Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

*Attorneys for Objector John Cashman*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE WELLS FARGO & COMPANY SHAREHOLDER DERIVATIVE LITIGATION,

This Document Relates to:
ALL ACTIONS

Case No. 3:16-cv-05541-JST

Judge: Hon. Jon S. Tigar
Courtroom: 9, 19th Floor
Date: August 1, 2019
Time: 2:00 P.M.

**OBJECTOR JOHN CASHMAN'S RESPONSE TO ORDER TO SHOW CAUSE RE: APPOINTMENT OF EXPERT WITNESS PURSUANT TO RULE OF EVIDENCE 706**

Objector John Cashman responds to the Court's order to show cause of October 24.[1]

1. Cashman agrees with the Court: the appropriate lodestar hourly rate for *any* attorney, contract or otherwise, is the amount "actual clients typically pay," because that is the very definition of "market rate." Dkt. 301 at 6. "[A]ny any method other than looking to prevailing market rates assures random and potentially perverse results." *In re Synthroid Marketing Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) (Easterbrook, J.).

2. But Cashman disagrees that an expert is needed to divine the market rate. Plaintiffs are bringing a derivative action on behalf of Wells Fargo. But one does not need to speculate or engage in expert analysis to estimate what Wells Fargo pays a law firm to engage contract attorneys to do document review in a matter of this size and complexity, because the Court has the power to learn the answer to that empirical question here and now. Simply ask counsel for Wells Fargo, Sullivan & Cromwell, what they charge defendant Wells Fargo for contract attorneys. *See also* Fairness Hearing Tr. 36 (Dkt. 293). Perhaps that is cost or close to cost, as Cashman suggests;[2] perhaps it is an enormous 1000% upcharge, as class counsel propose; perhaps it is somewhere in between. But it is absolutely and certainly the arms-length market rate negotiated between a willing buyer and seller in similar—indeed, identical—litigation. And it does not take an expert to learn the answer to that question. And any number an expert comes up with will be less accurate and equitable than the simple answer to that question: it would be unfair to class counsel to compensate them for contract attorneys at a rate lower than what Wells Fargo pays Sullivan & Cromwell for contract attorneys; it would be unfair to the class to pay class counsel for contract attorneys more than what Wells Fargo pays Sullivan & Cromwell for contract attorneys. Cashman will abide by that answer.

3. The previous paragraph also suggests another reason why the Court should not retain an expert. The cost is not being split between the parties, because the parties are Wells Fargo shareholders on the one hand, and Wells Fargo on the other. (The corporation will reimburse the costs of any officers and directors.) Shareholders would ultimately bear the full expense. (The OSC stated "The Court would order the parties to pay the costs and expenses of the expert in advance, divided equally between the two sides." It is

[1] It is not clear whether Objector Cashman is one of the "parties" the Court seeks views from, but in an abundance of caution the Objector provides his views on the order to show cause.

[2] In both *Citigroup* and *State Street*, the two previous cases where a court accepted Cashman's counsel's invitation to ask the defendant for information about what it paid for contract attorneys, the defendant paid for contract attorneys at cost.

unclear from the Court's order whether it believes the "two sides" are "plaintiffs" and "defendants" or "class counsel" and "objector Cashman." To the extent the Court is proposing that the objector pay for half of the expense of the expert, Cashman objects. His non-profit counsel, Hamilton Lincoln Law Institute, has a shoestring budget of under a million dollars a year, and paying a $150/hour share of a $300/hour expert would be an untenable bank-breaking expense greater than any of its attorneys earn in salary, especially given the much larger class counsel's incentives to run up the bill and punish the objector's counsel through attrition.) An expert report would be both less accurate than simply asking Wells Fargo what it pays Sullivan & Cromwell for contract attorneys and much more expensive.

4. If the Court does appoint an expert, Cashman does not object to Dr. Acland's *qualifications* to hypothetically perform a study (even though he does not list any similar work in his C.V.), but cannot adjudge whether he would be a suitable expert without a proposal of what his *methodology* will be to learn the market rate, or a disclosure of any conflicts. Perhaps he has a reasonable and inexpensive methodology to conduct an effective study that will approximate the same answer as asking Sullivan & Cromwell what they charge Wells Fargo. (However, any survey will have an "iceberg" effect from survey respondents being self-selected and perhaps unrepresentative because of the lack of incentive of survey recipients to respond. This Court inquiring of the rates paid by Wells Fargo and other defendants before the Court will not have that problem.) The information the Court and Dr. Acland provided are opaque as to what Dr. Acland proposes to do to divine an answer to the Court's questions, and it would be unfortunate to undergo the delay and expense of an expert report only to learn after the fact that it is invalid for reasons that could have been identified at the front end. For example, it would be problematic if a study confused the rates paid in the marketplace with the rates that "merely *submitted* to courts by plaintiffs' counsel in PSLRA common fund cases as part of a fee request." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 396 (S.D.N.Y. 2013) (rejecting plaintiffs' expert as "misleading" on this ground, emphasis in original). As *amicus* in *Citigroup*, the Association of Corporate Counsel submitted a survey showing what its members paid contract attorneys; the court rejected that survey because of a non-representative sample due to the lack of a response rate. *Id.* at 397. It is unclear what Dr. Aklund plans to do to resolve (1) the difference between market rates and publicly-submitted fee requests, and (2) the selection and response-rate problems that precluded the use of the ACC study.

