UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE CITIGROUP INC. SECURITIES LITIGATION	Case No: 07 Civ. 9901 (SHS)

OBJECTION OF THEODORE H. FRANK

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INTRODUCTION

Class counsel's billing records show inflation of their claimed lodestar by tens of millions of dollars. $17 million of time entries have no description, save the retroactively vague "document review"; other time entries indicate "$550/hour" contract attorneys were doing basic coding (contrary to class counsel's assurances); and as much as 30% of the lodestar was billed ***after*** the parties had agreed to settlement on May 8, 2012—with class counsel adding twenty attorneys to the case to do riskless busywork to inflate the lodestar after it was clear the case would be settled. All of this is grounds for reduction of the fee award by tens of millions of dollars without even reaching the question of what the appropriate lodestar is for contract attorneys.

But it is also indisputable that class counsel's proposed billing rate for the contract attorneys is inflated six- to tenfold. Lodestar reflects the ***prevailing market rate***: what do ***paying clients*** pay for attorneys of similar experience and skill performing similar tasks? Both expert testimony and the statements of in-house counsel and commentators across the country indicate that paying clients refuse to pay as much as $150/hour for document review (even if law-firm attorneys would be conducting it), and that temporary attorneys are billed to clients at under $100/hour—and then only if they are not billed directly to the client as a direct cost. Even class counsel's own cases do not support their claims that contract attorneys are to be billed at the same rate as law-firm attorneys of the same experience, and none of those cases ever considered the evidence submitted in this Court by an in-house counsel who actually paid the bills. Reducing the contract attorneys' lodestar to the prevailing market rate would also reduce the purported lodestar by tens of millions.

Plaintiffs take issue with the calculation of comparable cases in my original objection. I correct those calculations here—and they are even less favorable for class counsel. Indeed, the experts' cherry-picking and gerrymandering to rationalize support for a 16.5% award is even more blatant when compared to the law review articles the experts cite and to Professor Coffee's

testimony in other cases. The award in this case should not be above 12%.

But the Court should award less than 12% here. Class counsel's original fee petitions, combined with the millions of dollars of post-settlement busywork engaged in solely to inflate the lodestar, were cleverly misleading at best and a fraud on the Court and the class at worst. An appropriate sanction for the breach of fiduciary duty and for the original misleading fee petition is to reduce the multiplier below 1 on the uninflated lodestar amounts. If the only consequence from trying to claim more than what class counsel is entitled to is that class counsel will get what they would have been entitled to if they had filed a fair petition in the first place, there is no incentive to be forthright with a court in the original fee petition. In the absence of a sanction, every class counsel is playing with house money when they try to artificially inflate their fee request: "heads I win, tails don't count." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir.1980).

I. I Am a Class Member.

As documented in my initial objection (Docket No. 180) and declaration (Docket No. 181), which I incorporate in whole in this supplemental filing, I am a class member with standing to object. Class counsel does not dispute this.

Instead, they attack me because I have objected in the past. Dkt. No. 196-3 purports to list 27 of my objections in 26 cases. Ten were outright victories where the settlement was struck by a district court or the settlement approval was struck by an appellate court; four resulted in settlement approvals but material fee reductions; four other cases involved objections that resulted in multi-million-dollar settlement improvements. Of the other nine, six are outright losses, two are pending on appeal; one is still pending in district court without a fee decision. Why class counsel thinks the fact that I have successfully objected 18 times out of 24 (including winning five out of seven decided federal appeals) cuts ***against*** the merits of my objection is mysterious.[1]

[1] Moreover, the list is both overinclusive (*NVIDIA*, a loss on behalf of class members seeking

II. 17.0% Is Not a Reasonable Percentage of $590 Million.

Class counsel seeks 16.5% of $590 million plus $2,842,841.59 in expenses, a total of 17.0% of the $590 million fund. This is not a reasonable percentage—even under the same empirical studies that the experts cite.

As Miller acknowledges (¶ 32), a reasonable percentage should be a sliding scale because of economies of scale. "It is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998). "There is considerable merit to reducing the percentage as the size of the fund increases. In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *Id.* (quoting *In re First Fidelity Securities Litigation*, 750 F.Supp. 160, 164 n. 1 (D. N.J. 1990)). As a court in this district recently said about a 17.5% fee request in a $627 million settlement,

> The requested amount of attorneys' fees is high in relation to the Settlement Fund. Although fee recoveries over 15% of the settlement fund are not uncommon in PSLRA securities class actions, *see, e.g., In re Bristol-Meyers Squibb Co. Sec. Litig.*, No. 07 Civ. 5867 (PAC), Doc. No. 78, at 1 (Dec. 8, 2009) (awarding 17% of $125 million settlement fund), "'[t]o avoid routine windfalls where the recovered fund runs into the multi-millions, courts typically decrease the percentage of the fee as the size of the fund increases,'" *In re Currency Conversion Fee Antitrust Litig.,* 263 F.R.D. 110, 129 (S.D.N.Y. 2009) (quoting *In re Interpublic Sec. Litig.*, No. 02 Civ. 6527 (DLC), 2004 U.S. Dist. LEXIS 21429, 2004 WL 2397190, at *11 (S.D.N.Y. Oct. 26, 2004)). Indeed, in recent settlements of comparable magnitude, courts have awarded fees below eight percent of the settlement fund. *See In re Countrywide Fin. Corp. Sec. Litig.*, No. 07 Civ. 5295, 2011 U.S. Dist. LEXIS 126721, Doc. No. 1062, at 4 (CD. Cal. Mar. 4, 2011) (granting 7.7% of $601.5 million settlement fund); *In re Merrill Lynch & Co., Inc. Sec, Derivative & ERISA Litig*, No. 07 Civ. 9633 (JSR), 2009 WL 2407551, at *1 (S.D.N.Y. Aug. 4, 2009) (granting 7.8% of $475 million settlement fund).

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enforcement of the settlement against a defendant allegedly in breach, was not a Rule 23 objection) and underinclusive (it omits many other cases that attorneys working under my direction through my non-profit have won). Plaintiffs' claim that I have never succeeded in a PSLRA case is also false; I was awarded attorneys' fees in *In re Apple Sec. Lit.*—which they cite in their exhibit—for my success in increasing class recovery from $14 million to $16.5 million, a settlement modification that mooted my substantive objection.

In re Wachovia Preferred Secs. & Bond/Notes Litig., 2011 U.S. Dist. LEXIS 155622, *9-*10 (S.D.N.Y. Dec. 30, 2011) (cited by plaintiffs).

Miller's report heavily relies upon the empirical work of Brian Fitzpatrick. *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (attached as Frank Supp. Dec. Exh. 20). But he abuses the data. He relies upon Fitzpatrick's average of settlements "over $72.5 million" to find 16.5% reasonable relative to 18.4%. Dkt. 166 ¶ 57. But *Fitzpatrick himself* says that that "decile" covers an "especially wide range of settlements" and is not "meaningful." Fitzpatrick at 838. Fitzpatrick goes on to say,

> "[F]ee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with ***most awards at that level under even 10 percent***." [*Id.* (emphasis added)]

The very next page, Fitzpatrick has a table with a row for settlements of $500 million to $1000 million—far more relevant to a case like this where the settlement is $590 million. *Id.* at 839. There, both the mean and the median is 12.9%—corresponding to an award of fees and expenses substantially less than Miller claims is reasonable. Miller is disingenuous to cite the less relevant number as authoritative while omitting the more relevant number the cited author actually uses: "18.4%" is materially different than "12.9%" or "most awards at that level under even 10%." Neither plaintiffs' reply brief nor declaration mentions the Fitzpatrick paper that Miller purportedly relies upon, nor does Miller submit a reply opinion, even though I raised this failing in my initial objection.

Miller also cherry-picks his data artificially at Paragraph 58: he looks at PSLRA settlements of "$550 million to $800 million." Miller's cherry-picking can be seen by the choice of "$550 million" and "$800 million" as the cutoff. Why pick a range where the current settlement isn't directly in the middle? Instead of 93% to 136% of the current settlement, one could pick a range of

80% to 120%: by requiring the low end of the range to be the same distance from the settlement at bar as the high end of the range, there is no cherry-picking risk. But when one does so, one sees why Miller excluded settlements between $472 million and $550 million.

PSLRA Settlements of 80% to 120% of $590 Million

Case	Fund	Percentage
In re Wachovia Preferred Sec. and Bond/Notes Litig., No. 09-cv-06351 (S.D.N.Y. 2011)	$627M	12%
In re Countrywide Fin. Corp. Sec. Liptig., No. 07-cv-05295, (C.D. Cal. Mar. 4, 2011)	$601.5M	7.73%
In re Cardinal Health, Inc. Sec. Litig., 528 F. Supp. 2d 752 (S.D. Ohio 2007)	$600M	18%
In re IPO Sec. Litig., 671 F. Supp. 2d 467 (S.D.N.Y. 2009)	$586M	33.3%
In re Health South Corp. Shareholder Lit., No. 03-cv-1500 (N.D. Ala. Feb. 12, 2008)	$537.5M	18.1%
In re Lucent Techs., Inc., Sec. Litig., 327 F. Supp. 2d 426 (D.N.J. 2003)[2]	$517M	17%
In re Lehman Brothers Sec. & ERISA Litig., No. 09-md-2017 (S.D.N.Y. Jun. 29, 2012)	$516M	11.0%
In re Merrill Lynch & Co., Inc. Sec., Deriv. & ERISA Litig., No. 07-cv-09633 (S.D.N.Y. 2009)	$475M	7.8%
In re Dynegy, Inc. Sec. Litig., No. 02-cv-01571 (S.D. Tex. 2005)	$474M	8.72%

This is an average of 14.85**%** and a median of 12.0**%**. If one excludes the plain outlier of the *IPO* litigation, which was actually 309 separate class actions in a consolidated MDL and where the fee request was half of lodestar, **the mean is 12.54% and the median is 11.5%**.[3] And even these

[2] Another example of Miller's cherry-picking is incorrectly characterizing this as a $608M settlement to fit within the $550M to $800M range. In fact, the securities settlement of $517M was separate.

