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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE NOVO NORDISK SECURITIES LITIGATION	Case No. 3:17-CV-209-ZNQ-LHG Class Action
This Document Relates To: ALL ACTIONS	

OBJECTION OF NEVILLE HEDLEY

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INTRODUCTION

Plaintiffs' counsel negotiated a $100 million gross settlement and is seeking $29 million in attorneys' fees and $2.77 million in litigation expenses and costs, or approximately 32% of the Settlement Fund. Lead Counsel's Memorandum of Law in Support of Motion for Attorneys' Fees and Litigation Expenses, and Awards to Lead Plaintiffs Pursuant to 15 U.S.C. § 78u-4(a)(4); Dkt. 351-1 ("Fee Petition").[1] The Private Securities Litigation Reform Act (PSLRA) states that "Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class." 15 U.S.C. § 78u-4(a)(6) (emphasis added). Yet in addition to the unreasonable percentage, counsel have negotiated a "quick-pay" provision for themselves. That is, they will be paid "immediately upon award" notwithstanding any objections to the settlement, while class members will not receive any distributions until at least thirty days after settlement approval, and likely substantially longer. Stipulation and Agreement of Settlement, Dkt. 311-3 ¶¶ 9, 15, 31. Taken at face value, class counsel is seeking 47%, or almost half of what class members will recover under the proposed Plan of Allocation.[2] Counsel's fee and expense request is disproportionately excessive in relation to the result achieved by the Settlement.

Moreover, class counsel's lodestar computation as compared to the fee request strongly suggests that they compromised the value of the class's damages as compared to their expected

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[1] This does not include the $500,000 that counsel has already deducted from the $100 million Settlement Fund to pay for settlement administration expenses. Dkt. 311-3 ¶13.

[2] Counsel seeks $29 million in attorneys' fees and $2.77 million in expenses, for a total of $31,770,000. The Settlement Fund has already been reduced by $500,000 to pay for settlement administration. Dkt. 311-3 ¶13. If the Court approves counsel's fee and expense request, that will leave, at most, $67,730,000 to pay class member claims ($100 million less $29 million fee award, $2.77 million expenses and $500,000 in administrative expenses). Accordingly, counsel is seeking 47% of what is actually paid to class members ($31,770,000 divided by $67,730,000 equals 46.9%).

results, yet still expects to get paid as if it had achieved an "outstanding" result on behalf of the class. The Court should exercise its fiduciary duty and deny the fee as requested, and limit attorneys' fees and expenses to no more than $20 million. This would amount to a fee award more in line with the empirical range for similar cases and would limit counsel's take to a reasonable 25% of what class members will be paid.

ARGUMENT

I. Hedley is a class member.

My objection applies to the entire class. My mailing address is 1378 Bellemeade Lane, Charlotte, North Carolina 28270. Declaration of Neville S. Hedley ¶ 2. I am a member of the class. During the class period from February 3, 2015, to February 2, 2017, I purchased 400 shares of Novo Nordisk for my Charles Schwab Individual Retirement Account. On February 1, 2016, I purchased 200 ADRs[3] at a price of $55.3224 per share. On November 23, 2016, I purchased another 200 ADRs at a price of $31.5555 per share. I continue to hold all 400 shares in my IRA account. On or about April 8, 2022, I filed a claim through the settlement website novonordisksecuritieslitigation.com and was assigned a claim number. *See* Declaration of Neville Hedley ("Hedley Decl.") ¶¶3, 5 & Exhibit A.

I am an attorney and a member of the Illinois Bar in good standing and have been so since October 1996. Hedley Decl. ¶6. I am currently an attorney employed by the Hamilton Lincoln Law Institute ("HLLI"), a public interest law firm that houses the Center for Class Action Fairness ("CCAF").

Theodore Frank is the co-founder and Director of Litigation of HLLI and CCAF. Frank Decl. at ¶6. CCAF, established in 2009, represents class members *pro bono* in class actions where class counsel employs unfair practices to benefit themselves at the expense of the class. *See id.* at

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[3] For purposes of this objection, I use the term American Depository Receipts ("ADR") and shares interchangeably.

¶¶7-9. CCAF has "develop[ed] the expertise to spot problematic settlement provisions and attorneys' fees." Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN LAW 47, 57 & n.37 (2018). Since its inception CCAF has recouped over $200 million for class members by driving settling parties to reach an improved bargain or by reducing outsized fee awards. *See, e.g.*, *McDonough v. Toys "R" Us*, 80 F. Supp. 3d 626, 661 (E.D. Pa. 2015).

I intend to appear at the fairness hearing to discuss topics raised by my objection. I reserve the right to make use of all documents entered on to the docket and to cross-examine any witnesses who testify at the hearing. I adopt any objections not inconsistent with this one.

II. **The Court has a fiduciary duty to the absent members of the class.**

"Class-action settlements are different from other settlements." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 715 (6th Cir. 2013) (*Pampers*). In class actions "the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class." *Id.* at 718. "And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own." *Id.* at 715. "Because class actions are rife with potential conflicts of interest between class counsel and class members, . . . judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *In re Baby Products Antitrust Litigation.*, 708 F.3d 163, 175 (3d Cir. 2013) ("*Baby Prods.*") (quotation omitted); *accord In re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GM Trucks*") (Becker, J.). As such, the Court itself assumes a derivative "fiduciary" role for absent class members. *In re Google Inc. Cookie Placement Consumer Priv. Litig.*, 934 F.3d 316, 326 (3d Cir. 2019); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir.2001) ("The District Court acts as a fiduciary guarding the rights of absent class members.").

