys' fees is of little or no interest to the defense.'" *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (quoting *Staton v. Boeing*, 327 F.3d 938, 964 (9th Cir. 2003)). "Defendants, once the settlement amount has been agreed to, have little interest in how it is distributed and thus no incentive to oppose the fee." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). Class counsel, meanwhile, have an obvious interest in maximizing the fee award. *Id.* at 52-53. "[B]ecause the adversary system is typically diluted—indeed, suspended—during fee proceedings," "fixing a reasonable fee becomes even more difficult." *Id.* at 52; *see also In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) ("district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class").

In the light of these incentives in class-action settlements, "it is well settled that objectors have a valuable and important role to perform." *White*, 500 F.2d at 828. Absent "vocal objectors," district courts analyze settlements in a "non-adversarial posture" for which they are often "ill-equipped" to assess the reasonableness of the parties' positions. *See Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 122 n.7 (D.D.C. July 24, 2015). As recognition of objectors' valuable role and consistent with the substantial

benefit doctrine, this Court has long held that objectors who provide a material benefit to the class through their objections "are entitled to an allowance as compensation for attorneys' fees and expenses." *White*, 500 F. 2d at 828.

The public policy behind this practice is sound. Ordinarily, class members "have no real incentive to mount a challenge that would result in only a 'minuscule' *pro rata* gain from a fee reduction." *Goldberger*, 209 F.3d at 53. *See also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("only a lunatic or a fanatic sues for $30").[3] Allowing objectors to recoup attorneys' fees and costs they incur in bringing meritorious objections helps to incentivize class members who otherwise may be unwilling to give their time and effort to oppose an abusive class-action settlement or fee request when the difference in their personal recovery is likely to be nominal. Such good-faith objectors reintroduce an adversarial element into the settlement process, a point in the litigation when both plaintiffs and defendants are aligned in their mutual interest in obtaining settlement approval and ending the litigation.

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[3] While plaintiffs made much of the Trust's holding of 55 shares in the district court, nearly every class member's potential benefit from a successful objection will be relatively small. Haynes's objection increased class recovery by tens of millions of dollars, but divided among the hundreds of millions of shares in the class, the resulting benefit is only pennies a share. So, even if Haynes had purchased a million shares of Petrobras stock during the class period, his total benefit from his objection still would have amounted to only a fraction of his over $117,000 in lodestar fees. In short, even wealthy sophisticated institutional investors have no economic incentive to pay lawyers to even *investigate* possibly abusive fee requests—much less expose themselves to the sort of expensive retaliatory discovery that occurred in this case—unless they can retain lawyers willing to work on a contingency basis.

Fee awards for meritorious objections also serve to protect the legal process from the negative effects of bad-faith objectors. In recent years, the class action system has seen an unfortunate rise in bad-faith or "professional" objections. "Professional objectors are attorneys who file stock objections to class action settlements—objections that are most often nonmeritorious—and then are rewarded with a fee by class counsel to settle their objections." *Garber v. Office of the Comm'r of Baseball*, No. 12-CV-03704, 2017 WL 752183, at *4 n.9 (S.D.N.Y. Feb. 27, 2017) (cleaned up). "Professional objectors primarily seek to obstruct or delay settlement proceedings so as to extract attorneys' fees in exchange for the withdrawal of the objection." *Id.* (citing 7B Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1797.4 (3d ed. 2005)).

If good-faith objectors always incur costs, with only a small chance of recovering fees well-below their lodestar, then the system grooms only bad-faith objectors to participate in the Rule 23 settlement process. That effect is compounded where—as here—class counsel imposes additional burdens on objectors through abusive discovery requests and *ad hominem* attacks.[4] Those burdens increase the time, expense, and overall unpleasantness for absent class members who seek to exercise their Rule 23(e) right of objection in good faith. Much of that asymmetrical burden can be alleviated by awarding attorneys' fees to those objectors who benefit the class.

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[4] Such attacks were leveled notwithstanding this Court's admonition that "irrelevant personal or *ad hominem* attacks on [counsel] merely distract from the merits of the litigation." *Revson v. Cinque & Cinque*, 221 F.3d 71, 82 (2d Cir. 2000).