[3] Plaintiffs argue for also including *In re BankAmerica Corp. Sec. Litig.*, 228 F. Supp. 2d 1061, 1064-66 (E.D. Mo. 2002), which they represent as being a $490 million settlement. This is incorrect. That case involved ***two*** different settlements on behalf of two different classes of shareholders with two different sets of securities at issue and two different sets of lead class counsel: a $156.8M settlement and a $333.2M settlement. *Id.* at 1063-66. *BankAmerica* does not belong in a discussion of settlements larger than $470 million. If one were to include that 17% fee though in the averages, the mean is 15.07% with the *IPO* litigation and 13.04% without the *IPO* litigation.

figures are exaggerations, because they include cases like *Cardinal Health*, an out-of-circuit S.D. Ohio case where the multiplier was 5.9, a figure entirely illegal under Second Circuit law, which artificially inflates the means and medians.

This result is robust. It excludes the $460M settlement in *In re Raytheon Co. Sec. Litig.*, No. 99-cv-12142 (D. Mass. 2004), which is just below the 80% cutoff, and where the court awarded only ***nine percent***; and the $457M settlement *Waste Management* case (S.D. Tex. Apr. 9, 2002), where the court awarded less than ***eight percent***. If we go to settlements larger than the 120% range, we find cases like *In re United Health Group Inc. PSLRA Lit.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009), where the fee award was $64.7M, even though the settlement fund was $925 million. If we use Miller's methodology in a ***neutral*** way and compare this settlement with the PSLRA settlements that are closest in size, the 16.5% figure is plainly well above average when compared to the PSLRA settlements most similar in size.

We can also see how high the fee request is by comparing it to recent settlements of much larger magnitude where the attorneys received or requested fees similar to what class counsel is asking here for a much smaller settlement.

This very district has a similar financial-crisis settlement on the books pending against Bank of America, even involving the same defense counsel. *In re Bank of America Securities Lit.*, No. 09-MDL-2058 (S.D.N.Y.). That settlement is four times larger ($2.425 billion instead of $0.59 billion), yet the attorneys are seeking a fee award of $150 million, and may even be awarded less when all is said and done. *See* Peter Lattman, "Investors' Billion-Dollar Fraud Fighter," *New York Times Dealbook* (Oct. 8, 2012) (quoting both me and defense counsel Brad S. Karp). To award $97.5 million for the first $590 million won for the class, and $52.5 million for the next $1,835 million implies that the *Bank of America* class counsel is only getting a 2.7% percentage of the last three quarters of their settlement.

In another financial-crisis case currently pending in the Southern District of New York, *In re AIG Sec. Lit.*, No. 04 Civ. 8141, class counsel is seeking only 13.25% of a **$725 million** settlement—$94.87M. In other words, class counsel is seeking a smaller amount of fees in *AIG*, despite winning $135M more for the class, and despite litigating for three years longer.[4]

Or take *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012), where the attorneys won $1.512 billion of direct pecuniary relief for the class and another $1.9 billion for indirect relief. *Id.* at 914-15. The attorneys were awarded $99 million in fees. *Id.* at 916 n. 5. *Cobell* not only involved 24 written opinions and multiple appeals to the D.C. Circuit on unprecedented complex cutting-edge issues of Indian law and sovereign immunity, but required Congressional legislation before the settlement could be approved; the case lasted from 1996 to 2012, over three times as long as this case. In short the *Cobell* attorneys won five times as much money, yet received almost an identical amount of what class counsel is asking for here, and did so in a riskier, more complex, and longer case. Plaintiffs say their larger percentage in this case is alright because *Cobell* isn't a securities case. Dkt. 195 at 12. But that cuts in the opposite direction: *Cobell* was a much more complicated case and much riskier case being litigated against the government on questions of first impression. In contrast, securities litigation cases are, as the Second Circuit has recognized, generally relatively low risk because "virtually all cases are settled." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000).

Moreover, when class counsel's expert is writing academic papers, rather than testifying for

[4] Professor Coffee submitted a declaration in *AIG*. Frank Supp. Decl. Ex. 21. In this case, Coffee assumes *ipse dixit* without discussion that contract attorneys are entitled to a lodestar of $550/hour. But in *AIG*, Coffee argues that a lodestar rate for attorneys of $372/hour is necessary to prevent work from "be[ing] pushed down to paralegals and contract attorneys" of lower quality. *Id.* ¶39. Professor Coffee's other declarations shows the degree to which Coffee engaged in gerrymandering in this case to get to a conclusion that 16.5% was acceptable. In this $590M case, Coffee claims the relevant range of cases is $490M to $690M. Dkt. 167 ¶17. But in both *AIG* and *Wachovia*, Coffee claims the relevant range of cases is $400M to $1000M. Frank Supp. Decl. Ex. 21 ¶18; Ex. 22 ¶ 19.

pay, he takes a completely different approach to the question of appropriate attorneys' fees. Professor Coffee writes that for securities laws to operate most effectively, attorneys' fees should be higher when class counsel recovers from third parties and from insider board members and executives, and lower—in the ten percent range—when, as here, class counsel only recovers from the corporation. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation* 63 (2006) (attached as Frank Supp. Decl. Ex. 23) (cited in Dkt. 167 ¶ 1). As Professor Coffee says, "If the plaintiff's attorney in securities litigation is a bounty hunter, it is not too much to ask courts to set the bounties intelligently." But though Professor Coffee the academic considers this an important factor when assessing the appropriate and "intelligent[]" incentive for fee structure, Professor Coffee the testifying expert ignores it entirely, because it suggests a substantially lower fee than class counsel is requesting here. Professor Coffee calls the settlement here "extraordinary." But it seems that when Professor Coffee is paid to testify about a settlement, it is very ordinary for him to call the settlement "extraordinary." Frank Supp. Decl. Ex. 21 ¶ 1; Frank Supp. Decl. Ex. 22 ¶ 1. *See also* Lester Brickman, *Lawyer Barons* 335-37 (Cambridge U. Press 2011).

The 16.5% fee request here reflects the failure of the class representative to discipline their attorneys. As *AIG* and class counsel's own expert's testimony in that case demonstrates, when the class representative is an "experienced and sophisticated institutional investor" that negotiates with class counsel in the best interests in the class, they can negotiate a substantially lower rate capped at 13.25% for a case of this magnitude. Frank Supp. Decl. Ex. 21 ¶11.

Professor Coffee calls the settlement here "extraordinary" and says that this justifies a 16.5% fee. But Professor Coffee also called the *Wachovia* settlement of $627 million "extraordinary," and suggested a 17.5% fee appropriate there. Frank Supp. Decl. Ex. 22 ¶¶ 1, 38. The Southern District of New York rejected Professor's Coffee's inflated proposal, and awarded a fee of 12% there. *In re Wachovia Preferred Secs. & Bond/Notes Litig.*, 2011 U.S. Dist. LEXIS 155622 (S.D.N.Y.

Dec. 30, 2011). It would seem highly inappropriate to award more than 12% in this case, given its similarity to the "extraordinary" and materially superior settlement in *Wachovia* with a fee award of 12%, despite Professor Coffee's rejected testimony in *Wachovia* that both the percentage and the multiplier should be higher than the percentage and multiplier here.[5]

III. Class Counsel Dramatically Inflates Its Lodestar with Wildly Exaggerated Hourly Rates Several Times the Market Rate of What Paying Clients Are Willing to Pay.

As Miller concedes (Dkt. 166 ¶ 32), in a settlement of this size, the lodestar crosscheck is a much more important indicator of fee fairness. Class counsel claims that they have a lodestar of $51,438,451.15. But this figure is imaginary, and based upon the fiction that temporary contract attorneys doing trivial and relatively unskilled document review work that discerning paying clients refuse to pay a premium for has the same market rate of $350 to $550/hour that actual Kirby McInerney associates doing substantive work could bill. Plaintiffs have exaggerated their true lodestar by tens of millions of dollars between overstated hourly rates, inefficient billing, and the failure to keep contemporaneous time entries—and that's just for the over $28 million in timekeeper entries from contract attorneys. If the Court retains an audit firm as a special master or court-appointed expert, it will likely find millions more of overbilling.

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[5] Frank notes that Coffee's declaration omitted any mention that he gave this testimony. Dkt. 167 ¶10. Frank learned of it purely by accident on March 14 in doing a google search for Coffee's law review article.

The omission is especially significant because Coffee, in his testimony in this case, portrays *Wachovia* as relatively low risk because there was no need to prove scienter (Dkt. 167 ¶23), but told the *Wachovia* court under oath that the plaintiffs there faced "uncommon[ly]" high risk because of the need to prove defendants' scienter. Frank Supp. Decl. Ex. 22 ¶27.

Such omissions and contradictions are one of many reasons class members are being unfairly prejudiced by the Court's refusal to permit Frank to conduct discovery on class counsel's expert witnesses.

