IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THE COMPETITIVE ENTERPRISE INSTITUTE'S
CENTER FOR CLASS ACTION FAIRNESS'S MEMORANDUM
<u>PROPOUNDING AN APPROPRIATE TOTAL FEE AWARD</u>

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As invited by the Court (Dkt. 518), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") files this memorandum addressing the reasonableness of the $74,541,250 attorneys' fee award that the Special Master uses as a baseline for his Report and Recommendations ("Report," Dkt. 357) and the Proposed Partial Resolution of Issues for the Court's Consideration ("Proposed Resolution," Dkt. 485) with respect to Labaton Sucharow LLP ("Labaton").

CCAF recommends instead using a baseline fee award of $50 million (approximately 16.75% of the $300 million gross settlement fund less administrative and litigation expenses). The Court should calculate a proportionate baseline fee award for each law firm based on a corrected lodestar that more accurately values the time of contract and staff attorneys. From this baseline, the Special Master's recommended sanctions should be applied and the costs of the investigation can be taxed equitably on the firms in proportion to their responsibility for the costs.

EXECUTIVE SUMMARY

Before deciding sanctions and costs, the Court should determine a baseline attorneys' fee award that would have not been unreasonable in the absence of misconduct and error.

Appropriate aggregate fees in this case would be substantially lower than the 24.85% award that the Court approved in its now-vacated order. Dkt. 111. The award was based in part on Class Counsel's misrepresentation that a nearly 25% award was "right in line with Professor Fitzpatrick's findings." Dkt. 103-1 at 10-11 (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) ("Fitzpatrick"), filed at Dkt. 104-31). Class Counsel brazenly failed to tell the Court that "[f]ee percentages were strongly and inversely associated with the size of the settlement." *Id.* at 811. Thus, while attorneys' fees are about 25% on average of *all* class action settlements, "fee 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." *Id.* at 838. Larger common funds produce smaller percentage fee awards because the

effort required to obtain a $100 million settlement is nearly always substantially less than one hundred times the effort to obtain a $1 million settlement. Economies of scale should benefit class members, not merely class counsel. Fitzpatrick actually shows that the mean fee award in a settlement of $250 million to $500 million is 17.8%. *Id.* at 839.

Here, any award more than 17% of the net common fund, or about $50 million, at most, would be unreasonable. Such fee will return over $24 million to class members, before assessing the Special Master's recommendations for sanctions, which should be applied to this corrected baseline.

The reasonableness of an award is confirmed through a lodestar crosscheck. The crosscheck should take into account the market rates of contract and staff attorneys. Using very generous rates, a maximum corrected lodestar figure is about $27.4 million, so a $50 million fee award represents a lodestar multiplier of about 1.82. Such a lodestar multiplier more than adequately compensates class counsel for the results in this case; indeed, Class Counsel themselves argued that multiplier is appropriate.

A 1.82 multiplier is, in fact, too generous because the vast majority of hours were billed in this case after the case was stayed for mediation and after an agreement-in-principle was reached in *In re Bank of New York Mellon FOREX Transactions Litigation* ("*BONY Mellon*"), which Class Counsel describes as the "template" for this settlement. Dkt. 401-9 (Chiplock Depo.) at 110. There was little risk of non-payment to counsel after the case entered mediation. Lodestar multipliers are intended to compensate for risk, and Class Counsel had none when they cynically ramped up their document review in the first half of 2015 to a platoon of over 30 attorneys frantically churning on the eve of settlement (and a bit after). The multiplier also compares very generously to other cases, notably the *BONY Mellon* itself, where the defendant engaged in scorched earth tactics and counsel very well could have walked away empty-handed from a pugilistic litigant. Even though *BONY Mellon* involved many of the same firms and attorneys, the lodestar in that case was only $15 million more than this case,

even though 110 depositions were taken, and only a 1.6 multiplier was awarded by that court. This case was dramatically less risky and less efficiently litigated that *BONY Mellon*.

Finally, given the conduct the Special Master has uncovered, and in view of the oversized fee request and lodestar submitted by Class Counsel, it will not be enough to reduce class counsel's fee request to 16.75% of the megafund. Instead, CCAF recommends apportioning the fee award to each law firm, and then taxing costs and imposing sanctions on those firms in proportion to their conduct in this case.

I. Research shows a settlement of $300 million generally merits about 10-18% attorneys' fees.

A $300 million settlement is a megafund, and courts typically award less than 20% of the fund as fees in mega-fund cases of this size. Several studies independently confirm that the appropriate rate for a settlement over $250 million is less than 20% of the net fund (that is, the gross fund minus expenses). Here, an appropriate fee award for all counsel totals approximately 17% of the net common fund, or $50 million.

A. Attorneys' fees for megafunds tend to be awarded on a sliding scale so that counsel does not reap a windfall from valuable client claims.

Attorneys who achieve a valuable benefit for others should be paid due to "the equitable principle that those who have profited from litigation should share its costs." *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995). Amicus agrees that attorneys' fees awarded as a percentage of the common fund may be reasonable and such awards have "distinct advantages" over lodestar awards. *Id.* at 307. However, there is nothing equitable about awarding attorneys a windfall due to the intrinsic value of the claims, especially when the high settlement value hinged on the success of other litigation, for which attorneys have already been generously compensated.

Because of economies of scale, a reasonable fee award tends to be a smaller percentage in larger settlements to prevent a windfall for plaintiffs' attorneys at the expense of the class. "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). Thus, "[i]n cases with exceptionally large common funds, courts often account for these economies of scale by awarding fees in the lower range." *In re Citigroup Inc. Bond Litig.,* 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) (cleaned up). "The existence of a scaling effect—the fee percent decreases as class recovery increases—is central to justifying aggregate litigation such as class actions. Plaintiffs' ability to aggregate into classes that reduce the percentage of recovery devoted to fees should be a hallmark of a well-functioning class action system." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263 (2010).

But why should someone who provides $300 million to class members not get three hundred times as much as someone who provides $1 million? Basically, a flat percentage fee award on every dollar would allow class counsel (and not the class) to reap the efficiency awards of the class action mechanism. "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." *NASDAQ Market-Makers*, 187 F.R.D. at 486 (quoting *In re First Fidelity Secs. Litig.*, 750 F. Supp. 160, 164 n.1 (D.N.J. 1990)). Thus, "in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery [than 25%] to be appropriate." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) ("MCL") §14.121 at 188.

Empirical research shows that in class actions "fee 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." Fitzpatrick (Dkt. 104-31), at 835. Prof. Fitzpatrick—whose data Class Counsel misrepresented as supporting their 25% fee request—conducted a comprehensive survey of

all class action settlements in 2006 and 2007, a total of 668 cases. *Id.* at 811. Fitzpatrick found that percentage awards tend to decrease with the size of settlement, and for settlements between $250 and $500 million, the mean fee is 17.8%. *Id.* at 839.

A broad review of cases from 1993-2008 found even lower percentages. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 265 tbl. 7 (2010) (in cases over $175 million, a 12% mean and 10.2% median fee award). Earlier surveys reached similar conclusions. An earlier version of the Eisenberg & Miller study reported a 12% mean and 10.1% median in settlements over $190 million through 2002. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. Empirical Legal Stud. 27, 73 (2004). An empirical survey in 2003 showed average recovery of 15.1% where recovery exceeded $100 million Logan, Stuart, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REPORTS (March-April 2003). "One court's survey of fee awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.92%." MCL §14.121 at 188-189 (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339 (3d Cir. 1998)).

A more recent study of settlements from 2009 to 2013 breaks down fee percentages by only decile, so lumps the largest 10% of all settlements together, settlements above $67.5 million, and finds that the mean fee percentage of this broad range is 22.3%. Theodore Eisenberg, Geoffrey Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 948 (2017). The authors also conduct a regression of fees versus gross recovery, which predict the fee percentage for a $300 million fee award would be about 20%. *Id.* at 970.[1]

[1] The regression table shows that controlling for gross recovery, the base-ten logarithm (log) of the predicted fee = 0.94 x log (gross recovery) - 0.189. *Id.* If we look up log($300,000,000) on a slide rule or calculator, it is 8.477, and thus the log (fee) = (8.477 x 0.94) – 0.189 = 7.7795. The anti-

To date, Class Counsel has not acknowledged their misrepresentation of Fitzpatrick, nor have they shown that 25% would be a reasonable percentage for a settlement of this size.

