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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No.: 3:16-cv-00492-L-WVG

PLAINTIFFS' CORRECTED* RESPONSES TO OBJECTIONS FROM SETTLEMENT CLASS MEMBERS

Judge: Hon. M. James Lorenz
Place: Courtroom 5B
Hearing Date: June 18, 2018 at 11:00am

*Corrected from Responses to Objections filed May 31, 2018 [DE # 105]; these responses merely correct the page numbers and footnote number 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Plaintiffs, Joanne Farrell,[1] Ronald Anthony Dinkins, Tia Little, and Larice Addamo ("Plaintiffs" or "Class Representatives") and Class Counsel submit these Responses to Objections from Settlement Class members.

I. INTRODUCTION

The objections fall primarily into two buckets. First, a few object that any *cy pres* distribution should occur only if a secondary class distribution is not economically feasible, with one professional objector (Ted Frank representing Rachel Threatt) also asserting that a *cy pres* recipient should have been identified.[2] There is no real dispute here. It was always the Parties' intention to do a second distribution, provided it was economically feasible. It is only if it is not economically feasible, or if there is money left over after the second distribution, that the Parties would distribute to a *cy pres* recipient. In that event, the Parties hereby notify the Court that they have agreed to designate the Center for Responsible Lending ("CRL") as the *cy pres* recipient (if a *cy pres* distribution occurs) and ask for the Court's consideration and approval of CRL. Thus, all *cy pres* objections are moot.

The second bucket of objections concern the attorneys' fees for Class Counsel. These objections rest on the misguided notion that a lodestar cross-check is required or will assist the Court in determining the reasonableness of the fees to be awarded. The lodestar cross-check is neither required nor helpful. Given the state of the case law on EOBC-like fees, Class Counsel wisely settled this case without protracted litigation. While the special circumstances here clearly warranted an early settlement, the lodestar method, in contrast, would have encouraged Class Counsel not to settle early. In other words, the lodestar method, if applied

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[1] A motion to Substitute Plaintiff Joanne Farrell's adult children (Patrick Michael Farrell, Ryan Thomas Farrell, Timothy Gaelen Farrell and Brooke Ann Farrell) as Plaintiffs and Class Representatives was filed on May 25, 2018, pursuant to Fed. R. Civ. P. 25(a). [DE #100]. As of the date of the filing of this Response, the Court had not ruled on that motion.

[2] Another professional objector counsel, Michael Luppi (representing Ms. Sanchez), also argues the Class Notice is misleading with respect to the Settlement's value and seeks re-notice. [DE #88 at 3-8.] This objection merely disagrees as to what is the value of the Settlement's injunctive and debt relief; the objection should be rejected.

in cases like this one, would create the wrong incentives: encouraging class counsel to avoid an outstanding early settlement and to instead continue risky litigation to run up a big lodestar—jeopardizing the class's recovery—simply to increase fees.

The objections also overlook the significant risks Plaintiffs faced in continued litigation and the excellent results achieved for the Class, which are summarized below:

Amount	Description
$1.2 billion	Practice Change: BANA will not charge EOBCs for 5 years
$37.5 million	Cash Payments
$29.1 million	Debt Reduction Payments
$2 million	Settlement Administration Costs
Value unquantifiable	Additional Injunctive Relief: BANA will update reports to credit bureaus regarding customers with outstanding EOBCs
$1,268,600,000 TOTAL RELIEF (Does not include value of Credit Report Corrections)	

These significant benefits were achieved in the face of very long odds. Every other court in the country (eight courts in seven cases) has ruled against bank customers who, like Plaintiffs here, have alleged that fees equivalent to the EOBC are usurious. Given this context, Class Counsel's fee request—representing roughly 1% of the total relief the Settlement affords class members—is eminently reasonable.

Class Counsel requested fees in the amount of $16.65 million in their Application for Attorneys' Fees, which is the same amount that the Settlement Class was notified would be requested. Of over seven million Settlement Class Members only 11 timely objected to the amount of the request. Nonetheless, Class Counsel is prepared to reduce their fee request by $2 million (to $14.5 million) to provide a greater amount of distributable funds to Settlement Class members while also satisfying some objectors who participated in a pre-hearing, arms-length mediation coordinated by Class Counsel to discuss the objectors' concerns. Joint Decl. ¶ 46.[3] Setting aside the $1.2 billion practice change provided by the Settlement, this reduced

[3] The Joint Declaration and other material cited herein are being filed contemporaneously in support of the Memorandum in Support of the Motion for Final Approval, or were filed previously with Plaintiffs' motion for preliminary approval or fee application.

fee amount equates to 21.1% of the Settlement Value (cash, debt reduction amount and notice and administration costs), which is well below the 25% benchmark in the Ninth Circuit. This reduced fee request is below the 22.3-24.9% range that Mr. Frank cites in his objection for settlements valued at between $30-72.5 million. [DE #85 at 21.]