A. The Contract Attorneys Were Used Inefficiently; Most Seem Not to Have Kept Contemporaneous Time Records.

The Court will be able to deduct tens of millions of dollars of lodestar even if it disagrees with Frank and Frank's experts that the prevailing market rate for contract attorneys paid by paying clients is $60 to $75/hour. Class counsel's timesheets, ordered to be produced on February 28, are damning.

(Class counsel originally provided Frank Exhibit B in a low-resolution scan PDF that was not searchable, and sorted by date. In fact, the data is available electronically in a searchable and sortable spreadsheet format. If the Court has only a print-out of Exhibit B (and Exhibit A), it should insist upon getting the same spreadsheet file class counsel belatedly provided to Frank.)

Over $17 million of time entries in Exhibit B simply say "document review." According to class counsel's own admission (Frank. Supp. Decl. Ex. 24), timekeepers for Hudson Legal only handwrote their hours on a daily basis, and did not keep contemporaneous time records; Kirby entered the time as "document review" for "administrative convenience."[6] It is unclear whether that administrative convenience was engaged in before or after the Court's oral order of February 28, 2013. Regardless, this Court has previously held that such time entries that lack requisite specificity preclude reimbursement for attorneys' fees under Second Circuit law. *In re PaineWebber Ltd. P'ships Litig.*, 2003 U.S. Dist. LEXIS 13377, *13 (S.D.N.Y. July 31, 2003).

Daniel Fisher, a senior editor at *Forbes* magazine who graduated Yale Law School's one-year program for journalists, interviewed a contract attorney who reported that the document review was work that a paralegal could have done. *Citigroup Plaintiff Lawyers Fire Back at Fee Objectors*, Forbes.com (Jan. 24, 2013).

[6] Given that the contract attorneys were simply filling out a daily or weekly time-slip in the manner of a temporary secretary, rather than contemporaneously recording their time in a meaningful fashion, it suggests that their employer, Hudson, did not view them as performing substantive legal work. To the extent there is a factual dispute about this, discovery of Hudson and a small number of half-day depositions of contract attorneys would be telling.

There are numerous other inefficiencies one quickly determines by sorting the data:

- Class counsel apparently pumped the pipeline full of temporary attorneys doing busywork to inflate the lodestar once it became clear that the case was going to settle. Class counsel then hired numerous contract attorneys to begin working ten hours a day in May 2012 for the two months until halting work on July 19, 2012. Dkt. 196 ¶ 107. *See, e.g.,* Janet P. time entries (273 hours from June 20-July 19); Frank Supp. Decl. ¶ 13-14. These hires took place ***after*** the mediator's proposal to settle the case on April 25, 2012, and shortly before "parties accepted the mediator's proposal" on May 8, 2012. Dkt. 171 ¶98. The last deposition was conducted May 9, 2012, but class counsel proceeded to train ***twenty*** new attorneys who had no prior experience with the case to bill another 8946.50 hours—many at a purported lodestar rate of $550/hour. Dkt. 196 ¶ 106-107.
- $7,327,662.50 of lodestar was billed just by contract attorneys working under Kirby between May 9, 2012 (the day after the parties agreed to the terms of the settlement) to July 19, when work was apparently ordered to stop. That's about 30% of the total Kirby contract-attorney lodestar, which was about $17.3 million for the fifteen previous months. If all of the class attorneys, including the Kirby full-time attorneys, were working at a similar artificially accelerated pace, lodestar is inflated by $15 million.
- As part of that post-May expansion of work, new contract-attorney hire India A. billed 239 hours digesting a deposition transcript of under 400 pages—a rate of summarizing less than two pages an hour. Class counsel claims a $90,000 lodestar for this work normally provided by paralegals, and normally done in less than a tenth of that time for a one-day transcript of that size. Colin S. ($550/hour) billed at least 94.25 hours digesting a similarly-sized single-day deposition transcript at a claimed lodestar of $51,837.50. If all of the deposition summaries of the 55 days of depositions were

similarly inefficient, it suggests a lodestar exaggeration of between $3 million and $5 million. Frank Supp. Decl. ¶¶ 11-12.

- Several contract attorneys with purported lodestars of $550/hour have time entries showing that they were doing paralegal-level tasks such as coding, digesting depositions, and organizing exhibits—despite class counsel's claim to the Court that "Mr. Frank's arguments about overbilling for 'objective coding' – together with Mr. Frank's accusations concerning the same – are wholly without basis." Dkt. 196 ¶ 84.
- The declaration of John Toothman, a professional bill auditor, demonstrates millions of dollars of other inefficiencies consistent with a strategy of maximizing billable hours rather than effective litigation management.

"The mere fact that a non-designated counsel worked diligently and competently with the goal of benefiting the class is not sufficient to merit compensation. Instead, only attorneys 'whose efforts create, discover, increase, or preserve' the class's ultimate recovery will merit compensation from that recovery." *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 197 (3d Cir. 2005) (citation omitted). The millions of dollars of busywork conducted after May 8, 2012 should be excluded. *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, MDL No. 1500, 2006 U.S. Dist. LEXIS 78101, at *73-74 (S.D.N.Y. Sept. 28, 2006); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1296, 1323 (E.D.N.Y. 1985), *aff'd in relevant part*, 818 F.2d 226, 237 (2d Cir. 1987). So should any redundant haggling over who gets the lead-counsel position. *Cendant*, 404 F.3d at 204-05 (3d Cir. 2005) (filing a duplicative complaint for consolidation with an already pending action does not confer a benefit on the class and is not compensable); *In re Heritage Bond Litig.*, 02-ML-1375 DT, 2005 U.S. Dist. LEXIS 13555, at *85-*86 (C.D. Cal. June 10, 2005) ("As Lead Counsel points out, MMK's fee request includes approximately 450 hours spent drafting a duplicative compliant and moving for lead status in federal court. Such time spent is not compensable").

Class counsel's Exhibit C, submitted *in camera*, claims to be a sample of the work product of the contract attorneys. But this is plainly a self-selected group of documents to show the contract attorneys in the best light. The Court should demand a random sample of work product from specific contract attorneys generated on specific random days to get a truly representative sample of work product. Moreover, that random sample should be tied to specific time entries: a digest of a one-day deposition may be comparable to the works of Hemingway, but if class counsel attributes $50,000 of lodestar to it, it would suggest inefficient use of resources.

At a minimum, even if the Court accepts the fiction that the lodestar for contract attorneys is to be determined by their year of graduation, the Court should consider that the time entries of Michael M., a contract attorney who graduated in 2007, and for which class counsel claims a lodestar of $425/hour, demonstrate that he had the main supervisory role of the contract attorneys—including the contract attorneys with an alleged lodestar billing rate of $550/hour. Michael M. designed the coding protocol, did QA and "HR," and interviewed prospective contract attorneys. If an attorney with under four years of legal experience (over half of which was as a low-level contract attorney doing privilege review) was entrusted with this level of responsibility, it is entirely abusive of the class to be using $550/hour senior attorneys, instead of lower-level associates and paralegals, to be on the teams Michael M. was supervising. This by itself would reduce the lodestar by nearly $10 million.

B. The Prevailing Market Rate for a Contract Attorney Doing Document Review Is Cost or Otherwise Under $100/Hour.

But even billing the contract attorneys at $300/hour would be wrong as a matter of fact and law. "The lodestar figure should be based on ***market rates*** in line with those [rates] prevailing in the community for ***similar services*** by lawyers of reasonably comparable skill, experience, and reputation." *Reiter v. MTA N.Y. City Transit Auth.*, 457 F.3d 224, 232 (2d Cir. 2006) (emphasis

added). Simply put, "Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn." *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983). *Accord, e.g., Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1100 (2d Cir. 1977); *Tucker v. City of New York*, 704 F. Supp. 2d 347, 356 n.7 (S.D.N.Y. 2010); *In re KeySpan Corp. Sec. Litig.*, CV 2001-5852 (ARR) (MDG), 2005 U.S. Dist. LEXIS 29068, at *53-*54 (E.D.N.Y. Aug. 25, 2005) (rejecting use of $275/hour attorneys to do document review).

As demonstrated by the declaration of William Ruane (Dkt. 217)—a former in-house counsel for Wyeth Pharmaceuticals that managed multiple mass-tort defenses and supervised law firms conducting document productions for his employer—it it simply is not the case that paying clients pay $550/hour, or even half of that, for contract attorneys or document review.[7] As Scott

[7] Ruane's declaration is consistent with the expert opinion of Frank (Dkt. 181).

Plaintiffs claim that Frank cannot serve as an expert witness because he is an objector, and parties cannot be experts. The assertion is baseless. *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 (7th Cir. 1988) (Posner, J.) ("Rule 702 of the Federal Rules of Evidence, which governs the qualification of expert witnesses, is latitudinarian, and nothing in its language suggests that a party cannot qualify as an expert"); *Hathaway v. Bazany,* 507 F.3d 312, 317 n.1 (5th Cir. 2007); *Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996); *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1019 (5th Cir. 1993); *Liberty Mut. Ins. Co. v. B. Frank Joy Co.*, 424 F.2d 831, 832 (D.C. Cir. 1970); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698, 784 & n.116 (D. Or. 1997) (citing cases).