As a fiduciary for the class, the Court maintains a duty of keen oversight of all settlement proceedings, including "a thorough judicial review of fee applications . . . in all class action

settlements." *GM Trucks*, 55 F.3d at 819-20. District courts must "conduct an extensive analysis and inquiry before determining the amount of fees." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001). Judicial involvement is singularly important since it is to be expected that class members with small individual stakes in the outcome will not file objections. *GM Trucks*, 55 F.3d at 812. Reviewing fee requests requires a "sharp pencil." *United States ex rel. Palmer v. C&D Techs., Inc.*, 2017 WL 1477123, 2017 U.S. Dist. LEXIS 62932, at *10 (E.D. Pa. Apr. 25, 2017) (Pratter, J.), *rev'd in small part on other grounds* 897 F.3d 128 (3d Cir. 2018).

III. **The fee request is not reasonable.**

The Third Circuit has cautioned that "[t]he determination of attorneys' fees in class action settlements is fraught with potential for a conflict of interest between the class and class counsel." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). In fact, at the fee-setting stage of the case, the relationship between class counsel as a fee applicant, and the class members, as the equitable owners of the common fund, turns directly adversarial. *In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). District courts facing this conflict must act with a "jealous regard" for the class members' interests in the fund. *Id.* Courts cannot rely on the adversarial process between the parties because at the settlement stage of a class action, "the adversarial process—or … 'hard-fought' negotiations—extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members." *Pampers*, 724 F.3d at 717. The Defendant is indeed indifferent to such allocation here, as the settlement provides that the Defendant shall have no claim on the $100 million it pays into the Settlement Fund. Dkt. 311-3 ¶12; *see Ark. Teacher Ret. Sys. v. State St. Corp.*, 25 F.4th 55, 65 (1st Cir. 2022) (defendant has no remaining "dog in the hunt for fees.").

Fee applicants bear the "ultimate burden" of justifying their fee request. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 703 (3d Cir. 2005). In analyzing the reasonableness of fees under Rule 23(h), district courts "need to consider the level of direct benefit provided to the

class" to ensure that the class members rather than their counsel are the "foremost beneficiaries" of the settlement. *Baby Prods.*, 708 F.3d at 170, 179. Section 78u-4(a)(6) requires the same. Plaintiffs' counsel is not entitled to disregard their "fiduciary responsibilities" and disproportionately enrich themselves at the expense of the class. *Pampers*, 724 F.3d at 718 (internal quotation omitted). *See also In re Cendant*, 264 F.3d at 256 (noting that "every additional dollar given to class counsel means one less dollar for the class").

A. The fee request is unreasonably disproportionate to the result achieved.

As a preliminary matter, class counsel's fee request is based on a calculation that includes millions of dollars that will not be "actually paid to the class." Counsel requests Litigation and Lead Plaintiff expenses of $2,778,042.98 which should be excluded from the gross Settlement Fund of $100 million. In other words, before calculating a percentage fee award, the gross Settlement Fund of $100 million should be adjusted to omit these expenses. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014); *see also In re Prudential Ins. Co. Am. Sales Litig.*, 148 F.3d 283, 338 (3d Cir. 1998) ("[T]he amount of the benefit conferred logically is the appropriate benchmark against which a reasonable common fund fee charge should be assessed.") (internal quotation omitted); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 470 (N.D. Cal. 1994) (Walker, J.) (class members care about minimizing expenses). Accordingly, the fee request of 29% should be calculated based on the adjusted gross Settlement Fund by deducting the expenses sought by Plaintiffs' counsel. Consequently, such a fee request would amount to a fee award of slightly more than $28 million, i.e., 29% of $97,221,957 ($100 million less expenses of $2,778,042.98). Moreover, the Net Settlement also must exclude the expenses associated with settlement and claims administration which are to be paid from the Settlement Fund. Stipulation and Agreement of Settlement, Dkt. 311-3 ¶8. Yet, nothing in the Fee Petition (Dkt. 351-1), the Joint Declaration which summarized expenses (Dkt. 350-2 ¶¶ 194-195) or any of the declarations from class counsel that include itemized expenses (Dkt. 350-10, -11, -12, -13, -14, & -15) or the Claims Administrator's declaration (Dkt. 350-9) mention settlement administration costs. The only

reference to administrative costs is in the Settlement, which permits Plaintiffs' Counsel, prior to final judgement, to withdraw up to $500,000 of the Settlement Fund to pay administrative costs without approval from either the Court or Defendants. Dkt. 311-3 ¶13. Hence, the $2,778,042.98 expense figure is misleading, and results in an underestimate of the Net Settlement Fund by at least $500,000. Regardless, even 29% of a true and accurate Net Settlement Fund figure would be excessive compared to recovery for class members in relation to the damages alleged, as discussed further below.

The fee percentage is particularly excessive in light of the "megafund" status of the settlement. *In re Cendant PRIDES*, 243 F.3d at 736-37 & n.19. Notwithstanding considerable variation of fee awards, *see id.* at 737-38, "'[m]any courts, including several in the Third Circuit, have considered 25% to be the 'benchmark' figure for attorney fees in class action lawsuits, with adjustments up or down for significant case-specific factors." *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 249 (D.N.J. 2005) (quoting *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 262 (D. Del. 2002)).