B. Case law confirms an appropriate percentage in this case about 12-18%.

In their original fee motion, Class Counsel cherry-pick a handful of megafund cases that awarded more than 25%. Dkt. 103-1 at 7. These are unremarkable—CCAF expects that Class Counsel may generate an even larger cherry-picked list in response to this filing; with over 300 class action settlements a year approved in federal courts, there are certainly examples of counsel sliding excessive unopposed fee petitions by overburdened judges. "It does not take a statistical whiz" to realize "a non-random sample of five fee awards amounts to no more than looking over a crowd and picking outs one's friends." *In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 523 (S.D.N.Y. 2015). "[A]lthough counsel's case citations are accurate, there are many others where the percentage fee awarded in settlements as large as this one is typically lower—often substantially lower—than 20%." *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013). Moreover, in the megafund context, class counsel have the incentive and financial cushion to regularly support their petitions with a "bless-the-fee" expert declaration. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *22 n.8 (N.D. Cal. Aug. 17, 2018) (describing "multiple shortcomings in Professor Rubenstein's calculation").

However, Class Counsel's expert inadvertently provides a solution to the cherry-picking problem. While counsel's expert Prof. Rubenstein has provided a report and two expert declarations, none of these argue that the *percentage* here is appropriate for a megafund, and instead they chiefly concern the supposedly-appropriate lodestar rates for contract/staff attorneys and the multiplier crosscheck used in this case. *See* Dkts. 368, 401-234, and 446-2 (collectively the "Rubenstein Reports").

log of this number (in formula: 10 ^ 7.7795) results in a predicted fee award of $60,185,781 or 20.06% of $300 million.

There is good reason for this—Prof. Rubenstein's own treatise, his opinion in another litigation, and the cases he relies here upon suggest a smaller aggregate percentage for a large fund like this one.

> Interestingly, empirical data on class action fee awards do demonstrate that the percentage awarded to counsel decreases as the size of the fund increases, though more along the lines of a sliding scale (smooth decrease) than a megafund (cliff-like decrease). [Recounts results of Fitzpatrick (2010) and Eisenberg & Miller (2010).] **Similarly, the author's own database, taken from a six-year sample, shows the average . . . for settlements over $44.625 million is 20.9%**.

Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:81 (5th ed.) at 305. Opining as a fee expert in *Aranda v. Carribbean Cruise Line, Inc.*, Prof. Rubenstein acknowledged that "Seventh Circuit courts tend to award declining percentage as the size of the class's recovery increases." No. 12-cv-4069, 2017 WL 3642012, at *3 (N.D. Ill. Aug. 24, 2017).

Rubenstein's own citations here confirm that the vacated 25% fee award here was excessive. Because Rubenstein was not cherry-picking cases based on *percentage*, his citations provide a convenient unbiased sample of what other courts have awarded. Rubenstein lists 20 reported settlements he categorized as between $100 and $500 million. Dkt. 368, Ex. E. Of all of these cases—a sample that Class Counsel's own expert generated—attorneys were awarded more than 20% of a settlement fund greater than $100 million ***in just 2 of the cases***,[2] and the average fee award of these twenty cases was ***13.16%***. *See* Declaration of M. Frank Bednarz ("Bednarz Decl."), ¶ 12. Several of Rubenstein's citations show exactly the sort of scrutiny that the Court should apply here. *See, e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 130 (S.D.N.Y. 2009) (awarding 15.25% of $336 million fund rather than the requested 25.5%); *Pennsylvania Pub. Sch. Employees' Ret. System v. Bank of Am. Corp.*, 318 F.R.D.

[2] One cited case was not actually over $100 million, but instead established a $95 million fund. *See In re Lupron Mktg. and Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005).

19, 27 (S.D.N.Y. 2016) (awarding 12% of $335 million fund rather than requested 15% to "avoid a windfall to Barrack for charging more than $350 per hour for associates who are contract attorneys in all but name"); *In re High-Tech Employee Antitrust Litigation* ("*High-Tech*"), No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015) (awarding 9.8% of $415 million fund rather than the requested 19.5%).[3] While CCAF could cite many other cases in support of this point,[4] no such cherry-picking is necessary because Prof. Rubenstein's own list of similarly-sized settlements confirms that 25% is a remarkably high fee for a case of this size.

CCAF anticipates that Class Counsel may submit additional expert testimony in support of their 25% rate. While CCAF and Burch Porter do not have the resources to retain their own expert for this matter, the amicus respectfully requests an opportunity to reply to any new arguments advanced by Class Counsel on this issue.

C. A maximum fee award no higher than $50 million, absent misconduct, would return over $24 million to the class.

A reasonable percentage should be reckoned from the net fund—the amount sent to class members minus reimbursements and administration expenses—but this adjustment makes relatively little difference in this case. "In order to determine a reasonable fee for the services of counsel, it is necessary to understand what counsel has actually accomplished for their clients, the class members. This can only be done when the expenses paid by the class are deducted from the gross settlement." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *7 (S.D.N.Y. May

[3] *See also In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 375 (S.D.N.Y. 2013) (awarding 16% rather than 20% in $730 million settlement, in part due to objection by class member represented by CCAF) (cited by Rubenstein at Dkt. 368, 20).

[4] *E.g. Alexander v. FedEx Ground Package System, Inc.*, 05-CV-00038-EMC, 2016 WL 3351017, at *2-3 (N.D. Cal. June 15, 2016) (finding that requested 22% of a $226 million megafund settlement was "well above the typical range" and awarding instead 16.4%, "consistent with the higher end of awards in megafund cases").

14, 2004); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (excluding administration expenses in calculating fee percentage because such expenses are "costs, not benefits"). "It is only commonsense that a percentage-based fee should be based on the amount actually recovered by the class . . . and not include a percentage of the sums going to pay costs." *Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2014 WL 806072, at *2 (N.D. Cal. Feb. 27, 2014); *accord* 2003 Advisory Committee Notes to Amendments to Rule 23(h) ("fundamental focus is the result *actually achieved* for class members" (emphasis added)).

This district has followed this approach. Judge Young stated that going forward, he "will award attorneys' fees by reference to the value of benefits actually put in the hands of the class members." *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 410 (D. Mass. 2008). More recently, he adhered to this approach noting that "[c]ounting administration fees as part of the settlement valuation for attorneys' fees purposes might also inadvertently incentivize the establishment of costly and inefficient administration procedures which would inflate the benefits valuation without increasing actual benefit for class members." *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 170 (D. Mass. 2015).

Here, the administration expenses are relatively minimal. As of November 2017, $101,237 was paid, with the court approving an additional $49,673 to send an initial round of checks. Dkt. 213-1. Because litigation expenses were $1,257,697.94, the net settlement fund is less than half a percent smaller than the gross fund. Nonetheless, establishing the right rule is vital public policy by "encourage[ing] class counsel's prudence and discretion in incurring expenses—expenses that may not be as closely scrutinized given that there is no single client footing the bill." *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018).

Absent misconduct, a Rule 23(h) fee award to class counsel no more than about $35.8 to $53.75 million (representing 12-18% of net recovery) cannot be said to be too low and may well be

too high. The fee award here should not exceed $50 million, at most, representing 16.75%, which would increase relief to class members by over $24 million. This figure compares generously—perhaps overly so—with cases Rubenstein cited. *E.g. Currency Conversion Fee*, 263 F.R.D. at 130 (awarding 15.25% of $336 million fund, and 1.6 lodestar multiplier, rather than the requested 25.5%).

II. An 16.75% fee award represents a corrected lodestar crosscheck of 1.82, which Class Counsel already has supported as appropriate for the results in this case.

"[C]ourts making common fund fee awards are ethically bound to perform a lodestar cross-check." Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About Reasonable Fees in Common Fund Cases*, 18 GEO J. LEGAL ETHICS 1453, 1454 (2005). Justice Gorsuch and Third Circuit nominee Paul Matey have called the lodestar cross-check an "important safeguard against attorney over-billing." Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND., 23 (2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf. The crosscheck helps uncover the "disparity between the percentage-based award and the fees the lodestar method would support." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 n.8 (9th Cir. 2002). "[I]n megafund cases, the lodestar cross-check assumes particular importance." *Alexander*, 2016 WL 3351017, at *2; *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (describing how percentage-based awards become particularly arbitrary in a megafund context).[5]

The amicus agrees with Class Counsel that a lodestar crosscheck requires somewhat less rigor than a lodestar-based fee calculation, but the Court should not accept questionable billing rates in

[5] Prof. Rubenstein has opined that lodestar crosschecks are entirely discretionary in the First Circuit. Dkt. 446-2 at 8 n.4. That said, he has also testified that he is not opining as an expert on ethics. Dkt. 401-243 (Rubenstein Depo.) at 150. (Note, however, that Thornton apparently retained him to provide an ethics opinion in this case in 2011. Dkt. 401-275 at 38 ("Read draft opinion from W. Rubenstein to Thornton").) In Rubenstein's personal view courts should always conduct lodestar crosschecks. Dkt. 446-2 at 52. "[C]lass members lose millions, if not tens of millions, of dollars a year because judges don't ask for submission of the lodestar and crosscheck the percentage of work." *Id.*

conducting the crosscheck. A district court "is not bound by the hourly rate requested by the victor's counsel." *Bogan v. City of Boston*, 489 F.3d 417, 429 (1st Cir. 2007). The lodestar "serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013). "A reasonable rate is determined by reference to 'the prevailing hourly rate in Boston for attorneys of comparable skill, experience, and reputation.'" *Rudy v. City of Lowell*, 883 F. Supp. 2d 324, 326 (D. Mass. 2012).