The fee objections, if sustained, would misalign the interests of class counsel and the class they seek to represent. They would reduce or eliminate the financial incentive that attracts competent contingency fee class representation. And these objections are contrary to what Ted Frank has argued when seeking attorneys' fees for himself and his law firm.

II. BACKGROUND

Plaintiffs incorporate by reference their statement of facts from their Motion for Final Approval being filed contemporaneously. Plaintiffs also state the following additional facts.

Eleven class members timely objected. [DE ## 82, 84-93, 95, 96, 101.] The objectors are: (1) represented by "professional objector" counsel who routinely object to class settlements, or (2) *pro se* objectors whose concerns are not grounds to deny approval.

Objector Rachel Threatt is represented by Mr. Frank, Director of the Center for Class Action Fairness ("CCAF"), which has merged with the Competitive Enterprise Institute ("CEI"), an advocacy group whose self-stated goal is to advance "the principles of limited government, free enterprise, and individual liberty." [DE ##85, 87, 95]; *see* https://cei.org/about-cei (last visited on May 29, 2018). Mr. Frank and CEI have made similar objections dozens of times. *Kumar v. Salov N. Am. Corp.*, Case No. 14-CV-2411-YGR, 2017 WL 2902898, at *4 n.4 (N.D. Cal. July 7, 2017)("Frank has personally objected to class action settlements at least eleven times, and CEI has done so dozens of times.") Courts have repeatedly rejected his and CEI's attempts to push their political ideology against class actions and plaintiffs' attorneys. *See, e.g.*, *City of Livonia Employees' Ret. Sys. v. Wyeth*, No. 07 CIV. 10329 RJS, 2013 WL 4399015, at *5 (S.D.N.Y. Aug. 7, 2013) ("Petri's objection on this count does not seem grounded in the facts of this case, but in her and her attorney's [Mr. Frank] objection to class actions generally."); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 785 (N.D. Ohio 2010) (criticizing CEI's objections as "long on ideology and short on law."); *In re Citigroup Inc. Sec.*

Litig., 199 F. Supp. 3d 845, 847 (S.D.N.Y. 2016) (discussing Mr. Frank and CEI); *see also In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017), *pet. for cert. granted*, *Frank v. Gaos*, No. 17-961, 2018 WL 324121 (April 30, 2018) (rejecting Mr. Frank's objections to class settlement); *Gascho v. Global Fitness Holdings*, 822 F.3d 269, 274 (6th Cir. 2016) (same); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015) (same).

In short, Mr. Frank and CEI do not like the existing law. They ask courts to *change* the law. They want to deter class counsel from bringing class action lawsuits by misaligning counsel's interests and the interests of the classes they seek to represent. But not when it is contrary to their own pecuniary interests. Indeed, Mr. Frank has taken legal positions directly contrary to his arguments to this Court—most recently, in a brief filed last week. *See Eubank v. Pella Corp.*, Motion for Attorneys' Fees, Dkt. 683 (N.D. Ill. filed May 21, 2018), attached as ***Exhibit A***. In *Eubank*, Mr. Frank seeks $1.5 million in attorneys' fees based on a lodestar of $161,125, which amounts to a multiplier of 9.3, *id.* at 11, greater than the multiplier here if the Court performed a lodestar cross-check on Class Counsel's revised attorneys' fee request (which as discussed herein is now 8.8—excluding future time). Mr. Frank argued in *Eubank* that "[d]istrict courts in the Seventh Circuit are under no obligation to cross-check the requested fees against the lodestar," *id.*, which is of course also true in the Ninth Circuit. Mr. Frank contended that the high multiplier was justified because he "worked with efficiency and alacrity," *id.* at 12, which is the same reasoning Class Counsel has advanced here. Mr. Frank requested the lodestar multiplier because "[o]bjections are exceptionally risky and difficult," *id.*, which is identical to Class Counsel's reasoning here. As Mr. Frank argued, "[a]ttorneys who take on such risk are entitled to a multiple of their lodestar." *Id.* And, as Mr. Frank admitted in *Eubank*, the multiplier he requested (9.3), like the one Class Counsel requests here (8.8), "is far from unprecedented." *Id.* at 13.

Several other objectors are also represented by "professional objectors." This practice, called "objector blackmail," has been condemned as a shakedown designed to force Class Counsel to buy off the professional objectors so that the class settlement may proceed. *See, e.g., In re: Whirlpool Corp. Front–loading Washer Products Liab. Litig.*, 1:08-WP-65000, 2016 WL

5338012, at *21 (N.D. Ohio Sept. 23, 2016) ("In nearly every class action settlement today, professional objectors file objections (often frivolous ones) simply in order to obtain standing to appeal the district court's final approval order. The professional objector hopes that class counsel, in order to settle the appeal and gain access to the fee award, will pay the objector to go away" (internal footnote omitted).)