As particularly relevant here, a reasonable percentage award should recognize economies of scale 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). Instead, high-dollar recoveries tend to be the result of class size and claim strength rather than attorney skill, and, the percentage awarded ordinarily should decrease as the amount of the recovery rises. Thus, "absent unusual circumstances, the percentage will decrease as the size of the fund increases." *Cendant PRIDES*, 243 F.3d at 736 (internal quotation omitted); *accord In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013). "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 L. STUDIES 248, 263 (2010). "A 25% presumption is too big to be applied to common funds as large as this one" for that would "be the equivalent of a Willy Wonka golden ticket." *In re Facebook Biometric Info. Privacy Litig.*, 522 F. Supp. 3d 617, 631 (N.D. Cal. 2021).

Empirical research confirms this practice. The data show 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." Brian Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL L. STUDIES 811 (2010). In class actions where the settlements ranged from $100 million to $250 million, the median fee award was 16.9% and the mean was 17.9%. *Id.* at 839. Other surveys support this analysis. *E.g.*, Eisenberg & Miller, 7 J. EMPIRICAL L. STUDIES at 265 tbl.7 (finding a mean award of 19.4% and median award of 19.9% for settlements recovering between $69.6 million and $175.5 million); Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION—FOURTH 188–89 (2004) (noting survey where "class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.92%"). In a recent decision, one court of appeals affirmed a sanction against a class counsel who had mischaracterized one of these surveys by failing to note the megafund context. *Ark. Teachers Ret. Sys*, 25 F.4th at 65-66. And another court determined that a retainer that allowed 25% fees in a large megafund situation would be "arbitrary, unreasonable, and not consistent with a class representative's fiduciary duty to class members." *In re Stericycle Sec. Litig.*,—F.4th—, 2022 U.S. App. LEXIS 13414, at *10 (7th Cir. May 18, 2022).

Nevertheless, Plaintiffs' counsel seek attorneys' fees above even the informal 25% benchmark for non-megafund recoveries, and at the upper range of typical fee awards in PSLRA cases. They propose this despite a lackluster result achieved in a case of limited complexity; a settlement for which class member recovery according to Plaintiffs' own damages expert is below the historical median in PSLRA cases in the Third Circuit. Indeed, counsel cite a case in their motion for preliminary approval which illustrates that the result counsel achieved in this case falls short of even median recoveries within the Third Circuit. *In re Wilmington Trust Sec. Litig.*, 2018

U.S. Dist. LEXIS 196644 at 20-21, 2018 WL 6046452 (D. Del. Nov. 19, 2018) (citing research that median recovery in PSLRA cases in Third Circuit from 2008-2017 was 5% of estimated damages); *see also,* Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements, 2021 Year in Review*, Appendix 3: Settlements by Federal Circuit Court 2012-21 (Cornerstone Research 2022), available at: https://securities.stanford.edu/research-reports/1996-2021/Securities-Class-Action-Settlements-2021-Reviewl-and-Analysis.pdf (noting that the median settlement in Third Circuit is 5.6% of alleged damages); *In re Cendant Corp. Sec. Litig.*, 109 F.Supp.2d 235, 263 (D.N.J. 2000) (noting that a 36-37% recovery exceeded rate of recovery for other cases that ranged from a low end of 1.6% to a high of 14%).

The per share damage recovery computed by Plaintiffs' own damages expert is paltry compared to the damages caused by Defendants' alleged fraudulent conduct. Plaintiffs allege that Defendants made false and misleading statements about the performance of the company and that these statements artificially inflated the company's share price. Although the Plan of Allocation states that it "is not a formal damage analysis" the Plan goes on to include a sophisticated "Calculation of Recognized Loss Amounts" complete with a table representing the "Decline in Artificial Inflation Per Novo Nordisk ADR by Date of Purchase and Date of Sale/Retention." *See* Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and Litigation Expenses (hereinafter "Notice") Appendix A ¶2 and Table 1; Dkt. 311-3, Exhibit A-1 and also Dkt. 350-9, Exhibit A. The Plan of Allocation sets forth four different loss scenarios during the class period from February 3, 2015 to February 2, 2017. Notice, Appendix A ¶7. The Plan also states that a claimant must have a "recognized loss amount" to get paid from the Settlement Fund. Accordingly, the loss amounts derived from the Plan of Allocation must have some reasonable relationship to the damages allegedly suffered by shareholders. But how do those "loss amounts" compare to the amounts claimants can realistically expect to recover under the proposed settlement?

Let's examine my situation according to the terms of the Plan of Allocation. Under the Plan, a claimant must have purchased shares during the class period and held them through at least

one period during which Novo Nordisk made a corrective disclosure. If a recognized loss amount calculation is a negative amount based on the timing of share purchases or sales, then the loss amount is deemed to be zero. According to the Plan of Allocation, Notice Appendix A ¶6, the recognized loss amount is computed as follows:

- For each share purchased from February 3, 2015 to February 2, 2017
  1. Sold prior to February 2, 2016, the loss amount is $0;
  2. Sold from February 3, 2016 through February 1, 2017, the loss amount is the lesser of the decline in the artificial inflation during the holding period (as determined by Table 1), or the purchase price minus the sale price;
  3. Sold from February 2, 2017 through May 2, 2017, the loss amount is the least of the decline in the artificial inflation during the holding period determined by Table 1, or the purchase price minus the sale price, or the purchase price minus the average closing share price between February 2, 2017 and the date of the sale; and
  4. If the shares were held on or after May 2, 2017, the loss amount is the lessor of the decline in the artificial inflation during the holding period determined by Table 1, or the purchase price minus $35.05 (the average closing share price between February 2, 2017 and May 2, 2017).