Here, the rates for contract and staff attorneys are exorbitant and should be brought in line with prevailing market rates. Like the Special Master, CCAF observes that the proper rate for temporary contract attorneys is their cost on the open market and that highly marked-up rates are an "unfair burden on class members." Report at 189. Sophisticated clients like State Street pay cost for such attorneys, and so absent class members should not be asked to pay more for the purpose of a lodestar crosscheck. Similarly, clients in the market for staff attorneys tend to pay much lower rates than the rates of up to $515/hour claimed by Lieff. Most of the staff attorneys engaged exclusively in document review, and they certainly should not be paid more than the rate of a first year associate. *See generally Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir. 1992) (rates should be commensurate "to nature of the tasks"). Upon information and belief, WilmerHale LLP's staff attorneys are billed to paying clients at such rates.

Unless discovery shows that the market rate for such staff attorneys is higher, all document review-focused staff should be billed no more than a maximum of $200/hour, which represents four times their average salary and healthy leverage for Class Counsel even before allowing a lodestar multiplier. A few staff attorneys engaged in more sophisticated work comparable to a midlevel associate, and for these attorneys only somewhat higher rates would be appropriate, yielding a rate of no more than a maximum of $375/hour.

Once these still generous adjustments to rates are applied, the corrected lodestar is $27.4 million. This yields a lodestar multiplier of 1.82. Such lodestar multiplier is appropriate for the results achieved in this case for several reasons. This is almost identical to the 1.8 the multiplier Class Counsel itself argued for in its fee motion. *See In re Petrobras Secs. Litig.*, 317 F. Supp. 3d 858, 876-77 (S.D.N.Y. 2018) (declining to deviate upward from class counsel's originally-requested 1.78 multiplier after court determined lodestar reduction was necessary).

A. The market rate for contract attorneys is their cost on the open market.

Contract attorneys are hired to do relatively unskilled document review work that discerning paying clients refuse to pay a premium for and certainly don't pay rates of up to $515/hour, which is what Lieff and TLF request from the settlement fund. Lieff and TLF seek to credit hourly rates for contract attorneys that are ***ten times*** their market cost, with an additional 2.01 multiplier on top of that. Lieff is correct that "[m]ost important in determining the reasonableness of hourly rates for lodestar purposes is the 'market value of counsel's services.'" Dkt. 367 at 79 (quoting *U.S. v. One Star Class Sloop*, 546 F.3d 26, 40 (1st Cir. 2008)). For contract attorneys, this value is straightforward: their market value is their cost on the market. Unlike the rates for contingency fee attorneys never retained by a paying client, the market rate of contract attorneys can be accurately ascertained—it is the rate they are actually paid by class plaintiffs and defendants across the country.

The Special Master has already determined what Lieff and TLF paid for their seven contract attorneys and has also checked this rate against the rate defendants paid. Report at 167. Evidence of how the plaintiffs' adversary litigates and how they bill is "certainly" "helpful" to the lodestar determination. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1214 (9th Cir. 1986). This evidence should be used, and it suggests the correct rate for contract attorneys in this case is $50/hour.[6]

[6] CCAF departs somewhat from the Special Master's recommendation to also reimburse the contract attorneys as costs. While this is indeed the standard practice for paying clients, contingency

"[T]here is absolutely no excuse for paying these temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes." *In re Beacon Assocs. Litig.*, No. 09 Civ. 777, 2013 WL 2450960, at *18 (S.D.N.Y. May 9, 2013). *See also Lola v. Skadden, Arps, Slate, Meagher & Flom*, 620 Fed. Appx. 37, 40 (2d Cir. 2015) (observing that plaintiff contract attorney was paid $25 per hour, and holding that the work described was so devoid of legal judgment it may not even constitute the practice of law); *Pa. Pub. Sch. Employees Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 26 (S.D.N.Y. 2016) (holding that charging the class $362/hr for temporary attorney work "is unreasonable and warrants a reduction in the attorneys' fees").

Counsel objects that other courts have awarded such rates, but they conflate *ex post* (and largely *ex parte*) fee awards with the actual market rate for legal services. A lodestar calculation depends upon the market rates, so the best authority for how contract attorneys should be billed is the market itself, not fee orders issued from typically-unopposed fee motions. Too often, "[w]ithout the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter." *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 WL 5560541, at *1 (E.D.N.Y. Sept. 21, 2015); *see also, e.g., In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560, 571 (9th Cir. 2014) (reversing settlement and few award where district court accepted class counsel's lodestar with "a few boilerplate recitations about the attorneys' skill and the risks of proceeding with the litigation"). That in turn, leads to "proposed orders masquerading as judicial opinions" and ultimately, an entire self-sustaining jurisprudence that has become "so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). There is no better time than now to break the deleterious cycle.

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class actions attorneys can earn a multiplier to compensate for their risk of non-payment when appropriate in a particular case. Earning a reasonable multiplier for contract attorneys billed at their actual market rate of about $50/hour, is very different from the obscene $515/hour rate Lieff proposes to charge for some of its contract attorneys and then multiply by an additional 2.01.

The fact is that the outmoded orders cited by counsel do not capture the current reality of contract attorney billing, which is almost universally passed on to paying clients at cost. While many courts have approved higher rates for contract attorneys, they do this mostly *sub silentio* without awareness of the issue. Such rates were approved without objection *in this very case* prior to the *Boston Globe*'s article about the award. Contract attorney rates are simply often misunderstood by the judiciary:

> I think the jurisprudence indicates that the rates -- the lodestar is supposed to be calculated on what lawyers are charging to paying clients in the community, however it's properly defined, not -- I think probably many other judges made the same mistake -- well, have understood the representations made the way I have for many years when we try to do that lodestar reasonableness check.

Dkt. 176 at 94 (Tr. 3/7/17).

In the marketplace for legal services, paying clients do not tolerate marking up temporary employees in the way plaintiffs propose to charge the absent class.[7] Imagine if plaintiffs decided to bill Uber drivers (and their trips to and from depositions) as "contract paralegal" fees at ten times the firm's cost. Or imagine expert consultants, technical assistance, or word processing billed in this way. After all, Lieff charges the class $360/hour for a computer systems support (Dkt. 401-247 at 38), so what in principle would prevent them from billing outsourced technical costs the same way as they bill contract attorneys—other than insufficient chutzpah?

A paying client would not tolerate extensive markup on any temporary employees because such workers are fundamentally different from law firm associates, who require ongoing investment, benefits, and salary from the firm whether work is plentiful or scarce.[8] Firms must develop their

[7] Class Counsel have objected that their exorbitant rates do not "charge" anything to class members because the rates are only used to roughly ascertain the fee award as a cross-check. Dkt. 367 at 68. But this is a distinction without difference. The Court must set a reasonable fee, so *of course* excessive rates, if uncritically accepted, will cost class members money.

[8] The Special Master does not explore whether all of the staff attorneys nominally paid for by TLF should be considered contract attorneys. TLF paid Lieff and Labaton for staff attorneys wages

associates, so they select them carefully from among the most qualified applicants. Firms retain associates only when they exhibit superior motivation, work ethic, judgment, and quality; law firm associates are intrinsically costly and they represent the most promising attorneys in their cohort. Contract attorneys, in contrast, are hired to an expressly limited engagement and may be terminated within hours when no longer needed. While they are hired based in part on their past experience reviewing documents, contracting firms gain no benefit from further developing them. So contract attorneys receive no professional development investment, and frequently do not even get health insurance or other benefits. *See Down in the Data Mines A Tale of Woe from the Basement of Legal Practice*, 94 ABA J. 32 (Dec. 2008).