Indeed, such good-faith objectors can even help to safeguard the class action process from bad-faith objectors. *See Pearson*, 893 F.3d 980.

Under the status quo embodied by the district court's ruling here, we are left with a slanted system that permits class counsel to impose significant costs and burdens on class members who assist the court by filing meritorious objections. In the absence of an attorneys' fee award, a good-faith objector is almost always worse off if he objects than if he hadn't shown up at all. Bad-faith objectors, on the other hand, burden the judicial system with meritless filings yet are able to extract payments in the tens and hundreds of thousands of dollars "to go away." *See, e.g., Edelson PC v. Bandas Law Firm PC*, No. 16-cv-11057, 2018 WL 3496085, at *11 (N.D. Ill. Jul. 20, 2018) (allowing claims to proceed against objectors' counsel which collected $225,000 in attorneys' fees due to "pattern of reprehensible conduct that has harmed Plaintiff and others and benefits no one other than . . . themselves."). Rule 23 cannot countenance this result. Fortunately, the imbalance is easily resolved in this case under the Court's precedent.

## II. The district court's fee decision was based on an erroneous application of the law.

The district court properly recognized that objectors who improve the class's recovery are entitled to recover attorneys' fees and costs. But despite acknowledging that a $46 million class benefit was "directly attributable" to Haynes' objection, SPA-3, the district court determined that a reasonable fee award was merely $11,731.65. SPA-7. The district court calculated that Haynes' beneficial argument "constituted only 1.5 pages of Objector's 25-page brief." SPA-7. Thus, the court computed a fee of

10% of his lodestar (slightly above the 6% by-the-page calculation) as reasonable for Haynes to have put together this "novel, well researched" argument. SPA-7. Neither this outcome nor the method applied by the district court is legally permissible. While a court has discretion to determine attorneys' fees using a lodestar or percentage of the fund method, the court must apply the selected methodology properly. *Goldberger*, 209 F.3d at 50. The district court failed to do that here.

First, the district court improperly parsed Haynes's objection for argument-by-argument, page-by-page success rather than awarding Haynes fees for all hours reasonably expended on the litigation. Second, the district court, without explanation, excluded all time attributable to legal work necessary to file *any* objection raising *any* meritorious argument—including the one credited to him by the district court. Finally, the district court failed to account for the magnitude of the benefit conferred by Haynes. As explained below, each of these is an error of law. This Court should reverse and remand for the district court to enter an order granting Haynes's fee request.

### A. 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.

By parsing Haynes' time expenditures on a page-by-page, argument-by-argument, idea-by-idea, contention-by-contention basis and by disregarding the success of Haynes's participation on the whole, the district court violated Supreme Court precedent. Addressing the lodestar methodology in *Hensley*, the Supreme Court held that "[w]here a plaintiff has obtained excellent results … the fee award should

not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." 461 U.S. at 435. Rather, the attorney "should recover a fully compensatory fee," which normally "will encompass all hours reasonably expended on the litigation." *Id.* This direction recognizes that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Id.* Put simply, "[t]he result is what matters." *Id.* This is true even where only partial success is achieved. *Id.* at 436 ("[T]he most critical factor is the degree of success obtained."); *see also Kassim v. City of Schenectady*, 415 F.3d 246, 254 (2d Cir. 2005) (labeling this as "the mantra of *Hensley*").

Given *Hensley*'s focus on the result achieved, a prevailing party "should be compensated even for work done in connection with an unsuccessful claim if that claim was intertwined with the claim on which she succeeded." *Gierlinger v. Gleason*, 160 F.3d 858, 877 (2d Cir. 1998). As *Hensley* pointed out, it is where claims are so unrelated that they should be "treated as if they had been raised in separate lawsuits" that any hours spent on unsuccessful work should be removed from the lodestar—an event "unlikely to arise with great frequency." 461 U.S. at 435. Here, Haynes's work was entirely directed at the Rule 23 settlement approval process, where class certification, settlement approval, and Rule 23(h) awards are inextricably intertwined and all adjudicated at the fairness hearing. *See* Advisory Committee Notes to 2018 Amendments to Rule 23 ("The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement."); Procedural Guidance for Class Action Settlements, *available at*

http://cand.uscourts.gov/ClassActionSettlementGuidance ("requests for attorneys' fees must be noticed for the same date as the final approval hearing").