I purchased two 200-share blocks of Novo Nordisk during the class period, and continue to hold all 400 shares. Hedley Decl. ¶ 3. My first purchase was on February 1, 2016 at a share price of $55.32. *Id.* Table 1 in the Plan of Allocation contains an artificial inflation amount of $22.45 for purchases during this period. According to the Plan, my recognized loss amount for this block is the lessor of $22.45, or $55.32 (purchase price) minus $35.05 (average closing share price between February 2, 2017 and May 2, 2017), or $20.30. Hence, my recognized loss for this initial share purchase is 200 multiplied by $20.30, or $4060.00.

My second purchase was on November 23, 2016 at a share price of $31.56. The Table reflects an artificial inflation amount of $3.34 for purchases during this period, so my recognized loss amount under the Plan for this block is the lessor of $3.34, or $31.56 minus $35.05, or zero.

Accordingly, my total recognized loss amount under the Plan of Allocation is $4060. This amounts to a loss of $20.30 per share.

Yet, the proposed settlement purports to provide me a recovery of only $0.47 per share, or approximately 2.3% of my recognized loss amount. That percentage is even less if counsel are awarded a one-third share of the Settlement Fund. *See* Notice ¶5 (indicting that the $.47 per share figure would be reduced by approximately $0.15 for fees and expenses). According to Plaintiffs' damages expert, other similarly situated class members and I can expect a recovery of approximately 1.6%, or less than $0.02 recovery for every dollar of damages. Such recovery percentages hardly merit a stellar payday for class counsel. Indeed, the district court in *Wilmington Trust* approved a 28% fee award, emphasizing that the recovery was nearly 40% of the estimated damages, "far better than average." *Wilmington Trust,* 2018 U.S. Dist. LEXIS 196644, at *20.

The Court, like me, should be highly skeptical of counsels' unsupported and self-serving assertion that the settlement represents a 6.7% recovery for the class. Dkt. 350-1 at 24, Lead Plaintiffs' Memorandum of Law in Support of Motion for Final Approval of Settlement and Approval of Plan of Allocation ("Memorandum For Final Approval"); Dkt. 350-2 ¶159, Joint Declaration of Adam Hollander and Luke O. Brooks in Support of Final Approval of Settlement and Motion for Attorney Fees ("Joint Declaration"). Unlike my damages analysis above, Plaintiffs' counsel offer no data or mathematical computation to support this assertion. Conspicuously absent from any of counsel's submissions is any reference to the representations about damages and recovery included in the Notice. Notice ¶¶ 3, 5 (disclosing that estimated average recovery per share is $0.47, or $0.32 following anticipated deduction for fees and expenses). More shocking is the admission by Plaintiffs' counsel that the 6.7% figure represents a "best-case" recovery for the **Lead Plaintiffs**, *i.e.*, the class representatives, rather than the whole class. Joint Declaration, Dkt. 350-2 ¶159. This would indicate that the Plan of Allocation favored the class representatives at the expense of unnamed class members. Plaintiffs' counsel have a fiduciary duty to the whole class, not just the named representatives. *See Baby Products,* 708 F.3d at 175.

Regardless, counsel's assertion about the 6.7% recovery is meaningless and contradicted by the Joint Declaration, which essentially concedes that, even if they proved liability, "the amount of damages Lead Plaintiffs would be reasonably likely to prove at trial [would be] a fraction of the best-case scenario." Joint Declaration, Dkt. 350-2 ¶159. Translation: the "best-case scenario" is illusory and the 6.7% figure, however it was arrived at, is irrelevant.

Counsel may argue that my situation is unique and doesn't reflect the overall recovery level across the class. But that argument is specious. Counsel readily acknowledge that the estimated average recovery is $0.47 per share (Notice ¶ 3), and that counsel intends to reduce that by $0.15 per share for fees and expenses (Notice ¶5). Class counsel negotiated this settlement and engaged a damages expert to structure the Plan of Allocation, including the formula for determining recognized loss amounts. Notice, Appendix A ¶3. Plaintiffs' damages expert calculated "estimated amount of alleged artificial inflation" of the share price" that was caused by Defendants "alleged materially false and misleading statement and omission." *Id.* Based on counsel's own expert analysis, long-term-investor class members, like me, had greater recognized loss amounts and were arguably most victimized by the alleged misconduct and artificial inflation. Yet we are allocated scraps under the Plan while the short-term investors who limited their losses by selling early will realize a far greater recovery.

This is illustrated by a hypothetical shareholder who purchased Novo Nordisk shares at the peak price during the class period, which was $60.23 on August 3, 2015, and then was unfortunate enough to sell on November 23, 2016, for $31.57, the nadir of the class period. *See* https://finance.yahoo.com/quote/NVO/chart?p=NVO#ey. This hypothetical shareholder would have suffered a loss of $28.66 but, under the Plan, the recognized loss amount is limited to $19.11, due to the decline in alleged artificial inflation according to Plaintiffs' damages expert. If counsel is awarded a third of the Settlement Fund, this hypothetical shareholder would see a meager recovery of 1.6%, even though he or she had been most victimized by the alleged fraud.