For this reason, knowledgeable clients have long paid contract attorneys at cost, often making their own relationships with staffing agencies as the defendant has in this case. Dkt. 85 (Tr. 3/7/2017) at 84-85; *see generally* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 Minn. J.L. Sci. & Tech 151, 163-64 (2011).

In short, the marketplace compensates contract attorneys differently than associate attorneys because they *are* different in terms of cost, investment, overhead, type of work, skill level, and experience. Lieff and Rubenstein cannot change this reality by pretending that the market compensates all attorneys linearly based on their year of graduation.

Case law reflects this practice among paying clients. Rubenstein looks to bankruptcy filings for the billing rates of associates and partners at big law firms (Dkt. 446-2 at 12), and a similar comparison can be done with contract attorneys. When sophisticated corporate clients are entitled to fee shifting from each other, they only seek—and are awarded—contract attorney time at or near the

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so that TLF would shoulder more of the cost (and get more of the profit) from the litigation. But from TLF's perspective, all of them were short-term workers akin to agency contract attorneys. For the sake of limiting the length of this memorandum, we treat the staff attorneys paid by TLF as if they were TLF's own employees, but it's not obvious why this legal fiction should be credited.

cost of such time. *See, e.g.*, *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-cv-07098-AB, 2015 WL 1746484, at *16 (C.D. Cal. Mar. 24, 2015) (awarding defendant in copyright infringement action requested $100/hour for contract attorney time); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846-LHK, 2012 WL 5451411, at *3 (N.D. Cal. Nov. 7, 2012) (party submitted hourly rate of $125 for contract attorney time in connection with Rule 37 sanction); *4Kids Entm't, Inc. v. Upper Deck Co.*, No. 10-cv-3386, 2012 WL 2426569, at *7 (S.D.N.Y. June 21, 2012) (setting $50/hour rate for contract attorney time); *Tampa Bay Water v. HDR Engr., Inc.*, 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *15 (M.D. Fla. Nov. 2, 2012) (awarding $85/hour for contract attorneys). Lieff seeks to subject absent class members to fees that multinational corporations do not bear.

B. The lodestar is overstated by over $7 million because the staff attorneys' rates are exorbitant for document review.

As used by big law firms retained by sophisticated clients, staff attorneys are used to save clients' money on routine work such as document review. Paid about half the salary of partnership-track associates, staff attorneys are typically billed at the rates of junior associates—or even lower. *See At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES (May 23, 2011) (describing emergence of staff attorneys, describing their work, and noting entry level salaries that are only 30-40% as much as associates at the same firms).[9]

As employed by Class Counsel in this case, staff attorneys are a cynical profit center. Rates claimed for staff attorneys—up to $515/hour—actually exceed the costs these firms could credibly bill for junior associates doing the same work. Dkt. 104-17 at 8 (four staff attorneys with rates of $515/hour billed for over $2 million combined lodestar). Yet the salary for these attorneys is much lower than the salary for junior associates: "the vast majority of the staff attorneys were paid in the range of $40-$60 an hour, plus benefits." Report at 177. While law firms are entitled to markup full-

[9] Available online at: http://www.nytimes.com/2011/05/24/business/24lawyers.html.

time employees, the rates awarded must bear some resemblance to actual market rates. Staff attorney rates in this case simply do not pass the laugh test. As Lieff admits, $515/hour is the rate of an eighth-year associate on the verge of partnership. Dkt. 369-1 at 22. In fact, one of the partners in this case—Evan Hoffman—billed just a smidgen more than this rate ($535/hour).

Class Counsel pretends that their staff attorney rates represent a savings over associate because their staff attorneys have graduated years ago, but this assertion is a non-sequitur. The market for legal services does not value every lawyer ten years out of law school at $600 an hour. CJA panel attorneys would be surprised by this immodest premise. The market for legal services compensates time for staff attorneys differently than partnership-track associates because they *are* different—they are paid less and generally confined to lower level work even if they have a senior graduation year. While law firms may be entitled to leverage on their permanent attorneys, the market rate for staff attorney time is much lower than the senior associate-level rates earlier approved here.

Except for the rate of Michael Bradley, the Special Master does not adjust the rates of any staff attorney, even though he notes the rates TLF charges for the very same attorneys are almost uniformly higher than rates claimed by Labaton and Lieff. *See* Report at 169 n.134. He concludes that because some staff attorneys were doing the work of associates, the rates are essentially fine, thus giving a pass to ***over half the lodestar value claimed in this case***. *Id.* at 72. While some of the staff attorneys sometimes "prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore" (*id.*), Class Counsel's detailed billing records reflect that the vast majority of staff attorney time was consumed with document review, which militates in favor of lower fees for the purpose of the crosscheck.

Even if the review of documents was assigned to associates, many courts refuse to permit full lodestar rates to be charged, given that large-scale document review can be performed more economically by other professionals. *E.g., City of Pontiac Gen. Emples. Ret. Sys.*., 954 F. Supp. 2d at 280

("a sophisticated client, knowing these contract attorneys cost plaintiff's counsel considerably less than what the firm's associates cost (in terms of both salaries and benefits) would have negotiated a substantial discount in the hourly rates charged the client for these services").

Especially given Class Counsel's deceptive statements about the "regular rates charged" for attorneys' services, the Court should strive to use realistic market rates in its crosscheck. The market rates for discovery-focused staff attorneys can be discovered from WilmerHale, which employs them. "One way to judge the legitimacy of the plaintiff's fees is to look at the defendant's fees." *Dreher v. Experian Info. Solutions, Inc.*, 2016 WL 4055638, at *2 (E.D. Va. Jul. 26, 2016).

Failing that, staff attorney time should be adjusted to the rates of junior associates, which better comports with the Report's findings about their work level, and which are inconsistent with $415/hr and higher rates. *See* Report at 169 ("the staff attorneys performed associate-level work (albeit that of a junior-level associate)"). Any rate higher than $200/hour for the vast majority of staff attorney time, which consists of document review, would be unduly excessive. Such rate is, if anything, overly generous for attorneys doing the work of junior associates. *See Gonzalez v. Scalinatella, Inc.*, 112 F. Supp. 3d 5, 28 (S.D.N.Y. 2015) ("$250.00 for a third-year associate, $200.00 for a second-year associate, $175.00 for a first-year associate, and $125.00–$130.00 for paralegals—'are higher than the norm in this district'"). CCAF proposes using this rate only for the purpose of a crosscheck in the absence of discovery on actual market rates for discovery staff attorneys. Better evidence would be needed to calculate a lodestar-based award, and the time entries would need to be further scrutinized as the Special Master did not conduct a line-by-line review. Erroneous overbilling is evident on the face of Class Counsel's detailed hours. *See* Section IV.

Among the rates that should be reduced to no more than $200/hour at most is the one for Michael Bradley, which answers TLF's objection that his rate has been singled out by the Report "despite [his] similarity" to other staff and contract attorneys. Dkt. 361 at 85. CCAF agrees that the

Special Master's conclusion that "the work he performed was simple, straightforward, and unmonitored document review" should compel a systematic adjustment to all staff attorneys. *Id.* at 84.[10]

The Special Master has found that some staff attorney work more closely resembles tasks assigned to a mid-level associate, and a review of attorney billing descriptions suggests this is true. While the vast majority of staff attorney time was devoted to rote document review, some staff attorneys appear to have had a more supervisory role. The undersigned has sorted the billing descriptions of contract attorneys and has identified the billers with more sophisticated roles in the case. For the purpose of a cross-check, these attorneys should be billed at no more than the rate of a mid-level associate—about $375/hour, not $515. The reasonableness of this lower rate is confirmed by the fact that Joshua Bloomfield, who Lieff claims at $515/hour with a total lodestar of over $1 million, has since moved to Gibbs Law Group as an associate, where his billing rate is now $395. *See In re Anthem, Inc. Data Breach Litigation*, No. 15-md-02617-LHK, Dkt. 944-6 at 7 (N.D. Cal. Jan. 25, 2018) (fee request). The following staff attorneys either billed more than 10% of their time on tasks besides routine document review and/or were mentioned billing descriptions of associates and partners more than once: D. Alper, J. Bloomfield, T. Kussin, L. Nutting, and R. Yamada. Bednarz Decl. ¶ 9. These attorneys' hours as staff attorneys have been counted at $375/hour for the purpose of the cross-check.