Instead of focusing on the degree of success of Haynes's objection on the whole, however, the district court computed the precise numerical proportion of Haynes' brief that was necessary to generate the $46 million result the court credited to his work. *Hensley* explicitly "reject[s]" this "mathematical approach comparing the total number of issues in this case with those actually prevailed upon." 461 U.S. at 435 n.11. "Such a ratio provides little aid in determining what is a reasonable fee in light of the relevant factors." *Id.* And indeed, the tack taken by the district court was even more parsimonious than this because it counted not issue-by-issue but page-by-page. *See Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1165 (11th Cir. 2017) (finding abuse of discretion in "rote application of a mathematical formula"); *Phelps-Roper v. Koster*, 815 F.3d 393, 398-399 (8th Cir. 2016) (finding abuse of discretion in "arithmetically simplistic fee calculation [that] did not accurately reflect [plaintiff's] degree of success of her interrelated claims"); *Pub. Interest Research Group of N.J. v. Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995) (finding abuse of discretion in "simple, mechanistic reduction based solely on the ratio of successful to unsuccessful issues").

Beyond the issue of a formulaic reduction, the district court gave short shrift to time expended on all other aspects of Haynes' objection, even time spent on successful arguments. For example, Haynes maintained at length that class counsel's lodestar was overstated through the billing of contract attorneys at exorbitant rates, that class counsel's 9.48% fee request was out-of-step with Circuit precedent, and that class counsel's multiplier should not be raised above 1.78 to offset the downward

adjustment to their lodestar. A-416-419; A-421-427. These arguments successfully culminated in the district court reducing counsel's fees by nearly $95 million. A-501-506. That the district court asserted that these arguments were "general" and "did not assist the Court in reaching its decision to award Class Counsel lower fees" is not a proper reason to deny a fee entitlement, let alone a proper reason to exclude time that Haynes expended on those arguments. "[O]bjectors must decide whether to object without knowing what objections may be moot because they have already occurred to the judge." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002); *accord White*, 500 F.2d at 829 (citing *Green v. Transitron Elec. Corp.*, 325 F.2d 492 (1st Cir. 1964)). This is especially true here, where the district court had previously awarded 25% to 30% of the settlement fund in securities litigation. *E.g.*, *In re Monster Worldwide, Inc. Sec. Litig.*, No. 07-cv-02237-JSR, 2008 WL 9019514 (S.D.N.Y. Nov. 25, 2008) (awarding fees of 25% of settlement fund); *In re Bisys Sec. Litig.*, No. 04 Civ. 3840-JSR, 2007 WL 2049726 (S.D.N.Y. July 16, 2007) (awarding fees of 30% of settlement fund). And even apart from the substance of their arguments, objectors provide a benefit by creating an adversarial proceeding. *See Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009) (citing cases).

Not only did the district court fail to credit Haynes for the full magnitude of the benefit he conferred on the class, it also excluded all time expended by Haynes' attorneys beyond that purportedly necessary for the 1.5 pages attributable to the foreign attorney objection. Although the Court had broached the general issue of an excessive fee request at the preliminary approval hearing (SPA-5), that does not make it unreasonable for Haynes to have expended time crafting his fee objection, nor does

it make those arguments unrelated and unsuccessful such that he should be denied attorneys' fees. That's particularly true given the district court's comments at the hearing inviting parties to submit precedent regarding the appropriate percentage of recovery in mega-fund cases and welcoming objectors to voice concerns with the settlement and fee request. A-167; A-174. As another example, Haynes objected to the settlement's misuse of *cy pres* (*i.e.*, the provision contemplating donation of residual settlement funds to non-party charities) and the court ultimately decided that it was an issue that should be addressed later in the litigation. *Compare* A-492 and Dkt. 889 (reserving the question of the propriety of *cy pres* provision), *with* A-410-411 (raising this objection). The district court's order awarding Haynes a reduced fee did not explain why the court excluded time incurred advancing that argument from his fee award. Similarly and also without discussion, the district court eliminated all hours related to general litigation matters such as discovery and attending the fairness hearing. *See* Section II.B.