Using Table 1 of the Plan of Allocation as a proxy for the distribution of recognized loss amounts across the class, it is apparent that a significant number, perhaps even a great majority of

class members will see a recovery well below the 5.6% median for PSLRA cases in the Third Circuit. This result doesn't merit the fee award sought by class counsel. If the Court approves the exorbitant fee request for such a lackluster result, what incentive is there for Plaintiffs' counsel to fight for true relief for class members?

The foregoing analysis illustrates that Plaintiffs' counsel and not class members are the primary beneficiaries of the settlement and the plan runs afoul of 15 U.S.C. § 78u-4(a)(6). A fee award that is nearly 50% of what class members will actually receive would be unreasonable given the meager damages recovered for the class members. Class member shareholders are injured to the extent their purchase prices were inflated by an alleged fraud on the market, and now the funds to compensate class members (at a fraction of the alleged loss) and pay excessive attorneys' fees are coming from the corporate treasury. This will reduce the value of current shares, thereby further hurting long-term shareholders (never mind the cost to the corporate treasury in attorneys' fees to defend the lawsuit).

Moreover, if a class member's damage claim after the attorney-fee deduction falls below the $10 minimum distribution, the shareholder will recover nothing. This may apply to a significant number of shareholders. *See* Supplemental Declaration of the Claims Administrator, *In re Petrobras Secs. Litig.*, No. 14-cv-9662, Dkt. 932 (S.D.N.Y. Jun. 26, 2019) (more than 40% of claims denied for not reaching the $10 claims threshold). Hence, the settlement will make these shareholders worse off than had the case simply been dismissed. *See In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 724 (7th Cir. 2016) (terminating derivative lawsuit where settlement "yields fees for class counsel and nothing for the class"). Certain courts have rejected approval of plans of allocation that freeze out small shareholders. *Better v. YRC Worldwide, Inc.*, 2013 WL 4482922, 2013 U.S. Dist. LEXIS 116984, *18 (D. Kan. Aug. 19, 2013); *In re Thornburg Mortg. Secs. Litig.*, 885 F. Supp. 2d 1097, 1112 (D.N.M. 2012); *In re Dell Inc.*, Sec. Litig., 2010 U.S. Dist. LEXIS 58281, at *29-*31 (W.D. Tex. June 10, 2010); *see generally* Fed. R. Civ. P. 23(e)(2)(d).

B. There is nothing unique about the settlement to justify an upper range fee.

This case was not excessively complex, risky, or unique. There is nothing particularly remarkable in counsel's recitation of the procedural history of the case. Dkt. 350-1 at 3-7. It is a standard PSLRA case in which Plaintiffs have alleged that material misstatement and/or omissions on the part of the Defendants resulted in an artificial increase in the share price of Novo Nordisk. Discovery in the case was stayed until after the Court denied the motion to dismiss as required under the PSLRA. *See* 15 U.S.C. § 78u-4(b)(3)(B). Discovery in the case lasted for a little under two years. Tellingly, the parties reached a settlement via mediation within two months of filing and briefing the motion for summary judgment. Hence, there is nothing exceptional or particularly noteworthy about this case or how it was litigated. The reasons for settlement offered by the Plaintiffs in the class Notice support this. Notice, ¶¶ 26-29.

Moreover, it is not surprising that the parties reached a settlement since historical data indicates that the vast majority of PSLRA cases settle after the denial of a motion to dismiss. *See*, *Securities Class Action Filings 2011 Year in Review*, Figure 16 at 18 (analyzing 2145 PSLRA cases filed between 1996 and 2011 and noting that 82% of cases that survive a motion to dismiss settle) (Cornerstone Research 2012) ***available at***: https://securities.stanford.edu/research-reports/1996-2011/Cornerstone-Research-Securities-Class-Action-Filings-2011-YIR.pdf. This dramatically reduced the risk that class counsel would not reap some payment from the litigation. The timing of the settlement after surviving the motion to dismiss and after class certification indicates that Plaintiffs' counsel had limited risk that there would not be some financial reward at the conclusion of the litigation.

C. The number of objectors is irrelevant to whether a fee request is reasonable.

The Court also should not put too much stock in the number of objections filed. My Schwab brokerage account website indicates that only 8% of Novo Nordisk shareholders are institutions. Hedley Decl. ¶ 4. Both Yahoo Finance and Nasdaq.com show similar percentages. *See* https://finance.yahoo.com/quote/NVO/key-statistics?p=NVO; https://nasdaq.com/market-

activity/stocks/nvo/institutional-holdings. Hence, it is fair to conclude that a significant number of the class members are, like me, individual investors with relatively modest positions in the company. Unlike me, most of those class members are not attorneys that regularly do *pro bono* work on behalf of class members. Given the paltry recovery the settlement affords class members and the moderately onerous claims process, it would not be surprising to see a comparatively modest number of claims submitted and even fewer objections. "Why should they? They have no real incentive to mount a challenge that would result in only a 'miniscule' *pro rata* gain from a fee reduction." *Goldberger v. Integrated Res.*, 209 F.3d 43, 53 (2d Cir. 2000). Silence of the class members should not be construed as approval. "Silence may be a function of ignorance about the settlement terms or may reflect an insufficient amount of time to object. But most likely, silence is a rational response to any proposed settlement even if that settlement is inadequate. For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007); *see also In re GM Pick-up Litig.*, 55 F.3d at 812 (expressing skepticism that a small number of objectors reflects endorsement of the settlement).