Finally, several non-attorneys who supported document review should have their rates reduced. Namely, K. Dugar, various described as "staff attorney supervisor" (Dkt. 446-5 at 4) and "litigation support manager" (Dkt. 367 at 56) should have his or her rate reduced from $450 to no

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[10] That said, Michael Bradley was indeed uniquely unmonitored. Class Counsel's document review supervisors had no idea what he was doing. Report at 193. No evidence appears to exist showing that he performed any task that benefited the class.

more than $325/hour, which is a generous rate for an experienced paralegal. The same rate should also be applied to Anthony Grant and Willow Ashlynn, who apparently supported staff attorneys using the Relativity database. Dkt. 407-57 at 16.

C. Applying these generous rates yields a lodestar multiplier of 1.82.

Adjusting the billing rates to the maximum rates discussed above results in a revised lodestar multiplier of 1.82 for a fee award of $50 million.

To prepare its lodestar cross-check, the undersigned reconstructed staff and contract attorney hours.[11] *See* Bednarz Decl. ¶¶ 3-10. Using these hours, and applying the upper-end rates of $50/hour for contract attorney time and $200 or $375/hour for staff attorneys, and $325/hour for the staff listed above results in a corrected lodestar of $27.4 million. The table below shows the originally-claimed lodestar for each firm, which includes $4.05 million of fictitious double-counting (Dkt. 104-24) and the corrected lodestar. The third column scales up this award by the overall multiplier of 1.82 to show an allocation for the maximum fee award of $50 million (absent reductions resulting from Class Counsel's error and misconduct).

Firm	Claimed Lodestar	Corrected Lodestar	Share of $50 Million
Labaton Sucharow LLP	$17,368,905.50	$9,872,573.00	$18,008,302.66
Thornton Law Firm LLP	$7,460,139.00	$5,623,724.50	$10,258,089.04
Lieff Cabraser Heimann & Bernstein LLP	$9,800,487.50	$5,220,509.00	$9,522,594.17
Keller Rohrback LLP	$2,561,287.00	$2,561,287.00	$4,671,976.75
McTigue Law LLP	$2,625,503.75	$2,625,503.75	$4,789,112.84
Zuckerman Spaeder LLP	$1,174,925.00	$1,174,925.00	$2,143,150.02

[11] Surprisingly, neither Class Counsel nor the Special Master states how many hours were actually billed by each attorney in the case. For example, the only document purporting to show the alleged $37,265,241.25 lodestar and 2.01 multiplier appears to Labaton's November 10, 2016 letter to the court, which does not show its work. Dkt. 116. In spite of valiant effort, the undersigned has not been able to replicate this exact number. Bednarz Decl. ¶ 8. This showing would not suffice to justify a lodestar-based award. *See Weinberger v. Great N. Nekoosa*, 925 F.3d 518, 527 (1st Cir. 1991).

Richardson Patrick Westbrook & Brickman LLC	$137,411.00	$137,411.00	$250,647.82
Beins Axelrod PC	$187,712.00	$187,712.00	$342,400.56
Feinberg Campbell & Zack PC	$7525.00	$7525.00	$13,726.16
Total:	$41,323,895.75	$27,411,170.25	$50,000,000

Bednarz Decl. ¶ 11.

A maximum lodestar multiplier of 1.82 is more than reasonable given that the majority of hours were billed in the final months—after an agreement-in-principle was reached in *BONY Mellon*—when the case was substantially less risky. *See* Section II.D, below. In fact, the multiplier is actually higher than the 1.8 multiplier Class Counsel requested and higher than the average multiplier in class action settlements. *See* Rubenstein, 5 NEWBERG ON CLASS ACTIONS*,* § 15:89 (reporting 1.42 average multiplier); Fitzpatrick at 833-34 (1.65 average multiplier).[12]

Interestingly, the awards set forth in the table above results in significantly higher awards for ERISA counsel even though the overall fee award is reduced by 50%. This occurs for two reasons. First, the original fee application gave a misleading picture of what ERISA counsel would receive. While the original (fictitious, double-counted) lodestar figures suggested ERISA counsel had billed 16.2% of the lodestar, because of Class Counsel's undisclosed fee sharing agreement, ERISA counsel's percentage of the fees was limited to 10%. Second, because ERISA counsel did not employ armies of contract and staff attorneys, their lodestar figures were not as exorbitantly over-inflated and thus require less downward adjustment. Thus CCAF reckons the correct share of the award for ERISA counsel is 24.4%. Under this calculation and using the maximum fee award set forth above, ERISA counsel would share about $4.7 million more than they received in 2016 (*see* Report at 88), which renders obsolete the Special Master's propose resolution to direct most of the Chargois fee disgorgement to ERISA counsel. That money should go instead to the class.

[12] Where multipliers have been higher in megafund cases, this is because courts often fail to even perform a lodestar crosscheck, which results in too-common windfall payments.

III. A fee award of no more than 16.75% for a 1.82 lodestar multiplier is, if anything, too generous in this case because the majority of attorney time was cynically churned when the case was not risky.

The proposed $50 million fee award has a higher multiplier than awarded in *In re Bank of New York Mellon FOREX Transactions Litigation* ("*BONY Mellon*"), which achieved better results with much more risk than this case. No. 12-md-2335 (LAK) (JLC), Dkt. 637 at 3 (S.D.N.Y. Sept. 24, 2015). By all indications, this case was less costly, less risky, and less successful than the settlement achieved in *BONY Mellon*, where counsel were awarded a 1.6 lodestar multiplier. *Id.* A 1.8 multiplier in this case more than adequately compensates counsel for their work and risk.

While the First Circuit has not provided a list of factors for evaluating the reasonableness of a fee award, courts in this district often use the *Goldberger* factors from the Second Circuit:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.

In re Neurontin Mktg. and Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir.2000)).

An examination of these factors shows that a $50 million fee award is cannot be said to be too low and may well be too high. Awards in similar cases are examined in Section I, and these overwhelmingly show that a 25% award is excessively high for a settlement of this size. The Special Master and Class Counsel make much of the "outstanding result" achieved in this class, but this result was not achieved by the approximately 60,000 hours of document review billed in this case. Before the settlement agreement was filed on July 26, 2016, the case had been stayed for mediation continuously since November 19, 2012. Dkt. 62. Over this time, no depositions were taken. No motions were argued. Instead, the parties negotiated toward settlement.

In short, this case was not risky while it was in mediation, and so the lodestar multiplier—to the extent one is appropriate at all—should be modest. Ted Frank explained this concept in his November 13, 2016 memo to Andrea Estes of the *Boston Globe*, and the Memo has been in the record of this case since February 17, 2017:

> A higher contingent-fee percentage (and multiplier of lodestar) is designed to compensate class counsel for the risk that they will be unpaid in litigation, and if the defendant has made clear its willingness to settle rather than to win, class counsel is facing substantially smaller risk of being unpaid.
>
> Assuming that this case was of average risk, an appropriate percentage would have been in the 17.8% range. If, as the record appears to indicate, class counsel faced little or no post-motion-to-dismiss risk because of the willingness of State Street to resolve the case in mediation once government investigations concluded, even an 17.8% figure would overcompensate class counsel. Asking for 24.85% while misrepresenting the Fitzpatrick report as class counsel did is, in my opinion, abusive and objectionable, though it is certainly true that some courts have chosen to award similarly oversized percentages of similarly-sized settlements. Others have not. For example, around the same time as this fee request, class counsel in *Dial Corp. v. News Corp.*, 2016 U.S. Dist. LEXIS 150528 (S.D.N.Y. Oct. 31, 2016) asked for 30% of a $244 million settlement fund. The court awarded 20%.

Dkt. 125-2 at 4.

CCAF is disappointed that the Special Master did not question Class Counsel about their misrepresentation of Fitzpatrick or second-guess the assumption that the case was especially risky. But the record suggests that Class Counsel intentionally churned during the final months from February to June 2015, by which time the *BONY Mellon* case had reached an agreement-in-principle with the joint effort of private counsel and the Department of Labor.

As that case settled, the writing was on the wall to both plaintiffs and defendant that this case would follow, and on similar terms—so similar that the *BONY Mellon* settlement was called a "template." Dkt. 401-9 at 110. This is precisely when Class Counsel staffed platoons of document reviewers to churn on this case—not to improve recovery to the class, but to obtain a larger slice of

the fee pie from each other. Because there was no risk to counsel toward the end of the case, when the goal was only to "jack up" the lodestar, no risk multiplier should be awarded for this portion of the billing. Dkt. 401-63 at 3.