Plaintiffs' argument relies upon *Kranis v. Scott*, 178 F. Supp. 2d 330, 333-34 (E.D.N.Y. 2002), and *Benhabib v. Hughes Elecs. Corp.*, No. 04 Civ. 0095, 2006 WL 5014569, at *2 (C.D. Cal. Sept. 6, 2006), but that was a case about ***jury*** confusion under Fed. R. Evid. 403. The Court surely understands the difference between Frank's opinion testimony and Frank's factual testimony. Plaintiffs mislead the Court when they cite *Lonardo v. Travelers Ins. Co.*, 706 F. Supp. 2d 766, 773, 785 (N.D. Ohio 2010). *Lonardo* complained about Frank's objection to "kicker" clauses in class-action settlements. Since *Lonardo*, the Ninth Circuit adopted Frank's public-policy argument. *In re Bluetooth Headset Prod. Liab. Lit.*, 654 F.3d 935, 946-47 (9th Cir. 2011). Even if *Lonardo* was correct in 2010 that Frank's argument against kicker clauses (backed by dozens of law professors) was "long on ideology and short on law," that conclusion is clearly false today.

Class counsel's assertion that outside advocacy for a cause makes one inappropriate as an expert witness is not supported by the language of the Federal Rules of Evidence, and has been rejected by courts. *E.g., Arista Records LLC v. Lime Group LLC*, 06 CV 5936 (KMW), 2011 U.S. Dist. LEXIS 47416, at *24-25 n.4 (S.D.N.Y. Apr. 29, 2011). It also proves too much, as Professors Coffee and Miller have also advocated for causes. *E.g.*, Frank Supp. Decl. Ex. 23. Given Frank's

Rickman, the associate general counsel of Del Monte Corp., has publicly stated, "it doesn't make sense to pay $150 or $250 an hour at some of the larger firms to do the document review—it just seems like overkill." Zusha Ellison, *GCs Embrace Outsourced Work*, The Recorder (Jan. 25, 2008). And if it's routine for in-house counsel to announce that it doesn't make sense to pay $150/hour for document review, they surely would not agree to $300 to $550/hour—especially when the review is being performed by $32/hour temporary attorneys.[8]

This is not an argument that class counsel cannot make a large profit on a temporary timekeeper's time. While the press accounts have focused on the difference between the $1000/hour class counsel is effectively requesting and the $32/hour desperate unemployed attorneys are accepting to do unpleasant drudgework without opportunity for career advancement, this is not the nature of this particular argument that the billing rate is too high. This Court holds that class counsel may collect a lodestar rate for temporary attorneys. But the lodestar rate is an approximation of what ***paying clients pay***. *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("calculated according to the prevailing market rates in the relevant community"). The "prevailing market rate"

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repeated success in appeals courts on novel issues of law in this area, the fact that he is a member of the American Law Institute, and the fact that he has repeatedly testified before Congressional subcommittees on these issues, it is hardly the case that Frank's advocacy is so far outside the mainstream that his expert opinions inherently lack credibility. The Second Circuit has "'liberally construed expert qualification requirements' when determining if a witness can be considered an expert." *Cary Oil v. MG Ref. & Mktg., Inc.*, 2003 U.S. Dist. LEXIS 6150, 2003 WL 1878246, at *1 (S.D.N.Y. Apr. 11, 2003) (*quoting TC Sys. Inc. v. Town of Colonie, New York*, 213 F.Supp.2d 171, 174 (N.D.N.Y. 2002)); *see also In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 559 (S.D.N.Y. 2004). Class counsel's complaint that Frank is simultaneously too active and experienced in the field of class action attorneys' fees to be unbiased but not qualified enough to be an expert in this area is self-refuting.

[8] Class counsel's bald assertion that Fortune 500 companies routinely pay $550/hour for $32/hour contract attorneys beggars belief. Why engage in risky contingent-fee litigation at all if one can simply print money by hiring $32/hour attorneys, pay a third-party vendor another $20/hour premium for the office space, and simply bill them to a paying client at $550/hour? Why ever take the risk of hiring full-time associates, who require expensive benefits and office space, instead of temporary attorneys? The laws of economics simply don't work like that.

is that which is "comparable to what 'is traditional with attorneys compensated by a fee-paying client.'" *Missouri v. Jenkins*, 491 U.S. 274, 286 (1989). *Missouri v. Jenkins* held that it was permissible to bill paralegals above cost—but only because that "appears to be the practice in most communities today." *Id.* at 289. ***But***, "[i]f it is the practice in the relevant market … to bill the work of paralegals only at cost, that is all that [the law] requires." *Id.* at 288. The "fee awarded would be too high if the court accepted separate billing for paralegal hours in a market where that was not the custom." *Id.* at 287.

What is true for paralegals under binding Supreme Court precedent is true for document-review contract attorneys. Frank's argument—backed by the literature, his testimony, and the testimony of William Ruane—is that "the practice in the relevant market" is that paying clients do not pay $300/hour markups when law firms hire contract attorneys to do document review. They pay cost or, if the contract attorneys Therefore the lodestar rates are not $300/hour, much less $550/hour.

This is because "the established rates represent the opportunity cost of what the firm turned away in order to take the litigation." *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 328 (5th Cir. 1995) (*quoting Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24 (D.C. Cir. 1984)). But a firm that hires project attorneys only because of the press and volume of a particular litigation has no opportunity cost: if class counsel were not litigating this case, the contract attorneys would not have been paid a dime by class counsel, and they would not have been billed to any paying clients. This is why it is appropriate to reduce the lodestar rate because of "the zero opportunity cost to [attorney] by taking the case." *Trimper v. City of Norfolk*, 58 F.3d 68, 76 (4th Cir. 1995).

And paying clients pay much less for project attorneys than for full-time law-firm attorneys for document review, even when the temporary "lawyers are experienced, highly qualified attorneys." Nicole Bradick, *Freelance Law: Providing Solutions to Modern Day Practice Dilemmas*, 27 Maine

Bar J. 23, 24 (2012); *accord* Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 Notre Dame L. Rev. 359, 388 (1990) ("firms are reluctant to make a profit on services performed by temporary lawyers"); Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. Times B1 (Aug. 4, 2010) (clients "don't need a $500-an-hour associate to do things like document review and basic due diligence"); Julie Kay, *Contract Lawyers: Cheaper by the Hour*, NAT'L L.J. (Jan. 12, 2009); Mike Dolan and John Thickett, *Department: Technology: Document Review: Unbundling and Offshoring*, 71 Tex. B. J. 730, 731 (Oct. 2008); Jonathan H. Lewis, *Finding The Right Temporary Staffing Partner*, The Metropolitan Corp. Counsel, Vol. 14, No. 5 (May 2006) ("Bill rates for contract attorneys are far lower than for permanent workers. In the largest law firms, a junior associate's hourly bill rate can range between $200-350. In contrast, the hourly bill rate of an experienced temporary document review attorney typically averages between $60 and $75.").

As class counsel themselves argue, "the best indicator of the 'market rate' in the New York area for plaintiffs' counsel in securities class actions is to examine the rates charged by New York firms that *defend* class actions on a regular basis." Dkt. 170 at 8 n.8 (*quoting In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589 (S.D.N.Y. 2008)). The only evidence regarding defendants' use of contract attorneys and paying for document review is that from Mr. Ruane and Mr. Toothman, and both testify that class counsel's rates are several times what the market will bear.

In short, the evidence unanimously points to a lodestar market rate for document review in the last few years, whether performed by law-firm attorneys or contract attorneys, of well under $100/hour, and at $60 to $75/hour. While class counsel can point to a handful of cases that sign off on higher lodestars, not a single one of those cases actually considered evidence of what ***paying clients pay in the marketplace for those services in 2013***—and class counsel presents no evidence of their own.

C. Courts Agree That Document Review and Digesting Depositions Does Not Merit the Full-Fare Rate of Full-Time Associates Doing More Substantive Work.

Plaintiffs misstate the law when they claim that they're just doing what "every" court permits. More recent cases, consistent with the change in the legal market identified by Frank in his original declaration, recognize that document review and contract-attorney work does not merit full-scale rates. "It is not appropriate to use the current market rate for all of an associate's time worked on a case when the attorney was a contract attorney, and not an associate, for some of that time." *Wachtel v. Health Net, Inc.*, 2007 U.S. Dist. LEXIS 44225, at *25 n.22 (D.N.J. June 19, 2007). *Tampa Bay Water v. HDR Eng'g, Inc.*, 2012 U.S. Dist. LEXIS 157631 (M.D. Fla. Nov. 2, 2012) (contract attorney lodestar of $85/hour, less than half of regular associates); *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. Dist. LEXIS 160668 (N.D. Cal. Nov. 7, 2012) ($125/hour for contract attorneys vs. $500/hour for associates); *In re Warner Chilcott Ltd. Secs. Litig.*, 06 Civ. 11515 (WHP), 2009 U.S. Dist. LEXIS 58843, at *11 (S.D.N.Y. July 10, 2009) (class counsel "used project attorneys to perform a significant portion of the document review at a reduced rate"); *SEC v. Kirkland*, 2008 U.S. Dist. LEXIS 123308, at *5 (M.D. Fla. June 30, 2008) ("H&K anticipated using a senior associate whose rate was $245.00 per hour, a mid-level associate whose rate was $210.00 per hour, and contract attorneys at the rate of $125.00 per hour if extensive document review was required."). Finally, just this month, Judge McMahon issued an order demanding to know the compensation of contract attorneys conducting document review. *In re Beacon Assoc. Lit.*, No. 09 Civ 777, Dkt. 382 ¶4 (S.D.N.Y. Mar. 8, 2013) (attached as Frank Supp. Dec. Ex. 27). And one of the first cases to discuss the issue rejected an award of fees entirely for contract attorneys on the grounds that lead counsel had failed to disclose the arrangement—as has happened here. *In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 188-90 (E.D. Pa. 1983), *aff'd in relevant part*, 751 F.2d 562, 598 (3d Cir. 1984).