The district court did, however, observe that "approximately half of [Haynes'] brief" was devoted to arguments against class certification that were "rejected in their entirely by the Court." SPA-3-4. "The relevant issue, however, 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). "Reasonable paying clients may reject bills for time spent on entirely fruitless strategies while at the same time paying their lawyers for advancing plausible though ultimately unsuccessful arguments." *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 538 (S.D.N.Y. 2008). Haynes's

arguments meet this standard. The district court described similar certification arguments as "not frivolous and not unlike the kind of argument the Court would expect from a serious objector motivated by concerns for class welfare." Dkt. 896 at 23. Underscoring the strong legal basis for Haynes's certification objection, the district court's opinion and order approving the settlement spent twelve pages addressing that argument, A-478-490, and the court stated at the fairness hearing that the objection "at least gave me some pause" while questioning counsel at length on the topic. A-545.

Further illuminating the gravity of the district court's error is the fact that it did not apply the same standard when evaluating class counsel's fee request. Counsel for Petrobras detailed thousands of hours asserted in class counsel's lodestar that were of dubious benefit to the class, including numerous hours spent on motion practice after the case was stayed on oppositions never filed. Dkt. 793 at 7-11. In response to the court's questioning, defense counsel further stated that not all of the 65 depositions taken in the case were needed. A-189:4-8. Moreover, neither the district court's fee award nor class counsel's lodestar made any apparent reduction for time spent on significant motion practice that was at least partially unsuccessful. *See* Dkt. 189 (granting in part defendants' motion to dismiss); Dkt. 374 (granting in part defendants' motion to dismiss); Dkt. 461 (granting in part PwC Brazil's motion to dismiss); Dkt. 585 (denying plaintiffs' request for leave to amend the complaint to assert a new section 10(b) claim against PwC Brazil). Confronted with these instances of non-beneficial or not fully-beneficial work, the district court concluded only that "more global reductions" based on excessive hourly fees in conjunction with class

counsel's self-administered haircut "sufficiently account for any sporadic and idiosyncratic overcharging that may have occurred." A-500.[5] The district court effected a double standard in which Haynes, who engaged in one largely successful battle through his objection, was penalized because some of his arguments fell as casualties. Meanwhile, plaintiffs, who engaged in numerous battles that were partially or entirely unsuccessful, received no penalty. If the district court had applied the same fee methodology for plaintiffs' award, the court would have compared the portions of each of the briefs filed with respect to the above-referenced motions with the arguments the court ultimately credited in its orders and then reduced class counsel's lodestar accordingly. If this method seems odd and illogical, that's because it is. It also is contrary to the law and constitutes reversible error.

### B. The district court erred by refusing to award fees for time spent on "all-inclusive" activities necessary for Haynes to exercise his right of objection and failed to provide a reason for this refusal.

The district court further erred by excluding time spent on litigation activities necessary for Haynes to exercise his right of objection and otherwise participate in the Rule 23 settlement process. This error was compounded by the district court's failure to provide a "concise but clear" explanation for its refusal to credit such time. *See Hensley*, 461 U.S. at 437 ("district court [must] provide a concise but clear explanation of its reasons for the fee award"); *Gierlinger*, 160 F.3d at 876 (district court must state reasons it excluded certain hours from fee award "as specifically as possible in order

[5] Again in contrast, neither class counsel nor the district court suggested that the hourly rates Haynes's attorneys used to calculate their lodestar were excessive.

to permit meaningful appellate review" (internal quotation marks omitted)). It is legal error for a court to fail to elucidate which hours it excluded as insufficiently related to successful claims. *See Patterson v. Basamico*, 440 F.3d 104, 123-24 (2d Cir. 2006). Such statement is especially important "with regard to the grant or denial of an adjustment to lodestar based on degree of success." *Kassim*, 415 F.3d at 256.