D. It is misleading for counsel to assert that the fee request reflects the marketplace.

Plaintiffs' counsel also assert that the 29% fee request is below "normally negotiated contingent fees." Dkt. 351-1 at 22 n.4. This is misleading. Indeed, one of the law firms serving as Lead Plaintiffs' counsel has a documented history of negotiating retainers well below the 29% fee request. The Seventh Circuit recently held that an *ex ante* fee agreement between Bernstein Litowitz Berger & Grossman LLP ("BLBG") and a public employee pension fund was relevant evidence of a market rate that a district court should accord "substantial weight in assessing the reasonableness of the proposed award." *In re Stericycle Sec. Litig.*, No. 20-2055, —F.4th—, 2022 U.S. App. LEXIS 13414 (7th Cir. May 18, 2022). In that case, the *ex ante* retainer was a tiered, sliding-scale fee arrangement in which none of the percentages exceeded 25% and, had it been

applied to the settlement fund of $45 million, would have resulted in a fee award of 12.78%. *Id.* at 11. Similarly, in *In re Cendant Corp.* the Third Circuit thoroughly addressed the validity of another sliding scale retainer agreement between BLBG and another public pension plan in which none of the tiered percentages approached the 29% sought in this case. *In re Cendant Corp. Litig.*, 264 F.3d at 224. n.4. So too, in *AT&T Corporation Securities Litigation*, the Third Circuit affirmed a 21.25% fee in conjunction with a $100 million settlement, based upon a sliding scale negotiated *ex ante* with the lead plaintiff. 455 F.3d 160 (3d Cir. 2006). Again, none of the tiered percentages exceeded 25%. *Id.* at 163. *see also In re Bristol-Myers Squibb Sec. Litig*, 2007 U.S. App. LEXIS 18093 at *6, 2007 WL 2153284 (3d Cir. 2007) (approving a fee award of 20% even though counsel had negotiated a retainer agreement with a lower percentage; noting that although lead counsel is not bound by retainer, it would have been preferrable had it disclosed the original fee arrangement in the notice to the class).

If Plaintiffs' counsel truly believes that the 29% fee request is below "normally negotiated contingent fees" then I request that class counsel disclose to the Court and the class all fee arrangements and retainer agreements the firms have negotiated with clients, particularly public employee pension clients, in this case and all other cases for which the firms served as lead counsel or co-counsel in the past ten years. *See Cendant Corp. Litig.*, 264 F.3d at 280-81 (emphasizing that retainer agreements are needed guideposts in PSLRA litigation); Lynn A. Baker, Michael Perino, & Charles Silver, *Is the Price Rights? An Empirical Study of Fee-Setting in Securities Class Actions*, COLUM. L. REV. 1371, 1380 (2015) (arguing that fee setting is not occurring as the PSLRA contemplated and advocating that courts return to an *ex ante* approach in which the average fee request is 17.93%).

E. The fee request fails to disclose how fees will be allocated.

Counsel's fee petition indicates that Lead Counsel has *carte blanche* discretion on how to allocate the fees across the different law firms. Dkt. 351-1 at 6; Stipulation and Agreement of Settlement, Dkt. 311-3, ¶16 (both stating Lead Counsel will allocate attorneys' fees in "good

faith"). The Third Circuit is sensitive to the "pay-to-play" concerns related to securities litigation. *See AT&T Corp.*, 455 F.3d at 168. Securities class actions such as this case frequently attract public pension funds as lead plaintiffs, which present a risk of "pay-to-play" arrangements whereby law firms make campaign contributions to elected officials who have a role in selecting lead counsel for securities class actions. *Id.* The Third Circuit has cautioned that district courts "should be particularly attuned to the risk of pay-to-play." *In re Cendant Corp. Litig.*, 264 F.3d at 270 n.49. In *Cendant*, the Third Circuit offered useful guidance, short of full-blown discovery, that district courts can follow to mitigate pay-to-play concerns. For instance, the district court could require plaintiffs that are public pension plans to disclose any campaign contributions by class counsel to elected officials responsible for the pension fund. *Id.* (noting that evidence of campaign contributions would be sufficient for the district court to make further inquiries related to pay-to-play); *accord* Jessica Erickson, *The Gatekeepers of Shareholder Litigation,* 70 OKLA. L. REV. 237, 271 (2017) (suggesting "standardized disclosure forms that include, among other things, information regarding any campaign contributions or other types of payments made by the applicants' law firms to the plaintiff or any individual who controls the plaintiff"). Reviewing the retainer also serves to "ensur[e] that the plaintiff is not receiving preferential treatment through some back-door financial arrangement with counsel or proposing to employ a lawyer with a conflict of interest. *In re Cavanaugh*, 306 F.3d 726, 732-33 (9th Cir. 2002). Pay-to-play concerns also reach the allocation of the fee award. *See Bernstein v. Bernstein Litowtiz Berger & Grossman LLP*, 814 F.3d 132, 137 (2d Cir. 2016) (addressing allegations of undisclosed fee sharing arrangements with politically connected local law firms).