Even when document review is performed by full-time law-firm attorneys, many courts refuse to permit full lodestar rates to be charged, given that large-scale document review can be

performed by non-professionals. *Planned Parenthood of Cent. N.J. v. Attorney Gen. of N.J.*, 297 F.3d 253, 266 (3d Cir. 2002) (remanding an award because appeals court was "unable to make a determination" whether plaintiff's attorney had improperly "billed hours for. . . such tasks as document review"); *United States v. Metropolitan Dist. Com.*, 847 F.2d 12, 19 (1st Cir. 1988) (approving lower rate for document review); *FB-Stark, LLC v. White*, 2012 U.S. Dist. LEXIS 137892, at *4-*5 n.1 (D. Ariz. Sept. 26, 2012) (perusing documents is task for paralegal); *Microsoft Corp. v. Computer Care Ctr., Inc.*, 06-CV-1429 (SLT), 2008 U.S. Dist. LEXIS 112080, at *47 (E.D.N.Y. Apr. 8, 2008) (rejecting use of $385/hour associate for work a more junior attorney could have performed); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, 2001 U.S. Dist. LEXIS 8418, at *29-*30 (S.D.N.Y. Jun. 21, 2001) ($375/hour for "document review" unacceptable); *Weinberger v. Great N. Nekoosa Corp.*, 801 F. Supp. 804, 814 (D. Me. 1992) (disallowing hours for digesting depositions and reviewing documents). *See also Detroit v. Grinnell Corp.,* 560 F.2d 1093, 1100 (2d Cir. 1977) (inappropriate to use high-billing-rate attorneys for lower-skilled tasks); *Tucker v. City of New York*, 704 F. Supp. 2d 347, 356 n.7 (S.D.N.Y. 2010) (same); *Kahlil v. Original Old Homestead Rest., Inc.*, 657 F. Supp. 2d 470, 477 (S.D.N.Y. 2009) (same); *Simmons v. New York City Transit Auth.*, 2008 U.S. Dist. LEXIS 54870, 2008 WL 2795138, *2 (E.D.N.Y. July 17, 2008) (same); *Staples, Inc. v. W.J.R. Assocs.*, 2007 U.S. Dist. LEXIS 65211, 2007 WL 2572175, *8 (E.D.N.Y. Sept. 4, 2007) (same); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("In this case, UBS decided -- as is its right -- to have a senior associate at a top New York City law firm conduct the privilege review at a cost of $410 per hour. But the job could just as easily have been done (while perhaps not as well) by a first-year associate or contract attorney at a far lower rate."); *Mautner v. Hirsch*, 831 F. Supp. 1058, 1076 (S.D.N.Y. 1993) (reducing lodestar for using senior attorneys when junior attorneys and paralegals were available), *rev'd in part on other grounds*, 32 F.3d 37 (2d Cir. 1994); *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 180 (3d Cir. 2001); *New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co.*,

72 F.3d 830, 835 (10th Cir. 1996); *ACLU of Fla., Inc. v. Dixie County Fla.*, 2012 U.S. Dist. LEXIS 40513, at *3 (N.D. Fla. Mar. 23, 2012).

Plaintiffs argue that this Court should look to what bankruptcy courts award in determining prevailing market rates. Dkt. 166 ¶ 40. But a number of bankruptcy courts do not permit law firms to bill for contract attorneys as if they are regular associates. *In re Worldwide Direct, Inc.*, 316 B.R. 637, 652 (Bankr. D. Del. 2004) (firm to be compensated for contract attorneys only at invoice cost); *id.* at 647 (use of temporary attorneys is laudable only to "the extent that these cost-savings are passed on to clients and the debtors' estate"); *see also In re Ferguson*, 445 B.R. 744 (Bankr. N.D. Tex. 2011) (contract attorneys billing at attorney rates may not be compensated from debtor's estate as if they are law-firm attorneys without a separate application).

And even the cases the plaintiffs cite (Dkt. 211) do not support their argument that contract attorneys should be billed at the same rate as regular law-firm associates. For example, in *In re WorldCom Inc. Sec. Litig.*, No. 02 Civ. 3288, 2004 WL 2591402, at *21 n.48 (S.D.N.Y. Nov. 12, 2004), the court approved the use of contract attorneys ***because*** they were "more efficient" than "highly compensated counsel." Here, the contract attorneys ***are*** the highly-compensated counsel ($550/hour vs. $600/hour for partners) and, as the Toothman report shows, were considerably less efficient. The reliance on *In re UnitedHealth Group Inc. PSLRA Litig.* is also less helpful to class counsel than they suggest. 643 F. Supp. 2d 1094, 1105 (D. Minn. 2009) (reducing contract-attorney rates to 40% of partner rates and paralegal rates to $100/hour). Moreover, *UnitedHealth* held that staff positions such as "analysts" that class counsel bills $295/hour for should be "counted as overhead." *Id.* The vast majority of the cases plaintiffs rely upon (Dkt. 211 at 4-6) have no discussion of whether it was appropriate to bill contract attorneys at high rates; others did not even

consider the question of lodestar.[9] Cases like these have no persuasive value, and should not bind this Court when evaluating evidence about prevailing market rates never presented in earlier cases.

D. The Contract Attorneys Here Were Contract Attorneys for a Reason.

Class counsel claims that the contract attorneys in this case were just as skilled as their regular associates. If so, that suggests that the regular associates were overbilled, too. While a tiny number of the contract attorneys had resumes reflecting real securities litigation experience (and two, Michael M.[10] and Janet P., took depositions—which makes one wonder how essential the

[9] *Public Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, No. 08-cv-10841 (S.D.N.Y. May 8, 2012) (propriety of contract attorneys not raised; "staff attorneys" billed at lower rates than associates); *Silverman v. Motorola, Inc.*, No. 07-cv-4507 (N.D. Ill. May 7, 2012), Dkt. No. 470 at 8 (no consideration of lodestar in fee award); *In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09-cv-1376 (N.D. Cal. Nov. 14, 2011) (propriety of contract attorney rates not raised or considered; "staff attorneys" billed at lower rate than associates); *Eastwood Enters., LLC v. Wellcare Health Plans, Inc.*, No. 07-cv-1940 (M.D. Fla. May 4, 2011) (no consideration of lodestar in fee award; "staff attorneys" billed at lower rate than associates); *In re Maxim Integrated Prods., Inc. Sec. Litig.*, No. 08-cv-0832 (N.D. Cal. Nov. 1, 2010) (no consideration of lodestar in fee award; "project associates" billed at lower rate than "staff attorneys"; "staff attorneys" billed at lower rate than associates); *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-cv-1825 (E.D.N.Y. June 24, 2010) (propriety of contract attorney rates not raised or considered; "project attorneys" billed at lower rate than associates); *In re Bristol-Myers Squibb Co. Sec. Litig.*, No. 07-cv-5867 (S.D.N.Y. Dec. 8, 2009) (no consideration of lodestar in fee award; "project attorneys" billed at lower rate than associates); *In re Merrill Lynch & Co, Inc. Sec., Derivative & ERISA Litig.*, No. 07-cv-9633 (S.D.N.Y. Dec. 2, 2009) (same); *In re Brocade Sec. Litig.*, No. 05-cv-02042 (N.D. Cal. Jan. 26, 2009) (propriety of contract attorney rates not raised or considered; contract attorneys billed at lower rate than associates); *In re Doral Fin. Corp. Sec. Litig.*, No. 05-md-01706 (S.D.N.Y. July 17, 2007) (same); *Wyatt v. El Paso Corp.*, No. 02-2717 (S.D. Tex. March 9, 2007) (no consideration of lodestar in fee award; "project attorneys" billed at lower rate than associates); *In re Williams Sec. Litig.*, No. 02-cv-72 (N.D. Okla. February 12, 2007) (no consideration of lodestar in fee award; "project associates" billed at lower rate than associates).

[10] I received "Exhibit B" marked as "confidential." As I understand the Court's order of February 28, I can only use "confidential" exhibits "for litigation purposes," and the Court clarified that I could make a public filing with the "confidential" materials. Nevertheless, this brief and the Ruane report were drafted as if the last names and time records of the contract attorneys are confidential. I've since realized at the last minute that the confidentiality restriction on Exhibit B was lifted, and that the information we're obscuring is public. Dkt. 211. We would be happy to resubmit this brief with full names if the Court would find that helpful.

depositions, and the thousands of hours of preparation for them, were to the case),[11] the overwhelming majority of the resumes provided by class counsel show contract attorneys who contract attorneys because they could not get better jobs in the marketplace—including an attorney, Andrew W., released by Kirby McInerney in 2008 and who worked only as a contract attorney sporadically since.

Steven D.'s resume miraculously anticipates when his work on this case would begin and end. It appears that class counsel reconstructed that resume retroactively because it did not have a contemporaneous copy of the resume on file—suggesting that class counsel may have exaggerated the degree to which it screened its contract attorneys. I have not seen the timesheets of law-firm attorneys, but it appears that the contract attorneys were the ones interviewing most of the document-review attorneys. *See, e.g.*, time entries for Michael M. (Mar. 2, 2011).

Class counsel admits that a 1998 Pace Law graduate it used as a contract attorney, Nelson D., did not pass the bar until 2009. Dkt. 196 ¶ 158. His resume shows his only real legal experience is as an unlicensed document review attorney. Class counsel seeks a $450/hour lodestar for his work.