As *Hensley* explains, "[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." 461 U.S. at 435. That is the case here, and that's why courts are required to "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*; *see* Section II.C. When evaluating class counsel's lodestar, the court declined to eliminate time attributable to general litigation tasks. A-500. But again, confronting Haynes' lodestar, the court expunged all generalized hours not specifically attributable to the 1.5-page foreign contract attorney objection. Worse yet, the lower court provided no reasoning for its eradication of these hours. A decision without reasoning is a textbook abuse of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

No reduction in fees is permissible for time that is spent on activities that are necessary as a precondition for a litigant to raise any meritorious argument. That was the holding reached by another district court where the court adopted only a portion of CCAF's objection that admittedly demanded very little lodestar time. Judge Breyer of the Northern District of California still awarded the full $90,000 in fees that the objector requested, crediting CCAF's argument that it would have been impossible to raise the meritorious issue in isolation without spending time drafting the entire

objection and defending from discovery. *In re Transpacific Passenger Air Transportation Antitrust Litig.*, No. C 07-05634, 2015 WL 4776946, at *2 (N.D. Cal. Aug. 13, 2015).

Here, Haynes presented evidence that his counsel reasonably expended 231.7 hours on the litigation and that his hourly rates were reasonable. A-536. This time included a number of litigation tasks required for Haynes to object without being sanctioned or having his objection stricken, such as meeting the objection requirements set out in the class notice, discovery, and the fairness hearing. The district court did not suggest any of the following time was unreasonably incurred but nevertheless failed to credit the hours as part of Haynes's fee award:

1. *Declarations filed in support of Haynes's objection.* The class notice approved by the preliminary approval order set forth certain requirements that class members had to meet to file a valid objection. For example, class members had to provide a list of other cases in which they or their counsel had appeared as objectors or as counsel for objectors in the preceding five years and a list and documentation of transactions involving the Petrobras securities included in the settlement class definition. Dkt. 770; Dkt. 767-4 at 10. To meet these requirements, Haynes filed his own declaration stating this was his first settlement objection, describing the relevant transaction of Petrobras securities, and attaching documentation of that transaction. Dkt. 798. In addition, his counsel filed a declaration describing their objection history and preempting some of the most common *ad hominem* arguments made against them and their clients—many of which class counsel subsequently raised. Dkt. 799. His counsel also filed a declaration with tables demonstrating the size of class counsel's overbilling of both the Brazilian and U.S. project attorneys and the appropriate fee percentages

under Circuit precedent and attaching evidence of market billing rates. Dkt. 800. *All* of this time was necessary for Haynes to object to the settlement or fee request—and particularly to expound his objection to the overbilling for Brazilian project attorneys. Yet the district court did not award Haynes fees for any of this time or explain why it declined to do so.

2. *Discovery responses*. Within hours of filings his objection, Haynes and his counsel were subject to an onslaught of discovery requests and *ad hominem* attacks. A-537. The requests were not based on the substance of his objection. Rather, they were facially overbroad and appeared intended to impose costs and other burdens on objecting class members, perhaps to the point of forcing them to withdraw their objections. *See* Dkt. 841-1. Haynes's counsel expended considerable time objecting to the initial subpoena, responding to narrower (but still unnecessary) requests ultimately granted by the court, and filing letter responses and a sur-reply to rebut false personal attacks by class counsel that were unrelated to the merits of Haynes's objection. A-537-538. Yet again, even though Haynes would have had to expend this time regardless of whether he raised the single Brazilian contract attorney issue or a hundred issues, the court disallowed all of the time in determining his fee award and failed to explain why it did so.

Excluding the time Haynes spent on class counsel's scorched-earth discovery attacks contravenes this Court's holding that "even attorneys who achieve modest financial returns for their clients should receive fees for the time they spent 'defending against frivolous motions and making motions to compel compliance with routine discovery demands.'" *Serin v. N. Leasing Sys., Inc.*, 501 Fed. App'x 39, 41 (2d Cir. 2012)

(quoting *Kassim*, 415 F.3d at 252 (cleaned up)). In other contexts, this Court has protected against erosion of a successful party's attorneys' fee where a culpable, deep-pocketed opponent has tried "to dissipate the incentive provided by an award through recalcitrance." *Hines v. City of Albany*, 862 F.3d 215, 222 (2d Cir. 2016) (internal quotation marks omitted). Plaintiffs ran up the costs and burden on Haynes here, too, and it was legal error for the district court to allow them to shift the costs of their overzealous litigation tactics to him and his counsel.