5. Cashman suggests, without naming a specific one, that a better expert witness would be

someone who is a recently retired in-house counsel who regularly retained and budgeted for law firms to engage in complex securities and corporate litigation. His or her first-hand experience in the relevant marketplace could supply the expert report the Court requests about whether "firms commonly charge a premium or multiplier in addition to the contract attorneys' fees when billing those fees to the client." (The *Citigroup* court rejected this approach when Cashman's counsel submitted the testimony of William J. Ruane, the former Vice President and Associate General Counsel of Wyeth, on the grounds that Ruane's experience was with a single company focused on product-liability litigation. 965 F. Supp. 2d at 397. But there is no reason to think that law firms have more market power to demand high rates for contract attorneys in securities litigation, or that Wyeth's experience was atypical of the market.) A former in-house counsel would have more experience on these matters than an economist who, while certainly capable of conducting the undergraduate-level statistics necessary to average responses to survey questions, has no discernable litigation experience, and may inadvertently ask the wrong questions or poll the wrong subset of attorneys. Another possibility would be to retain as an expert an independent auditor with experience analyzing law-firm bills on behalf of paying clients. Such third-party services would have first-hand knowledge what a wide variety of paying clients pay law firms for contract-attorney services. Class counsel would likely object to the eminently qualified John Toothman of Devil's Advocate, because Cashman's counsel has previously retained him, but other independent third-party services are readily available through a web search.

6. Finally, "the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with prevailing market rates." *Citigroup*, 965 F. Supp. 2d at 396 (*quoting Savoie v. Merchs. Bank*, 166 F.3d 456, 463 (2d Cir. 1999)) (cleaned up). That the Court is considering retaining an expert to determine what market rates are demonstrates that class counsel has not met their burden. Cashman, on the other hand, has proposed a simple readily-discernable methodology for determining the prevailing market rate: ask Wells Fargo. No one has made any argument why learning what Wells Fargo actually pays would not be a sufficient or accurate means of determining the prevailing market rate for what Wells Fargo shareholders would pay to do the same work in the very same litigation. 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). *See also, for example,* David F. Herr, *Ann. Manual for Complex Litigation* § 14:13 (4th ed. 2018); *In re Home Depot Inc., Customer Data Sec. Breach Litig.*, 931

F.3d 1065, 1089 n.22 (11th Cir. 2019); *Dreher v. Experian Info. Solutions, Inc.,* 2016 WL 4055638, 2016 U.S. Dist. LEXIS 97640 (E.D. Va. July 26, 2016) ("One way to judge the legitimacy of the plaintiff's fees is to look at the defendant's fees.").

## CONCLUSION

The Court is correct that the lodestar rate for contract attorneys is the prevailing market rate, what paying clients pay law firms for contract-attorney services. Class counsel has failed to meet their burden of proving the prevailing market rate is materially greater than cost. But the simplest and cheapest and fastest way to learn that number is to ask the defendants what they paid their law firms for contract-attorney services in this case, rather than retain an expert. If an expert is retained, an attorney with in-house counsel experience retaining law firms in complex shareholder litigation or an independent auditor of law-firm bills would be preferable to and more efficient than an economist without experience in legal billing and the market for legal services.

Dated: November 8, 2019

Respectfully submitted,

*/s/ Theodore H. Frank*
Theodore H. Frank (SBN 196332)
HAMILTON LINCOLN LAW INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1629 K Street NW, Suite 300
Washington, DC 20006
Voice: 703-203-3848
Email: ted.frank@hlli.org

*Attorneys for Objector John Cashman*

PROOF OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Response using the CM/ECF filing system thus effectuating service of such filing on all ECF registered attorneys in this case.

DATED this 8th day of November, 2019.

*/s/ Theodore H. Frank*
Theodore H. Frank