Michael B. was a corporate attorney working on transactions unrelated to those in this case. Since May 2010, he could only find work doing "e-discovery" at Hudson Legal. All 3,119.75 hours of his time at $550/hour are recorded as "document review."

Gayle B. ($550/hour) was working almost exclusively as a document review attorney since June 2008.

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[11] If the depositions were not superfluous, then lead counsel's application for PSLRA lead-counsel status did not disclose that temporary attorneys with no stake in the litigation or future at the firm would be used to conduct important depositions in this case. Such a disclosure might have resulted in selection of different lead counsel better situated to manage the large-scale litigation, and is a public-policy reason for reducing class counsel's lodestar and fee request to deter future bait-and-switches. *Cf. In re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 188-90 (E.D. Pa. 1983), *aff'd in relevant part*, 751 F.2d 562, 598 (3d Cir. 1984).

Peter B. ($550/hour) was working exclusively as a contract attorney since March 2009.

Eileen D. ($550/hour) spent nearly her entire career as a contract attorney.

Damien F.'s resume's first line is "substantive document review attorney"; the resume is nearly all contract-attorney work. Daniel Fisher reports that Damien F. declared bankruptcy in 2010 with nearly $70 thousand in student-loan debt, and assets that included "one pending case at a fixed fee of $500." *Class-Action Firms Capitalize On Wretched Market For Law-School Grads*, Forbes.com (Jan. 4, 2013) ("*Capitalize*"). But plaintiffs claim that Damien F. had a "prevailing market rate" of $550/hour.

Joshua G. ($550/hour) has spent nearly his entire career on contract-attorney work.

Brian H. ($550/hour) was a collections and small-time personal-injury attorney until 2007, appears to have been unemployed from 2007 to 2009, and worked as a contract attorney since.

Janet P. ($550/hour) has a resume that claims work as a solo practitioner and ALJ, but was assigned to do document coding according to her time entries.

Colin S. ($550/hour) appears to have been unemployed for over two years starting in 2009, and worked exclusively as a contract attorney since June 2011 with the job description of "conduct electronic discovery."

Steven W. ($550/hour) was an intellectual-property litigator who left full-time practice in 2005. His time entries indicate he was doing coding.

Belden N. ($525/hour) was a "structured finance associate" from 2003 to 2009, but was doing coding according to his time entries.

Soo W. ($525/hour) worked in workers' compensation from 2003 to 2006, and has been a contract attorney since.

Jason S. ($500/hour) was a patent litigator for under four years until May 2008, and has been doing temporary document review since August 2008.

Kristine C. ($450/hour) graduated in 2006, has no resume entry for 2006-07, worked as an LSAT instructor in 2008, as a law-firm associate from June 2008 to June 2009, and has been a contract attorney since March 2010.

The attorneys who graduated *after* 2006 have even skimpier resumes; many never held a permanent legal job. Fisher's source told him that "Most of these people can't find a job, either because of the market meltdown or they don't have the skills. 90% of these people have some other reason they're not working as a lawyer." *Capitalize*, *supra*.

> Much of the work is mind-numbing document review, my source says, sitting in a Midtown office in front of a computer, searching for highlighted words or phrases and quickly assessing their value as evidence in the case. …
>
> Much of the work performed by contract attorneys in this case was at the level of a paralegal or possibly a first-year associate, the source says, including "relevance reviews" to determine which documents should be referred to senior lawyers for further examination. Many of the contract attorneys worked for Hudson Legal, an outsourcing firm that provides workspace, pay and benefits to lawyers and charges firms like Kirby McInerney a slight premium over the hourly rate to cover overhead.

Id. The vast majority of the contract attorneys in this case were not exceptional. It is certainly sad to contemplate that graduates of top-ten schools are unable to find a real substantive legal job (though the fact that one such graduate, India A., took 239 hours to summarize a one-day deposition transcript perhaps provides some explanation of her legal employment troubles), but nearly every single one of the contract attorneys in this case do not have the "reasonably comparable skill, experience, and reputation" of full-time law firm associates, much less to be billed at more than 90% of the rate of law-firm partners. The timesheets show that very few of these attorneys were working as contract attorneys for flexibility or work-life balance reasons: some worked eighteen straight months without a vacation. Nearly every single one of these contract attorneys is a contract attorney because he or she has no better alternative.

E. ABA Ethical Rules Preclude Charging More Than Cost for Outsourced Attorneys.

When confronted with the question of outsourcing, the ABA Standing Committee on Ethics ruled that "In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract." Furthermore, "The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and ***to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost***, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services." ABA Formal Opinion 08-451 (attached as Frank Decl. Ex. 12).

We now know that the document review by the temporary attorneys was entirely outsourced with little or no overhead for class counsel: the work was performed at Hudson's offices. *See, e.g.*, Dkt. 211 Exhibit B (Andrew Watt's time entries of "document review at Hudson"); *Capitalize*, *supra*; *cf. also* Dkt. 196 ¶ 158 (negative pregnant use of passive voice failing to identify who "established [contract attorneys] in offices one block away"). And class counsel is billing in full for any full-time attorneys who are supervising the contract attorneys (even though it seems that contract attorneys were assigned to supervise the contract attorneys). The fact that the contract attorneys may have occasionally met in a conference room at Kirby does not merit an 800% markup in lodestar for "overhead."

No court has considered the effect of this sentence of ABA Formal Opinion 08-451 on the question of reasonable rates for entirely outsourced contract attorneys like the ones here,[12] and

[12] The district court in *Carlson v. Xerox Corp.* is the only court to even mention No. 08-451, and it neither discussed nor mentioned the clause Frank relies upon.

Frank preserves the question of whether 08-451 precludes class counsel's exorbitant markup as a matter of law, if the Court is unwilling to reconsider its interim February 28 ruling that entirely-outsourced contract attorneys are to be treated as timekeepers rather than as an expense.

F. There Is No Evidence for the $295/Hour "Analyst" Rate.

Class counsel bills over 12,000 hours at $295/hour for "analysts": a lodestar of over $3.6 million. Dkt. 171-5. This may be a prevailing market rate; it may not. But class counsel's fee petition, declarations, and expert reports provide exactly zero evidence that clients of law firms pay $295/hour for analysts, and no documentation of the skills or credentials of the senior analysts; firm resumes indicate they have B.A. degrees. At least one of the senior analysts was a law school graduate who has never passed the New York bar: was she doing the same work as the contract attorneys? Perhaps the *in camera* Exhibit A answers this question. *See also* Frank Supp. Decl. ¶¶29-33.

IV. The Proposed Multiplier Overcompensates Class Counsel for the Risks of the Case and the Poor Results Achieved.

In my initial objection, I demonstrated that a 1.22 multiplier for hours spent after a motion to dismiss is decided would more than compensate the average firm conducting PSLRA litigation. Dkt. 181 ¶¶ 56-67.[13] As the Second Circuit has previously stated, a high multiplier in securities

[13] Plaintiffs assert that I failed to consider the risk of summary judgment. But summary judgments are expressly considered by my analysis: under 20% of cases that survive a motion to dismiss are resolved by a summary judgment motion.

Plaintiffs try to stack the deck in the Cornerstone report by saying "fewer than 50% of PSLRA actions commenced since 2008 have resulted in settlements." Dkt. 196 ¶ 27. This makes a basic mathematical error. If a case is dismissed, it will be dismissed early in the age of the case; the longer a case lasts, the more likely it is to settle. Thus, data for more recent years will artificially look riskier than data for earlier years because the dataset is skewed to cases that have resolved early in the proceedings. As I noted in my original expert report, the Cornerstone report therefore *overstates* the risk PSLRA attorneys face. Dkt. 181 ¶¶ 61-62. For example, the Cornerstone report excludes the case at bar, which has settled, from the 2007 data, because it had not yet been resolved when the counting was done; the incomplete 2007 data thus understates the chances of plaintiffs' success for cases brought in 2007. Plaintiffs do not, and cannot, rebut this basic truism, and their cherry-picking use of the time-biased data only serves to prove my point. Had plaintiffs not been afraid to show my expert report and objection to their experts, they would have not

litigation is inappropriate, because "virtually all cases are settled" and the risk is corresponding low. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000). Though class counsel relies heavily on *Goldberger* in their brief, they unsurprisingly neglect to quote the following passage of direct relevance to this request:

> But the principal analytical flaw in counsel's argument lies in their assumption that there is a substantial contingency risk in every common fund case. We harbor some doubt that this assumption is justified in cases such as this. At least one empirical study has concluded that "there appears to be no appreciable risk of non-recovery" in securities class actions, because "virtually all cases are settled." Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991). Anecdotal evidence tends to confirm this conclusion. Indeed, Mr. Weiss and his partner William S. Lerach of the Milberg firm have stated that losses in these cases are "few and far between," and that they achieve "a significant settlement although not always a big legal fee, in 90% of the cases we file." *In re Quantum Health Resources, Inc. Sec. Litig.*, 962 F. Supp. 1254, 1258 (C.D. Cal. 1997) (internal quotation marks and citations omitted). Of course, we are not suggesting that compensation for risk is never permitted, merely that it is not - under either the percentage or lodestar methods - an appropriate starting assumption. Even where there is some contingency risk but recovery remains virtually certain, we question whether a fully informed group of plaintiffs able to negotiate collectively would routinely agree to pay their lawyers a fee of 25% of a multi-million dollar settlement.