Rule 23 Advisory Committee Notes support the notion of transparency regarding fee allocation, stating "members of the class have an interest in the arrangements for payments of class counsel." Notes of Advisory Committee on 2003 Amendments to Rule 23. Indeed, Rule 23(e)(3) requires that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." The vague and generalized statement that the fees will be divided in good faith among the law firms is not sufficiently transparent. Such an extra-judicial division

of the fee award would undermine Rule 23(h)'s policy of "ensuring that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested information to evaluate the reasonableness of a proposed fee." *Mercury Interactive*, 618 F.3d at 994.

Rule 23(h) may require the district court to set and allocate the fee award. It is legal error for the Court to simply delegate the allocation of that fee award to a non-judicial third party or to defer to the allocation proposed by the attorneys themselves. *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 229 (5th Cir. 2008).

> It is likely that lead counsel may be in a better position than the court to evaluate the contributions of all counsel seeking recovery of fees. But our precedents do not permit courts simply to defer to a fee allocation proposed by a select committee of attorneys, in no small part, because "counsel have inherent conflicts." As Judge Ambro noted, "They make recommendations on their own fees and thus have a financial interest in the outcome. How much deference is due the fox who recommends how to divvy up the chickens?"

Id. at 234-35 (quoting *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 173 (3d Cir. 2005) (Ambro, J., concurring)).

In this case there are at least six law firms who presumably will share any fee award. Rather than asking for individual awards, the firms asked for a single lump sum of $29 million in fees plus approximately $2.7 million in expenses, to be divided secretly among themselves. The *High Sulfur* fee agreement is comparatively inoffensive to the situation here: there, at least the judge had the fee committee's recommendation available. In contrast, the allocation in this case will be made by an *out of court* determination among Plaintiffs' counsel without any judicial involvement. It is impossible to reconcile this with the *High Sulfur* requirement that the allocation of fee awards be done openly by the court. *See Glaberson v. Comcast Corp.*, 2016 U.S. Dist. LEXIS 148879, 2016 WL 6276233 (E.D. Pa. Oct. 26, 2016) (fee splitting arrangements must be "disclosed to the named plaintiffs or the class").

There are good reasons why public policy should require a court to be the one allocating the fees. If one of the law firms has secretly agreed to accept a lower amount or percentage of its

lodestar, it is the class that is entitled to that giveback, not a law firm that, unbeknownst to the class and the court, extracted a return greater than justified. *Cf. Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014); *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 949 (9th Cir. 2011) (givebacks to parties instead of class is a sign of impermissible self-dealing because "there is no apparent reason the class should not benefit from the excess allotted for fees"). Perhaps one firm is entitled to a larger percentage of its lodestar than another firm, or a disproportionate share of the lump sum awarded to counsel, but those reasons should be tested in court. *Cf.* MANUAL FOR COMPLEX LITIG., FOURTH, § 14.11 at 186; *see also generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (illuminating repeat-player phenomenon and concluding that fees should be allocated "through a transparent process, not through the backdoor of settlement").

Accordingly, I request that the Court require that Plaintiffs' counsel disclose the fee allocation among the six law firms that filed declarations in support of the fee petition and any fee sharing arrangement in this case with any attorneys or law firms not among the six law firms. (Dkt. 350-10, -11, -12, -13, -14, -15). In addition, to address pay-to-play concerns I request that the Court require the named Plaintiffs that are public employee pension plans to disclose campaign contributions by any of the lawyers or law firms that constitute Plaintiffs' counsel.

F. Quick-pay violates the PSLRA

Plaintiffs' counsel seek immediate payment for fees and expenses, even before the dust settles with respect to a determination regarding the number of valid class member claims submitted and what the *pro rata* distribution will be for those claimants. Notice ¶51; Stipulation and Agreement of Settlement Dkt. 311-3 ¶¶ 9, 15, 31. The Stipulation and Agreement of Settlement lists five pre-conditions before the settlement is "effective" and the only one remaining is the Court's final entry of judgment. Dkt. 311-3 ¶31. Nonetheless, the only thing certain at this juncture is that Defendants have paid into escrow $100 million, the Settlement Fund. Counsel has submitted documentation regarding expenses, but this figure doesn't appear to even include the expenses for

the settlement administrator, which is a sum that will further erode what is available to pay class members. As such, it is unknown how much of the Settlement Fund will be "actually paid to the class." 15 U.S.C. § 78u-4(a)(6). Until that is known, the Court cannot award fees and expenses because it will not be equipped with sufficient information to ensure that fees "shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class." *Id.* But even when class payments can be anticipated, under the PSLRA, class counsel cannot receive a fee until those funds are "actually **paid**" to class members. *City of Philadelphia v. AG*, 916 F.3d 276, 285 (3d Cir. 2019) ("Congress' use of a verb tense is significant in construing statutes.").

Other courts have rejected quick-pay provisions even outside the PSLRA context. In *Hart v. BHH, LLC*, 334 F.R.D. 74, 77-78 (S.D.N.Y. 2020), class counsel argued that the quick-pay provision was designed to dissuade frivolous objections, even though it would have paid counsel even before class members in the event there were no objections. The district court rejected this argument and the quick-pay provision noting that "the entire purpose of the lawsuit is to compensate the class—not the lawyers." *Id.* at 77 ("The interest of the class being paid before the attorneys clearly outweighs any theoretical risk of frivolous objectors."). The district court reasoned that it was more appropriate "to ensure that the class has been compensated prior to attorneys in class-action settlements" because there was no longer an adversarial footing between class attorneys and the defendant. *Id.* Hence, the award of attorneys' fees was "the best way to keep lawyers engaged." *Id.*

Similarly, in *Eubank v. Pella Corp.*, the court characterized a settlement provision allowing payment of a portion of attorneys' fees before class claims were paid as "suspicious." 753 F.3d 718, 724 (7th Cir. 2014); *see also Hymes v. Earl Enters. Holdings*, 2021 WL 1781461, 2021 U.S. Dist. LEXIS 26534, *32 (M.D. Fla. Feb. 10, 2021) (characterizing quickpay as "troubling"). Accordingly, the Court should refrain from awarding attorneys' fees and expenses until after claims have been validated and *pro rata* distribution has been made to the class members.