3. *Fairness hearing*. Another litigation task on which Haynes's counsel would have expended time regardless of whether his objection addressed multiple issues or only the Brazilian contract attorney issue is the fairness hearing. Haynes's attorneys billed time for the substantive preparation and appearance at the hearing,[6] but, yet, again, the district court did not award fees for any of the time he spent on the hearing or explain its reasons for disregarding such time.

4. *Investigation*. Haynes's successful objection found a needle buried in a haystack—a needle that a sophisticated law firm billing substantially more to its paying client defendants failed to find. Class counsel filed over eight hundred pages of briefing, declarations, and exhibits in support of their $300 million fee request (a tactic they repeat in this appeal by designating hundreds of irrelevant pages for the Rule 30 appendix to make the record seem more complex than it is). Without extensive

[6] As a best billing practice Haynes' lead counsel did not submit any of her time spent traveling to the fairness hearing during which she was not engaged in substantive preparation. Haynes did not even seek reimbursement for counsel's reasonably incurred travel expenses.

detailed investigation into this bulk, an objector could never have found the problems that ultimately won the class tens of millions of dollars. The court's lodestar-based calculation disregards this.

* * *

By itself, the absence of an adequate explanation for the exclusion of the time Haynes's counsel spent on general litigation work such as the items described above was reversible error. But more importantly, no explanation could justify excluding the generalized time that Haynes had to expend to exercise his right of objection, time that would be spent identically whether Haynes raised a single meritorious argument or 100 arguments.

### C. The district court erred by failing to consider the magnitude of the benefit conferred.

The district court further erred by losing sight of the substantial benefit that Haynes conferred on the class. It is firmly established that "the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained." *Hensley*, 461 U.S. at 437. A "finding that the significant extent of the relief clearly justifies the award of a reasonable attorney's fee does not answer the question of what is reasonable in light of that level of success." 461 U.S. at 438-39 (cleaned up). This Circuit agrees that "the degree of success obtained" is "the most important factor in determining a reasonable fee," *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 760 (2d Cir. 1998), and "the quality of representation is best measured by results," *Goldberger*, 209 F.3d at 55.

There is no dispute that Haynes was the only objector or party to raise the issue of overbilling by the Brazilian contract attorneys or that class counsel's fee award was reduced—and the class's net recovery was increased—by $46 million originally attributable to those attorneys. Nor is there any dispute that Haynes raised the other arguments that the district court adopted to reduce class counsel's fees by an additional $49 million. But, even though Haynes requested fees on a percentage-of-recovery basis (less than a quarter of 1%), the district court didn't consider this $95 million benefit to the class—or even the $46 million benefit—when determining an appropriate fee award for Haynes. The district court did not once reference the fact that its ultimate $11,731.65 award equated to 0.02% (two-hundredths of one percent) of the declared $46 million benefit conferred. Instead, the Court relied on the number of pages that Haynes spent addressing the overbilling of Brazilian contract attorneys in his objection brief to reach what it considered an appropriate percentage of lodestar to award as fees. SPA-7. Under *Hensley*, this neglect for the result obtained requires reversal.

Haynes's involvement in the litigation was a "unitary" effort focused on protecting the class from an unfair result. His primary involvement was a single objection brief supported by three declarations and appearance at a fairness hearing—all of which addressed the propriety of the settlement certification and accompanying fee petition by class counsel under Rule 23. The discovery imposed on him by class counsel—although entirely unnecessary—arose directly from his filing this objection. This was not a case in which the issues could have been brought in separate lawsuits. *Cf. Hensley*, 461 U.S. at 435. As such, the district court was required to "focus on the

significance of the overall relief … in relation to the hours reasonably expended on the litigation." *Id.* at 435. Had the district court properly analyzed Haynes's fee petition, it would have recognized that his request for sub-0.5% of the benefit he conferred on the class was imminently reasonable.