Id.; *accord In re KeySpan Corp. Sec. Litig.*, CV 2001-5852 (ARR) (MDG), 2005 WL 3093399, 2005 U.S. Dist. LEXIS 29068, at *17-*19 (E.D.N.Y. Aug. 25, 2005) (noting that even after PSLRA, "the settlement rate of cases between 1998 and 2001 ranged between 73.6% to 78.6% and less than 1% of cases were tried").

I noted that if class counsel disputed my calculation or my model, they were welcome to provide me with data demonstrating how much lodestar is expended on cases where no fee is recovered versus lodestar expended on cases where a fee is recovered; I asked the Court to permit discovery on this purely empirical question. Frank Supp. Decl. Ex. 25 at 4.

In response, class counsel stated that all of their lodestar data is publicly available and "does

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made this basic mathematical error.

not require any discovery from Plaintiffs." Frank Supp. Decl. Ex. 26 at 4-5. It's true that most victorious securities litigation includes a submission of lodestar data. But when plaintiffs ***lose*** securities cases, and don't receive any fees, there is never a public disclosure of the lodestar that has gone uncompensated. Because Plaintiffs have stated to this Court that all of their lodestar data is available without discovery, one must conclude either that they settle 100% of their cases and engage in securities litigation without any real risk or that they misrepresented the facts to the Court to preclude discovery. Thus as either a matter of admission against interest or a matter of judicial estoppel, a multiplier above 1 is entirely inappropriate, because there is no need to compensate this class counsel for risk, and a multiplier would result in a windfall. *Goldberger*, 209 F.3d at 52 ("there appears to be no appreciable risk of non-recovery"); *Perdue v. Kenny A.,* 130 S. Ct. 1662 (2010).

At a minimum, Frank's calculation that a 1.22 multiplier would be sufficient must be honored. *Goldberger* expressed concern that "attorneys in [securities] cases are routinely overcompensated for such things as contingency risk." 209 F.3d at 57. The Second Circuit recently reiterated this concept in mega-fund cases. *McDaniel v. County of Schenectady*, 595 F.3d 411, 425, 426 (2d Cir. 2010) (describing the "danger of 'routine overcompensation' for risk that has troubled this court in the context of 'mega-fund' class actions" and holding that "an award of no lodestar multiplier at all is within the district court's discretion."). *See also In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009) (1.6 multiplier to megafund award, citing *Goldberger*'s caution with megafunds and general refusal to award up to 2.03 multipliers).

Plaintiffs fail to provide any factual empirical evidence to contradict *Goldberger*'s conclusion or overrule *Goldberger*'s analysis; Frank's analysis relies upon the very Cornerstone report that they use. As *In re Twinlab Corp. Sec. Litig.* noted before *Kenny A* was decided, "post-*Goldberger* courts . . . have generally refused multipliers as high as 2.03." 187 F. Supp. 2d 80, 87 (E.D.N.Y. 2002) (applying 1.3 multiplier). The 1.9 multiplier requested (even assuming lodestar is correctly calculated) is at the

top of that range, with no showing of an extraordinary result meriting both a percentage substantially higher than the mean and median for settlements of this size on top of the high multiplier; given the lodestar exaggeration, the real requested multiplier is nearly 4. This is wrong. *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 WL 313474, 2007 U.S. Dist. LEXIS 9450, at *75-*77 (S.D.N.Y. Jan. 31, 2007) ("an award that equates to a multiplier of 2.43 of the lodestar is excessive"); *In re Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 143 (S.D.N.Y. 2008) ("counsel's fee request must be reduced in order to provide a fair and reasonable fee that translates to a multiplier that is not markedly greater than twice counsels' lodestar and an aggregate hourly wage that is less than $1,000.").

Plaintiffs assert that *Perdue v. Kenny A.* has never been applied to a common-fund case. This is simply false. *E.g., Weeks v. Kellogg Co.*, No. 09-cv-8102, 2011 U.S. Dist. LEXIS 155472, at *129-*135 & n.157 (C.D. Cal. Nov. 23, 2011); *Van Horn v. Nationwide Prop. & Cas. Ins. Co.,* 436 Fed. Appx. 496, 500 (6th Cir. 2011). Plaintiffs' argument that *Kenny A* is inapplicable here would have this Court believe that the word "reasonable" in the PSLRA and Rule 23(h) means something different than the word "reasonable" in 42 U.S.C. § 1988. Not only does the statute not help them, but it is ironic that they rely upon the statute after previously arguing that the Court should ignore their failure to comply with the language of 15 U.S.C. § 78u-4(a)(6) because lots of district courts do so.[14] Class counsel cannot have it both ways, relying upon the statute when convenient and asking

[14] Class counsel's claim that one can calculate the amount that class members "actually receive" under § 78u-4(a)(6) simply by deducting fees and expenses and notice costs from the common fund is incorrect. Many class members are buy-and-hold shareholders. As class counsel's own expert, Professor Coffee, has noted, when a securities class action is funded by a corporation, class members who are buy-and-hold shareholders are effectively paying themselves, and are receiving little, if any, net benefit. John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006) (SSRN version attached as Frank Decl. Ex. 23). This is why Professor Coffee, when writing for academia rather than for litigation purposes, argues that settlements that fail to collect from culpable third parties rather than from the corporate treasury should result in lower attorney-fee awards.

the district court to ignore it otherwise. If § 78u-4(a)(6) is applicable, then class counsel has failed to meet their burden of demonstrating they are requesting a reasonable percentage of what is actually paid to shareholders. If class counsel is instead asking for this Court to apply a common law of "reasonable attorneys' fees," then *Kenny A* supersedes their cited district court opinions awarding multipliers. A lodestar enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not have been adequate to attract competent counsel." 130 S.Ct. at 1673. "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant." *Id.*

We know from the testimony of class counsel's own expert that a disciplined lead plaintiff will restrict class counsel to a request of their lodestar and a 13.25% share of a megafund, yet be able to obtain highly skilled class counsel. Frank Supp. Decl. Ex. 21 ¶11 (Coffee declaration in *AIG*). The class here should not be penalized for the failure of the hurriedly-selected lead plaintiff to negotiate adequate protection for the class.

V. Sanctions Are Necessary to Deter Overinflated Fee Requests in the Future.

An appropriate sanction for the breach of fiduciary duty and for the original misleading fee petition is to reduce the multiplier below 1 on the uninflated lodestar amounts. If the only consequence from trying to claim more than what class counsel is entitled to is that class counsel will get what they would have been entitled to if they had filed a fair petition in the first place, there is no incentive to be forthright with a court in the original fee petition. On the rare occasions they get caught, they're no worse off; if no objector investigates, they receive a windfall. "Heads I win, tails don't count." In the absence of a sanction, every class counsel is playing with house money when they try to artificially inflate their fee request. If "the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of

such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980); *Toussie v. County of Suffolk,* No. 01-CV-6716(JS)(ARL), 2012 U.S. Dist. LEXIS 127143, at *15 (E.D.N.Y. Sept. 6, 2012) (failure to exclude excessive or redundant hours from fee request is grounds for sanctions). Public policy and the law demands that there be material consequences for the original assertion that lodestar is $51 million.

VI. The Expert Opinions of Coffee and Miller Must Be Excluded.

As documented in my original objection, the expert opinions are trumped up rationalizations working backwards from the desired result, and fail to meet Fed. R. Evid. 702 and *Daubert*. Frank discusses further in the contemporaneous motion to strike.

VII. It Would Be Reversible Error for the Court to Accept Class Counsel's Contentions While Precluding Discovery.

The Court denied most of Frank's requests for discovery. Dkt. 207; Feb. 28 Transcript. As documented in the offer of proof in Frank's Supplemental Declaration, this unfairly prejudices the class, which is not being allowed to test the contentions of class counsel's declarants, even though those declarations contradict the billing records and independent journalistic accounts of the level of work of what the contract attorneys were doing. The Court should simply adopt Frank's factual arguments. What limited discovery class counsel has produced destroys the credibility of their attempted rebuttals. Moreover, if such things as the contemporaneous communications with the contract vendors and the coding sheets designed by Michael M. supported class counsel's factual contentions, they would have produced them, rather than fought tooth and nail to keep them from Frank and the Court. "Sherlock Holmes recognized in *Silver Blaze* that the dog's failure to bark, when barking would have been expected, conveyed a powerful message." *Johnson v. Acevado*, 572 F.3d 398, 401 (7th Cir. 2009) (Easterbrook, J.) (reasonable to make inferences from telling

omissions, even when *Miranda* Fifth Amendment rights are implicated). The absence of these documents from the record, and the preference of class counsel to risk reversible error by precluding experts or Michael M. to be deposed, are telling.

Class counsel seems to think that the Rule 23(h) hearing is simply for show, and that class members are neither entitled to notice nor adversarial testing of the issues. That simply isn't so. In "common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). Class counsel is on the same side as class members when it comes to establishing the size of the settlement fund, making discovery on those issues redundant. But class counsel is adverse to the class members when it comes to the question of how much of $100.3 million will go to class counsel or the class.

"The rule in [the Second] Circuit provides that an approval of a class action settlement offer by a lower court ***must*** be overturned if that court acted 'without [knowledge of] sufficient facts concerning the claim' or if it '***failed to allow objectors to develop on the record*** facts going to the propriety of the settlement.'" *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (emphasis added) (quoting *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir. 1972). Other circuits agree: while an objector's right to discovery is not absolute, depriving objectors of discovery relevant to the fairness of the settlement is an abuse of discretion. *See In re General Motors Corp. Engine Interchange Lit.*, 594 F.2d 1106, 1124 (7th Cir. 1979); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *Cohen v. Young*, 127 F.2d 721, 726 (6th Cir. 1942).