No paying client would tolerate their attorneys billing a case to death on the eve of certain settlement—it's outrageous conduct. Since ATRS seems to have had little interest in overseeing Class Counsel (and indeed instructed counsel not to tell them about referral fees), the Court must act as the fiduciary for the class. This Court should emphatically reject the argument proffered by Class Counsel that multipliers of 3 or even higher could be blessed in a case where counsel spent years in mediation and "jacked up" half of the entire lodestar when settlement was inevitable. A 1.82 multiplier can be thought of as the equivalent of a 5.0 multiplier for work prior to the motion to dismiss (suggesting a very pessimistic 80% risk of failure), a 1.5 multiplier for work after the case was stayed for mediation until February 2015 (33% risk of failure), and a 1.0 multiplier for the last few portion of the bill when settlement was inevitable and counsel cynically churned staff and contract attorney time in order to capture a larger slice of the certain pie. If anything, this structure is overly generous.

A. Lodestar multipliers chiefly exist to compensate for the risk counsel takes in prosecuting a case on contingency, but the vast majority of the billing in this case was churn billed without risk.

"A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008). In awarding fees, courts utilize the lodestar crosscheck to "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) ("The goal of [the lodestar cross check] is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel.").

The lodestar multiplier exists to compensate counsel for the risk of nonpayment. In *Steinlauf v. Continental Illinois Corp.*, 962 F.2d 566, 569 (7th Cir. 1992), Judge Posner described the effect of risk on setting a reasonable multiplier:

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his expected fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400).

In general, we can expect that plaintiffs' counsel in the *ex ante* world would not agree to a contingent fee unless, given the risk of nonpayment and the stakes of the case, the percentage of recovery would, on average, produce an expectation of at least a lodestar amount on average. After all, attorneys can realize lodestar simply by offering hourly billing rates to defendants or other clients who pay in advance.

While a multiplier of two may be appropriate in a case with extraordinary risk and results (perhaps 50% risk of nonpayment), from the time this case entered mediation, the risk was lower. By mediating, instead of fighting tooth-and-nail, the defendant signaled it was willing to settle. And the case stayed in mediation—*for years*—because Class Counsel accurately perceived that the defendant would settle and was not just stringing them along. Thus, there was a high likelihood that Class Counsel would collect fees at that point, and it was just a question of how large the pot would be.

Class Counsel's defense of high multipliers fails to take risk into account. There is a "strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1669 (2010). 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." *Id.* at 1673.[13] "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant." *Id.* Instead, Class Counsel and Prof. Rubenstein have simply cited to cases where high multipliers—sometimes appallingly ridiculous multipliers—were approved, to argue that a 2.01 or 2.07 or 3.0 multiplier here would be "well within the range of reasonableness." Dkt. 446-2 at 21; *see also* Dkt. 367 at 72. This is incorrect: when there is no risk, a multiplier of 1.0 is presumptively reasonable. While the Court found that the case was "risky" (Dkt. 114 at 36), it also found rates were reasonable. Uncontested representations often do not withstand adversarial scrutiny, and this is no exception.

After the case survived a motion to dismiss and entered mediation, there was no particular reason to find the case risky. To the contrary, the Department of Justice, Department of Labor, and state governments' coordinated investigation of the same underlying conduct suggested that State Street would sooner or later have to reckon with private claimants as well.

The risk of non-payment dropped to essentially zero on February 5, 2015, when an agreement-in-principle was reached in analogous litigation by Ohio pension funds in *BONY Mellon*. No. 12-md-2335, Dkt. 630, Mot. For Final Approval (S.D.N.Y. Sep. 15, 2015), at 6. Lieff and TLF immediately knew of this development because they were also counsel in *BONY Mellon*.

B. Class Counsel's request for a 1.6 multiplier in *BONY Mellon* shows why a $50 million fee award with 1.82 multiplier in this case may be too high.

This case settled not due to any particular good bit of lawyering in this case, but due to success in *BONY Mellon*. This case, which was stayed for almost 4 years without substantive action, became more valuable and even less risky due to success in *BONY Mellon*. In Daniel Chiplock's own words,

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[13] *Perdue*'s limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable" fee awards, but several courts hold it has equal application to "reasonable" fee awards in class actions made under Fed. R. Civ. P. 23(h). *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 500 (6th Cir. 2011); *Weeks v. Kellogg Co.*, No. 09-cv-8102, 2013 WL 6531177, at *34 & n.157 (C.D. Cal. Nov. 23, 2011); *cf. also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J. concurring/dissenting) (referring to *Perdue* as an "analogous statutory fee-shifting case.").

the *BONY Mellon* result "doubled the value of State Street." Dkt. 401-86 at 5. True, many of the same attorneys were involved, but they were already paid for the risk and unexpected success of *BONY Mellon*—by the judge in *BONY Mellon*. No. 12-md-02335, Dkt. 637 (S.D.N.Y. Sep. 24, 2015).

Unlike the defendant here, BONY Mellon did not agree to endless mediation, but fought a scorched earth war of attrition against its opposing plaintiffs. An astonishing 110 depositions were taken, including 18 harassment-maximizing depositions of plaintiff fund officers. BONY Mellon wielded counterclaims against the named plaintiffs, which the district court refused to dismiss, and which could potentially make the Ohio public funds plaintiffs liable for millions of dollars of attorneys' fees (potentially subjecting the officers to public criticism and malpractice suits). In the end, plaintiffs emerged with a $336 million settlement that paid its class members 35% of the estimated damages. Plaintiffs sought and were awarded 25% of this common fund, for an average 1.6 lodestar multiplier—which the court justified based on the phenomenal results, breathtaking risk, and heroic effort. *BONY Mellon*, Dkt. 12-md-02335-LAK, Dkt. 642, Transcript (S.D.N.Y. Sep. 24, 2015). But that case is over. The attorneys responsible for that success have already been paid.

This settlement compares unfavorably in almost every way to *BONY Mellon*. While this settlement's recovery of 20% of estimated damages is not unreasonable for a class action, it's no *BONY Mellon* in terms of success. The risk here was comparatively minute once plaintiffs survived a motion to dismiss, as plaintiffs' expert in *BONY Mellon* observed. Prof. John Coffee opined that the 25% fee request in *BONY Mellon* was justified due to the unprecedented success and high risk that class counsel in that case would recover nothing. About this case, he remarked:

> The only other custodial FX class case of which I am aware, Arkansas Teacher Retirement System v. State Street Corporation, et al., No. 11-cv-10230 MLW (D. Mass.), survived a motion to dismiss in 2012, but then was ordered into mediation by the presiding judge, where it has remained throughout the pendency of this MDL. That case involved far fewer causes of action than those alleged here, and also benefitted from a powerful unifying theory of liability that was not generally available to class members in this case (namely,

> violation of the Massachusetts consumer protection statute, which has been held by some courts to be available to out-of-state plaintiffs suing an in-state defendant, and which provides for double or treble damages and prejudgment interest at a rate of up to 12%).

BONY Mellon, Dkt. 12-md-02335-LAK-JLC, No. 620 at 14 n.15 (S.D.N.Y. Aug. 17, 2015). Prof. Coffee's assessment of the "powerful" Ch. 93A claims here matches Class Counsel's own candid banter about the case. *See* Dkt. 107-86 at 3 (Lieff attorney taking credit for having "developed the ch. 93A theory (the most readily certifiable claim in State Street, and by far the most valuable).").

The fact that defendant was willing to settle and that the value of the settlement turned on other litigation demonstrates that a 25% award here would constitute a windfall. For an extreme example of this principle, the plaintiffs in *Heien v. Archstone* sought a 33% award of the $1.3 million settlement they negotiated, but Judge Young awarded them $29,250 (2.25%), or less than half the lodestar plaintiffs claimed. 837 F.3d 97, 99 (1st Cir. 2016). The First Circuit affirmed, finding the district court correctly pointed out the "relevant legal issues had already been resolved" in another case and that *Heien* "had not proceeded to discovery, nor had the parties engaged in any significant motion practice." *Id.* at 101. The First Circuit further found that the district court had reasonably deducted hours from the lodestar award for waste, and rejected plaintiffs argument "that the fee award constitutes an impermissibly low percentage of the total common fund." *Id.* at 102.[14] While plaintiffs' claims were not decided by *BONY Mellon* litigation, similar reasoning applies here. This case was stayed for *years*, the value of the settlement increased greatly on the resolution of *BONY Mellon*, and the lodestar claimed by Class Counsel appears to be the product of strategic churn—deliberate waste calculated to increase the attorneys' fee award.