And once again, by neglecting the magnitude of the benefit Haynes had conferred, the district court subjected Haynes to a double standard vis-à-vis the plaintiffs. As a lodestar cross-check, Haynes demonstrated a multiplier of 1.7, lower than the 1.78 received by plaintiffs, thus showing that Haynes did not seek a windfall, even though an award of even a single-digit percentage of the benefit to the class would have entitled Haynes's attorneys to millions of dollars. *Cf. Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 396-97 (D.N.J. 2012) (awarding objectors' counsel $82,134, 10.5% of $782 thousand benefit conferred to the class). After decimating Haynes' lodestar, the district court cursorily found no justification for granting objector him a multiplier given that he "was only involved in the case for a short period of time and faced no risks in his involvement." SPA-7. Although the finding of lack of risk was itself erroneous,[7] it is more notable that the district court omits any discussion of the

[7] *See Rodriguez v. W. Publ'g Corp.*, 602 Fed. App'x 385, 387 (9th Cir. 2015) (reversing district court's conclusion that class action objection is a "matter which [has] little risk"). This is especially true here, where class counsel's tactics were designed to attempt to embarrass Haynes and his counsel by exposing sensitive financial information (or, perhaps, hoping to induce a violation of a court order on discovery and winning sanctions), and class counsel made a variety of meritless claims of unethical behavior. *See, e.g.*, Dkt. 824 at 9-10 (implausibly claiming counsel violated standards of professional responsibility by informing client of implications of agreeing not to settle objection in bad faith and reserving right not to file frivolous appeals and misrepresenting Haynes's statements regarding his "motives" for objecting).

benefit conferred upon the class. By contrast, when deciding to award plaintiffs a 1.78 multiplier, the court relied upon findings that "Class counsel's performance was in many respects exceptional, with the result that, as noted, the class is poised to enjoy a substantially larger per share recovery than the recovery enjoyed by numerous large and sophisticated plaintiffs who separately settled their claims." A-504-505. Considering the benefit conferred is the best way to align the interests of advocates with those of the absent class; that is true both for class counsel and objector's counsel alike. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005); *see generally* Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (2000) (citing authorities that show a "broad consensus that percentage-based formulas harmonize the interests of agents and principles better than time-based formulas like the lodestar approach"). As *Hensley* instructs, even under a lodestar approach, the benefit conferred remains the guiding light of fee awards. The lower court's neglect of that guiding light, at least when evaluating Haynes' fee request, is reversible error.

This case differs dramatically from cases in which this Court has upheld reductions in fee awards where the litigant was only nominally successful or raised spurious claims. In *Green v. Torres*, 361 F.3d 96 (2d Cir. 2004), this Court affirmed a district court's 20% lodestar reduction where a plaintiff pled overbroad claims not supported by any "material evidence" and with no realistic expectation of prevailing. There, the district court made findings that unmeritorious claims were asserted after plaintiff obtained substantial discovery, when they were not viable. Consistent with *Hensley*, the Court emphasized, however, that "while the voluntary dismissal or

withdrawal of *inflated* claims may justify a fee reduction, the same will not be true for claims pursued in good faith…." *Id.* at 100 (emphasis in original). Rather, parties "may 'in *good faith* … raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.'" *Id.* (quoting *Hensley*, 461 U.S. at 435) (emphasis in original). *See also Abrahamson v. Bd. of Educ.*, 374 F.3d 66 (2d Cir. 2004) (affirming fee reduction where injunctive relief obtained by plaintiffs was different and far less favorable than the relief they sought).

In accordance with this precedent, the district court should have considered the multi-million dollar benefit that Haynes achieved for the class. It failed to do so, and its order awarding fees should be reversed on that independent ground.

In the alternative, and at a minimum, this Court should vacate and remand because the district court did not adequately explain why it excluded time if it believed the underlying work was "sufficiently separable" from Haynes's prevailing work. *Konits v. Valley Stream Cent. High Sch. Dist.*, 350 Fed. App'x 501, 505 (2d Cir. 2009). This is especially true in this case, where Haynes spent considerable time defending against discovery requests, appearing at the fairness hearing, and on other litigation activities that were necessary for Haynes to prevail on any meritorious argument. Indeed, it would have been impossible for Haynes to pursue any meritorious argument in the litigation with only $11,731.65 of lodestar.

## 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 Haynes's attorneys' fee request.

Dated: December 18, 2018

Respectfully submitted,

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Anna St. John

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Anna St. John