In assessing the reasonableness of class counsel's Rule 23(h) fee request, "a court is to act as a fiduciary who must serve as a guardian of the rights of absent class members." *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 249-50 (2d Cir. 2007) (quotations omitted). "As a fiduciary for the class, the district court must act with a jealous regard to the rights of those who are interested in the fund in determining what a

proper fee award is. Included in that fiduciary obligation is the duty to ensure that the class is ***afforded the opportunity to represent its own best interests***." *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 994-95 (9th Cir. 2011) (emphasis added and internal quotations omitted).

The district court may allow objectors discovery to defend such interests:

> Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members. It also ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and ***adequately-tested***, information to evaluate the reasonableness of a proposed fee.

Id. at 994 (emphasis added); *see also Bowling v. Pfizer, Inc.*, 159 F.R.D. 492, 498 (S.D. Ohio 1994) (granting objectors' motion for discovery regarding attorneys' fees); *In re Master Key Antitrust Litigation*, MDL No. 45, 1977 U.S. Dist. LEXIS 12948, *3 (D. Conn. 1977) (noting that it had continued "the hearing for a month to allow objectors an opportunity to engage in discovery to test the fee petitions").

In Plaintiffs' Reply Memorandum ("Reply Memo") in support of class counsel's request, class counsel argues that the discovery I seek is not proper under *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985) *abrogated on other grounds*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. N.Y. 2005). Reply Memo, Dkt. 195, at 25.[15] In fact, those cases *support* the limited discovery that I seek. The Second Circuit first noted in

[15] The other cases on which plaintiffs rely are inapposite. Reply Memo, Dkt. 195, at 24-27. In *Charron v. Pinnacle Group N.Y. LLC*, the district court had *ordered* discovery for the objectors, but denied a second request for additional overbroad discovery. 874 F. Supp. 2d 179, 2012 U.S. Dist. LEXIS 79550, *25-26 (S.D.N.Y. 2012). The district court denied discovery in *Dupler v. Costco Wholesale Corp.* because objector's request for information regarding the direct economic benefit to the class had already been produced. 705 F. Supp. 2d 231, 247 n.12 (E.D.N.Y. 2010). In *Epstein v. Wittig*, the court denied the objector's request for discovery because it was untimely, sought information that was in the public domain, and sought information on legal issues that factual discovery would not support. 2005 U.S. Dist. LEXIS 31078, *25-26 (D. Kan. 2005). Unlike these cases, Objector Frank's request is timely and narrowly-tailored to seek information that has not been discovered regarding plaintiffs' Rule 23(h) fee request.

Malchman that "[o]n first impression, the district court's denial of discovery appears in conflict with" an earlier opinion requiring scrutiny of the issue on which objectors wanted discovery. 761 F.2d at 898. But *Malchman* affirmed the denial of discovery *only* because defendants had conducted discovery "at length" on the issues where the objectors wished discovery. *Id.* at 898-99. In both *Malchman* and *Wal-Mart* objectors were seeking to re-litigate the *underlying merits* with information that had *already* been produced. *Malchman*, 761 F.2d 893 at 898 (finding discovery unnecessary regarding class representative adequacy because "defendants had deposed the named plaintiffs at length" and discovery regarding settlement negotiations unnecessary because of transcripts before state court referree); *Wal-Mart,* 396 F.3d at 120 (affirming denial of discovery because district court "possessed an abundance of facts" regarding settlement consideration for and valuation of *claims*). Here, by contrast, there has been no discovery or testing of the claims made in the fee request because the settlement agreement proscribes it.

While the Second Circuit does not require a district court to "convert settlement hearings into mini-trials on the merits," *Malchman*, 761 F.2d at 897, I am not seeking discovery regarding the underlying merits (Rule 23(e)). Instead, I am requesting information that has not yet been produced relating to the Rule 23(h) fee request. Plaintiffs misconstrue my distinction between discovery under Rule 23(h) and Rule 23(e). Reply Memo, Dkt. 195, at 25. Whether objector discovery should be granted depends on whether the record is sufficiently developed. *See Wal-Mart,* 396 F.3d at 120; *Malchman*, 761 F.2d at 897-898; Fed. R. Civ. P. 23, 2003 Advisory Committee Notes, ¶ 69 ("One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion…."). Here, the record regarding the underlying merits (Rule 23(e)) may arguably be sufficient because *both* plaintiffs and defendants discovered such information through the course of the litigation. On the other hand, because defendants are contractually precluded (by the Settlement) from challenging class counsel's $100.3 million request, the record

regarding fees (Rule 23(h)) consists merely of class counsel's two *unexamined* expert opinions and self-serving declarations, and the billing records that class counsel is putting its own spin on. Class counsel's other cited cases are similarly inapposite as they are Rule 23(e) cases where there had already been extensive discovery, not Rule 23(h) cases where there is a well-recognized adversary relationship between class members and class counsel.

"Because in common fund cases the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stages," there is no one here to protect the class members' interests by testing plaintiffs' submissions. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002). Indeed, if objectors cannot seek discovery to develop the record regarding such submissions, no one will, and the fairness hearing becomes mere pretense. *Cf. In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 743-44 (3d Cir. 2001) ("[T]he contribution a particular class member's attorney [can make], by providing an adversarial context in which the district court could evaluate the fairness of attorneys' fees, [is] substantial.") (quoting *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999)). Many of class counsel's submissions in connection with their fee request will remain untested without the requested discovery if the Court accepts class counsel's representations about the meaning of the billing records despite class counsel's previous claims that the contract attorneys were not doing low-level work such as coding.

Plaintiffs are incorrect that there is no basis to depose expert witnesses. In *In Re Prudential Insurance Company America Sales Practice Litigation Agent Actions*, the Third Circuit approved a class action settlement but remanded on the question of attorneys' fees instructing the district court to provide a "more thorough examination" regarding the 6.7% fee award. 148 F.3d 283, 340, 346 (3d Cir. 1998). The court also recommended additional discovery because the objector complained that the lack of discovery from plaintiffs' expert opining that class counsel was responsible for $1.123 billion value prevented the objector "from performing a similar analysis and rebutting the expert's

valuations." *Id.* at 338. If the Court relies upon the Coffee and Miller opinions without permitting depositions (and discovery of other undisclosed expert opinions, Frank Supp. Decl. ¶22), it will be similar reversible error.

Rule 23(h) contemplates as much. The Advisory Committee Notes instruct that the court may permit "objector discovery relevant to the objections." Fed. R. Civ. P. 23, 2003 Advisory Committee Notes, ¶ 69; *see also* 5 Moore's Federal Practice § 23.124[4] (Matthew Bender 3d ed. 2009) (objectors should receive "an adequate opportunity to review all of the materials that may have been submitted in support of the motion and, in an appropriate case, conduct discovery concerning the fees request"). The discovery Frank sought regarding class counsel's fee request is not before the Court, and, if the Court is not willing to accept that the billing records prove Frank's point, is necessary to adequately test the assertions of class counsel about the level of work performed by the contract attorneys.

VIII. The Court Should Make No Inferences From a Low Number of Objectors.

If class counsel had clearly disclosed to Citigroup shareholders that $20 million of the lodestar had no contemporaneously recorded descriptions of billed time, that as much as 30% of the hours billed were ***after*** the parties had agreed to settlement, and that they were being charged $550/hour for deposition digests and document coding, there surely would have been more objections. Such "informational barriers to class opposition" artificially reduce the number of objections. *In re GM Pick-Up Trucks*, 55 F.3d 768, 812 (3d Cir. 1995).

IX. Statement Regarding Fairness Hearing.

My reasons and evidentiary support for the objection are stated in this brief and in my declaration. I intend to attend the fairness hearing.

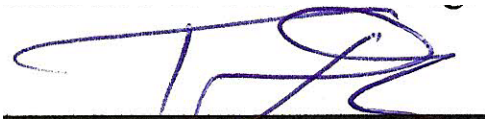
I reserve the right to cross-examine any witnesses presented in support of the fee request and any witnesses who assert that the settlement is more than a nuisance settlement. I join any

objections to the fee request and notice to the extent they are not inconsistent with this one.

CONCLUSION

The requested percentage is not reasonable or supported by the experts' own purported methodology neutrally applied. As demonstrated by the billing records, and by the declarations of William Ruane and John Toothman, the purported lodestar (which class counsel's expert concedes is the most relevant *Goldberger* factor in a megafund case like this) is inflated by tens of millions of dollars both by overstating "prevailing market rates" for contract attorneys doing document review and by millions of dollars of intense busywork assigned to new attorneys ***after the settlement was agreed to***. Class counsel's original submissions to the Court were misleading at best and intentionally deceptive at worst. It would be within the Court's rights to reduce the fee award to $30 million. Even the 12% figure the S.D.N.Y. used for the superior settlement in *Wachovia* would grant class counsel a tremendous windfall of over twice class counsel's reasonably expended lodestar, but any amount above the 12% figure would be especially unfair to the class, which should not be punished by the failure of the class representative to adequately supervise class counsel the way a paying client would.

Dated: March 15, 2013.



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Certificate of Service

The undersigned certifies he electronically filed the foregoing Objection (along with the Declarations of William Ruane (Dkt. 217) and Theodore H. Frank (Dkt. 218)) via the ECF system for the Southern District of New York, thus effecting service on all attorneys registered for electronic filing.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 15, 2013

/s/ Theodore H. Frank
Theodore H. Frank