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[14] At the November 7 hearing, the undersigned advised that a guardian *ad litem* could appeal a decision it believed to be erroneous. Dkt. 519 (Tr. 11/7/2018) at 95. The possibility of an appeal exists but the likelihood of an appeal appears to be modest. CCAF attorneys do not anticipate they would find such appeal fruitful given the abuse of discretion standard for fee awards.

C. Half of Class Counsel's hours were billed as apparent make-work between February and June 2015, after the *BONY Mellon* agreement made settlement near-certain.

It is difficult to fathom how much higher the lodestar in this case is relative to *BONY Mellon*. Class Counsel asserts that the non-double-counting lodestar here is $37,265,241.25. Dkt. 116. In *BONY Mellon*, with many of the same attorneys billing similar rates,[15] the lodestar was $52,097,202.06. For just $15 million more, the plaintiffs in *BONY Mellon* took and defended 110 depositions (0 here), exchanged 11 expert reports (0 here), and defeated four motions to dismiss in two venues (1 here). Plaintiffs in *State Street* instead mediated and reviewed documents for years on end, dramatically expanding their staffing in the final few months. Document production was not more burdensome in this case either; the reverse is true. State Street produced 19 million pages, compared to 20 million produced by defendants in *BONY Mellon*. ATRS and other plaintiffs produced about 80,000 pages, compared to 6 million pages produced by plaintiffs in *BONY Mellon* in response to tooth-and-nail counterclaim discovery. BONY Mellon also conducted extensive third-party discovery; 3.3 million pages from third parties were produced and needed to be reviewed in that case. *BONY Mellon* thus had 50% more documents than this case, and reviewing them was much more time sensitive due to rapid-fire fact depositions.

These differences sharply call into question the reasonableness of the lodestar here. Roughly the same number of hours was spent on document review in this case, which was never litigated

[15] The Special Master finds staff attorney rates reasonable in part because some of the same attorney's rates were approved in *BONY Mellon*. Report at 225. However, this conclusion is unwarranted because the Judge in *BONY Mellon* has not been shy about slashing similar fees to avoid windfalls. *See In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 523 (S.D.N.Y. 2015) (accepting rates of $210 to $420 for associates, but finding 32,000 hours devoted to discovery unreasonable in a case with "only" 15 depositions, and reducing hours and awarding 1.33 of adjusted lodestar or 8.2% of $346 million fund). Rather, the *BONY Mellon* billing request was approved in full because "[t]his really was an extraordinary case in which plaintiff's counsel performed, at no small risk, an extraordinary service, and they ought to be compensated for it." No. 12-md-02335-LAK, Dkt. 642, Transcript (S.D.N.Y. Sep. 24, 2015). These facts do not exist here.

beyond a single motion to dismiss, and which had much less voluminous and acrimonious document discovery. The hours billed in *BONY Mellon* seem like hours efficiently spent to win hard-fought victory for class members. The hours billed in this case appear largely to be churn performed by Class Counsel competing for a larger slice of the pie under their 20/20/20 agreement (where each lead firm was guaranteed 20% of the fee award, but the remaining money would be allocated based on lodestar). Dkt. 401-82. Each firm thus had an incentive to "jack up" their lodestar, as Garret Bradley indelicately put it on February 6, 2015. Dkt. 401-63 at 3.

The hours billed during the first half 2015 are especially suggestive. Document review was ramping up precisely when *BONY Mellon* reached an agreement-in-principle, on February 5, 2015.

> Between January and March 2015, Labaton bolstered their document review team, maintaining more than fifteen to twenty different SAs on the *State Street* case at any given time. Lieff did the same, assigning fifteen SAs (thirteen of whom transitioned directly from the *BONY Mellon* review) and two "contract" attorneys to complete the review.

Dkt. 401-232 (Gellers Report) at 12.

The sudden urgency Class Counsel apparently felt toward document review in *State Street* is difficult to explain as a matter of legal strategy. The case continued to be stayed, and the Court had expressed no reservations about extending the stay. But as a matter of game theory, the ramp-up makes perfect sense: Class Counsel realized settlement would soon occur, precipitated by the template *BONY Mellon* settlement, and a land rush was on to claim the largest slice of the certain fee award through make-work document review.[16] This suggest that the risk of the case was much lower than

[16] After the land rush ended, in August 2015, attorneys got testy—paranoid that they might "suddenly see an additional 12,000 hours mysteriously appear" on another firm's bill. Dkt. 401-150. Daniel Chiplock proposed fixing the exact fee split between Class Counsel in writing, but Garrett Bradley replied they should wait for the actual fee award before deciding how to split it. Dkt. 401-84 at 1. Chiplock answered there was no need to wait because the Court was "not a skeptical judge, as far as we can tell," unlike Judge Kaplan in *BONY Mellon*. *Id.*

in *BONY Mellon*, particularly in the final months, and that the effort expended in these months was more for the benefit of the firms involved than the class members. These riskless hours themselves should be discounted steeply as excessive. *Cf. e.g., In re Citigroup Secs. Litig.*, 965 F. Supp. 2d 369, 391-92 (S.D.N.Y. 2013) (eliminating post settlement hours).

In any event, the lower risks here compared to *BONY Mellon* confirm that a 25% fee award and a 1.6 lodestar multiplier would be excessive compensation for Class Counsel for their results here.

IV. The Court should calculate an appropriate fee award for each firm, and only then deduct costs and impose penalties.

The Special Master's Report and Proposed Resolution recommends adjustments to fees retained by the law firms, but this entire approach oddly treats Class Counsel's division as the baseline. Class Counsel's fee division was an arbitrary and concealed product of compromise among the firms. There is nothing sacrosanct about how Class Counsel decided to carve up $75 million—especially given the undisclosed $4.1 million diversion to Chargois—and this status quo makes a poor baseline.

For this reason, once a reasonable total fee award has been decided, the Court should set the fee award on a much firmer foundation. As the Court observed, it has the authority to set fee awards with respect to each individual firm. Dkt. 519 at 84 (Tr. 11/7/18). "In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content*, 517 F.3d 220, 227 (5th Cir. 2008). "[T]he district court must not . . . delegate that duty to the parties." *Id.* at 228 (internal quotation marks omitted).

If fees are allocated by the district court in accordance with the fee papers submitted, it encourages class counsel to truly police one another's hours for reasonableness, rather than turning a blind eye to lack of billing judgment. *See* Jessica Erickson, *The Market for Leadership in Corporate Litigation*, 2015 U. Ill. L. Rev. 1479 (2015) (counsel will punish inefficiency when dividing up the fee award). The

Court should not award a lump sum to be privately and secretly partitioned; rather "the better practice" is for the parties to propose an allocation and for the court to approve or disapprove it. *In re Critical Path, Inc., Sec. Litig.*, No. C 01-00551 WHA, 2002 WL 32627559, at *8 (N.D. Cal. Jun. 18, 2002). After the 2003 amendments to Rule 23, in some courts this better practice has become a required practice. *High Sulfur*, 517 F.3d at 228. Class Counsel's own expert believes courts should exercise such oversight more often. "Look, the law says that the judge is a fiduciary and oversees fee allocation. Ninety-nine percent of the judges say we don't want to know. . . . the class representative . . . [is] not really to be able to oversee and manage the lawyers. It's precisely why we make the judge the fiduciary for the absent class members, and the judges themselves neglect this authority." Dkt. 401-243 (Rubenstein Depo.), at 142-43.

Setting an award for each firm involves slightly more arithmetic, but it is worth the effort. Counsel cannot be prejudiced by such an process. To the extent that a new bespoke fee order awards a smaller payment than previously received, each firm will have to forfeit the excess—which has been deposited in their bank accounts since 2016. For each firm that owes money back to the class, or possibly to ERISA counsel, the firm has effectively enjoyed an interest-free loan on the difference.

A. Awarding attorneys' fees to each firm provides a firmer basis for untangling the double-counting, and the Special Master's other recommendations can be applied on top of firm-specific fee award.

Setting fee awards for each firm ensures that every firm is dealt with equitably and better rationalizes the Special Master's recommendations.

For example, the Special Master proposes to disgorge $4.05 million from Class Counsel, but an adjustment of this magnitude becomes unnecessary should the Court assign reasonable awards for each firm. The problem with the Report's recommendation is that it incorrectly identifies this disgorgement as a sanction. One third of this $4 million disgorgement—$1.35 million—seems wholly disproportionate to TLF and Lieff, which share comparatively little blame for the actual double-

counting error. Dkt. 515 at 6. Instead, the Special Master's recommended disgorgement should be thought of as an adjustment to the total fee award—effectively removing the excess billing to give Class Counsel the multiplier they originally sought. Seen this way, CCAF's recommended approach makes it unnecessary to apply the entire proposed $4.05 million adjustment for the double-counting error. The heavy lifting is resolved by simply calculating reasonable fees that should have been awarded to begin with in the absence of double-counting or other misconduct.