IV. Counsel misjudged the value of the case. Class members should not have to pay for that miscalculation.

Plaintiffs' counsel believed that the value of the case and the damages attributed to the alleged fraudulent conduct was worth over $1 billion. Joint Declaration, Dkt. 350-2 ¶159. They have now tacitly conceded that they failed to achieve this result. The Notice setting forth the reasons justifying the settlement signals as much. Notice ¶¶ 26-29.

Plaintiffs' counsel tout that the lodestar cross-check reveals a negative multiplier in relation to the hours worked and the fee requested. Dkt. 351-1 at 24. This should be taken with a grain of salt. An equally plausible explanation is that Plaintiffs' counsel, after surviving the motion to dismiss, ratcheted-up discovery which it admits began in earnest in April 2019. Notice ¶ 16. It did so with the full confidence that the odds of the case concluding with a settlement dramatically increased after surviving the motion to dismiss. *See supra* Section III.C. It seems incongruous that Plaintiffs' counsel would put the amount of time and resources into the case that they did ($60,856,642.25, or approximately 61% of the settlement) for a settlement of $100 million. That's a lot of buck for a comparatively modest bang. By the time Defendants filed a motion for summary judgment, the litigants had initiated mediation and serious settlement negotiations, and plaintiffs may have been churning the case to increase their lodestar. Although Plaintiffs' counsel initially judged to be a case with damages in the billions (Joint Declaration, Dkt. 350-2 ¶159), they ultimately agreed to settle the case for a fraction of that amount. Rather than rely on that lodestar, the percentage-of-recovery "method is better designed to reward counsel for success and penalize it for failure." *In re Diet Drugs Prods. Liab. Litig.*, 582 F.3d at 541 (cleaned up).

Plaintiffs' counsel essentially concede their lack of success by repeatedly acknowledging the apparent strengths of Defendants' case/arguments. *See* Memorandum in Support of Final Approval, Dkt. 350-1 at 2 (recognizing "Novo Nordisk's strong defenses on liability and damages"); Dkt. 350-1 at 14 (noting "difficulties in proving the alleged statements were materially false, scienter, loss causation, and damages"); Dkt. 350-1 at 19-22; Joint Declaration, Dkt. 350-2 ¶159 (acknowledging Defendants' "persuasive arguments").

Plaintiffs' counsel approached the case as if the damages were in the billions of dollars. The expectation of a big score surely increased after prevailing on the motion to dismiss and the class was certified. Counsel is now demonstrably more pessimistic about the strength of the case yet hypes the $100 million Settlement Fund to justify a fee award that doesn't reflect the modest recovery for the class members. In any event, the lodestar should not be permitted to "trump" or "displace" the primary reliance on the percentage of common fund method." *Rite Aid Corp.*, 396 F.3d at 307 ("trump"); *AT&T Corp.*, 455 F.3d at 164 ("displace"). Accordingly, the fractional lodestar multiplier should not be viewed as reasonableness on the part of counsel's fee request; it is simply "the nature of the beast" that "sometimes the recovery turns out to be lower than expected" and other times it "turns out to be substantial or even enormous." *Keirsey v. Ebay, Inc.*, 2014 WL 644738, at *3, 2014 U.S. Dist. LEXIS 21371 at *7 (N.D. Cal. Feb. 18, 2014). "Just as the Court would not deprive Class Counsel of all of their potential profit in cases in the latter category, it cannot insulate Class Counsel from the risk of pursuing an unprofitable case." *Id.* Put simply, "Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). In this instance, the result is lacking and does not warrant the renumeration being sought.

CONCLUSION

Plaintiffs' counsel tout the big number of $100 million. But it is not simply a big settlement number that matters, but rather how much of that number the class will actually benefit from, which at this moment is unknown. *See Yedlowski v. Roka Bioscience, Inc.*, 2016 U.S. Dist. LEXIS 155951 at *59; 2016 WL 6661336 at *20 (D.N.J. Nov. 10, 2016). Counsel had grand expectations for this case but fell short of those expectations. The fee request far exceeds the results achieved for class members. In essence, Plaintiffs' counsel is seeking to be compensated for hitting a homerun when in reality it managed to leg-out an infield single. Consequently, the Court should deny the fee request as unreasonably disproportionate and set a fee award that more accurately

reflects counsels' performance and that is reasonably proportional to "the amount of any damages . . . actually paid to the class."

Dated: June 6, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court and the below listed parties by overnight delivery:

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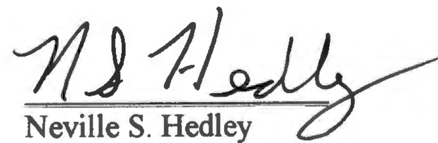

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