Having removed the excess billing *ab initio*, the Court is free to assign a more reasonable adjustment for the misleading statements and errors in the TLF and Labaton declarations. For example, the Special Master recommends a sanction "in a range of $400,000 to $1 million" for TLF's misleading declaration. Report at 365. Perhaps a similar-magnitude sanction would be appropriate for Labaton for their declaration due to its: (1) similarly misleading language about rates, (2) failure to disclose the Chargois arrangement, and (3) failure to perceive the double-counting error when they had the only opportunity to catch it. A sanction of this magnitude for the double-counting error seems more defensible than $4.05 million.

Calculating the fee award that ought to have been granted also eliminates the need to apply kludgy disgorgement as to Lieff and TLF for their use of contract attorneys. As explained above, all contract attorney time has been reasonably assessed at $50/hour, as the market values it, so further adjustment is unnecessary.

B. Additional sanctions and the costs of the investigation should be taxed to each firm's individual fee award.

By precisely apportioning each fee award, the Court can then apply sanctions and tax costs on the firms responsible for them. "A party whose unreasonable behavior has occasioned the need to appoint a master . . . may be charged all or a major portion of the master's fees." Advisory Committee Notes to 2003 Amendments to Rule 53. "[T]he district court enjoys broad discretion to allocate the

master's fees as it thinks best under the circumstances of the case." *Aird v. Ford Motor Co.*, 86 F.3d 216, 221 (D.C. Cir. 1996); *accord Latin Am. Music Co. v. Archdiocese*, 499 F.3d 32, 43 (1st Cir. 2007); *K–2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471, 476 (9th Cir.1974). "[E]quity requires that the loss, which consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned." *Neslin v. Wells*, 104 U.S. 428, 437 (1882).

Should the Court ultimately appoint a guardian *ad litem*, the guardian's fees could also be taxed to firms as appropriate.[17] Such costs would "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring) (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)).

C. Any fee award should be decreased further because of class counsel's misleading fee petition.

An appropriate sanction for overinflating lodestar is to reduce the multiplier on the actual lodestar. "[I]t is absolutely imperative that attorneys submit honest and accurate fee petitions." *Young v. Smith*, 905 F.3d 229, 234 (3d Cir. 2018). 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 request. On the rare occasions they get caught, they are no worse off; if no objector investigates, they receive a windfall. 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

[17] The Court inquired whether *amici* could be compensated. Little law exists on this question, and none in the First Circuit, but some other circuits have found that *amici* could be compensated if appointed by a court and if the fee is "paid by the party responsible for the situation that prompted the court to make the appointment." *Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987); *see also Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 853 (D.C. Cir. 1981).

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); *see also First State Ins. Grp., v. Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005) (endorsing *Brown*). "A request for attorney's fees" is "not an opening gambit in negotiations to reach an ultimate result." *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991). An "outside-chance opportunity for a megabucks prize must cost to play." *Commonwealth Electric Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985). Public policy and the law demand that there be material consequences for the assertion that lodestar is over $41 million when it includes $4 million of wholly imaginary double-billing and is inflated by at least another $9 million. In the face of excessive and misleading submissions, the Court has discretion to reduce hours across the board. *E.g., Cent. Pension Fund of the Int'l Union of Operating Engineers & Participating Employers v. Ray Haluch Gravel Co.*, 745 F.3d 1, 5 (1st Cir. 2014) (affirming a 33% across the board reduction for excessive billing); *cf. also Jacobson v. Persolve, LLC*, 2016 WL 7230873, at *6-7 (N.D. Cal. Dec. 14, 2016) (weighing counsel's disregard for the interests of absent class members in the fee calculus). Let the punishment fit the crime.

Class counsel will argue "But everyone does it," and that shows deterrence is necessary because it's so infrequently caught. If class counsel overstated their lodestar by $13 million, then their fees could be capped below lodestar minus the $13 million overstatement—otherwise, if class counsel is caught only half the time, they would come out ahead. And courts are surely failing to catch Class Counsel's overbilling half the time.

V. The hours submitted in this case may not be completely reliable, and additional scrutiny would be necessary to issue a fee award based on lodestar.

Should the Court wish to instead award fees on the basis of lodestar, a more careful review of the billing should be performed. District courts "should exclude" "hours that were not reasonably

expended" where cases are "overstaffed" and hours are "excessive, redundant or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

The Special Master did not review the detailed bills line-by-line, and CCAF did not have enough resources to carefully scrutinize it, but several examples of excess billing are apparent:

- Obvious errors remain in the detailed hours, unacknowledged and uncorrected. For example, Lieff indicates that K. Gralewski billed 45 hours on March 5, 2013, which is included in her 1478.9 hour total. *See* Dkt. 401-248 at 33; Dkt. 104-17 at 8. This is an obvious data entry mistake, which Lieff apparently contends to be worth $16,807.50 as part of a lodestar crosscheck. Bednarz Decl. at 11.[18]
- As discussed in Section III.C, significant document review time was billed in the final months of the case before an agreement-in-principle was reached in June 2015. Furthermore, many staff attorneys continued frantically reviewing documents 7-10 days after the agreement-in-principle was reached (no later than June 21, 2015), which a sophisticated client would not tolerate. *See Citigroup*, *supra*.
- Labaton appears to have included many hours spent researching and preparing its own fee motion. Dkt. 401-264 at 466-67. In common fund cases, "fees on fees" are generally not permitted because they do not benefit the class. *See In re Fidelity/Micron Secs. Litig.*, 167 F.3d 735, 738 (1st Cir. 1999).
- Pure travel time is billed, which sophisticated clients generally do not tolerate. *See*, *e.g.*, Dkt. 401-258 at 51 ("Fly back to Los Angeles." 8 hours, at $1000/hour). "[T]ravel time

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[18] Class Counsel will argued that the potential overbilling documented in this section makes no material difference to the lodestar crosscheck. For example, if the cited figure should actually be 4.5 hours instead of 45, it's a 40.5 hour mistake in a case with over 86,000 hours billed. While this is true, the continued existence of such trivial and frankly dumb errors calls the reliability of the lodestar total into question.

is widely recognized as less productive than regular time." *Automobile Club of New York, Inc. v. Dykstra*, No. 04-cv-2576 SHS, 2010 WL 3529235, at *3 (S.D.N.Y. Aug. 24, 2010) (reducing travel time rates by 50%).

As a general matter, 86,000 hours claimed in a five-year litigation, stayed for four-years, and settled on docket number 103 is unconscionable, even in a complex document-heavy securities case. *Contrast, e.g., In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 527 (S.D.N.Y. 2015) (refusing to credit 55,372 billable hours claimed in a virtually-unstayed five-year litigation to be "eyebrow-raising") and eliminating 25% of discovery hours). If the Court would prefer to award attorneys' fees on the basis of lodestar (rather than as a percentage with lodestar cross-check), significantly more scrutiny should be given to the billing in this case, and the amicus hopes to file a supplemental memorandum if this occurs.

Conclusion

The underlying settlement created a $300 million megafund, and the vast majority of courts award substantially less than 25% for such a settlement to avoid providing a windfall to counsel. The now-vacated 25% attorneys' fee award would be especially inappropriate here given the other questionable conduct the Special Master uncovered.

The Court should base its final fee decision on what would have been a reasonable award in the absence of error or misconduct. Here, a rate of no more than 16.75% ($50 million) would not be too low, and perhaps too high. Such an amount more closely resembles the average fee award for a case of this size and—when contract and staff attorneys are appropriately billed at market rates—would deliver counsel a 1.82 lodestar multiplier which is higher than even they have indicated is appropriate. Indeed, this multiplier is slightly higher than the multiplier Class Counsel sought on the basis of fanciful rates and double-counting. More importantly, it more than fairly compensates counsel given that there was little risk when most hours were billed, and is especially generous in view of the

1.6 multiplier earned in *BONY Mellon*, where counsel bore significant risk and engaged in much less wasteful churn than in this case. The Court should apportion the fee award to each firm and then use this baseline to apply additional penalties recommended by the Special Master, to the extent the penalties are warranted.

Respectfully submitted,

Dated: November 20, 2018

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CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: November 20, 2018

/s/ M. Frank Bednarz
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