Objector Amy Collins [DE # 86] is represented by professional objectors Timothy Hanigan and Chris Bandas. Mr. Bandas has objected to countless settlements,[4] been *sua sponte* disbarred from practice before one federal court,[5] and "been excoriated" by courts for his conduct. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 533 (N.D. Cal. 2012) ("Bandas is . . . improperly attempting to 'hijack' the settlement of the Actions from deserving class members and dedicated, hard working counsel, solely to coerce ill-gotten, inappropriate, and unspecified 'legal fees.'"). One court, while concluding that Mr. Bandas' objector blackmail did not constitute criminal racketeering, found his conduct to be "troubling" because it "appears to be in bad faith, to have no genuine social value, and to be inconsistent with the ethical standards of the legal profession." *Edelson PC v. Bandas Law Firm PC*, 16 C 11057, 2018 WL 723287, at *2 (N.D. Ill. Feb. 6, 2018). Furthermore, this court concluded, "[g]aming the rules of the legal system solely for personal self-enrichment wastes the time and money of courts and attorneys, wrests funds away from deserving litigants, and tarnishes the public's view of the legal process." *Id.* Mr. Bandas's co-counsel, Mr. Hanigan, is also a frequent objector[6] who has been criticized as a serial objector on an objection in which he worked with Mr. Bandas. *See Chambers v. Whirlpool Corp.*, No. SA CV 11-1733 FMO (JCGx), 2016 WL 9451360, at *2 (C.D. Cal. Aug. 12, 2016). Mr. Bandas also has previously worked with Mr. Frank (the CEI director and Ms. Threatt's counsel) in objecting to settlements. Ex. A at 2 n.1 Indeed, he was Mr. Frank's co-counsel in the *Eubank* case and would share in the $1.5 fee Mr.

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[4] https://www.serialobjector.com/persons/4 (last visited May 21, 2018).

[5] *See Dennings v. Clearwire Corp.*, No. 10-cv-01859-JLR, Dkt. 166 (W.D. Wah. Filed Aug. 20, 2013).

[6] *See* https://www.serialobjector.com/persons/10 (last accessed May 21, 2018).

Frank is requesting. *See* Ex. A at 2 n.1.

Objector Stephen Kron [DE # 84] is represented by professional objector Caroline Tucker, who has objected to class actions as an attorney and a class member. She previously has represented Mr. Kron's family members in objections.[7] Ms. Tucker has been criticized as a "serial professional objector[] to class settlements, raising serious concerns about the legitimacy of both [her] arguments and [her] motives." *In re Honest Mktg. Litig.*, No. 16-cv-01125, 2017 WL 8780329, at *2 (S.D.N.Y. Dec. 8, 2017) (quoting *Goldemberg v. Johnson & Johnson Consumer Companies, Inc.*, No. 13-0373, Dkt. No. 132 (S.D.N.Y. Nov. 1, 2017)).

Objector Steven Helfand (DE # 90) is an attorney who appears here on behalf of himself. He is another "serial" objector. *See, e.g., Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016 WL 631880, at *9, 10 (N.D. Cal. Feb. 17, 2016) (finding that objectors, including Helfand, are "professional" objectors and that "courts across the country (including in the Ninth Circuit) have repeatedly turned aside their efforts to upend settlements"); *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1260 n.11 (C.D. Cal. 2016).

Objector Estefania Osorio Sanchez ([DE # 88] is represented by professional objector counsel Michael Luppi and Albert Bacharach.[8] Mr. Bacharach frequently objects to class action settlements[9] and courts have deemed his objections meritless. *E.g.*, *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 121 n.15 (D.N.J. 2012); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 5062697, at *6-8 (S.D. Ill. June 5, 2006).

The remaining timely objections were by *pro se* litigants: Shenita Thompson [DE # 82],

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[7] At least three of Mr. Kron's family members appear to be serial objectors. See https://www.serialobjector.com/persons/435, https://www.serialobjector.com/persons/494, https://www.serialobjector.com/persons/749 (last accessed May 21, 2018).

[8] Mr. Bacharach has not appeared in this Court. But when Class Counsel scheduled the mediation with the objectors, Mr. Bacharach contacted Class Counsel claiming to represent Ms. Sanchez. Joint Decl., ¶ 42.

[9] https://www.serialobjector.com/persons/35 (last accessed May 21, 2018).

Ashwin Khobragade,[10] [DE # 101-1] George O'Dell [DE # 101-2], Bruce Ebneter [DE #91], Ochiochioya Eidon [DE ## 93, 101-3], and Algerine Romero [DE # 102-1]. To varying degrees these objectors plead their individual cases and complain that the compensation is not enough. As such, the proper action for these objectors would have been to opt-out of the Settlement, and not object. Regardless, their objections have factual errors, are legally deficient, and are not grounds to disapprove the settlement. Two untimely *pro see* objections were filed by Michael Colley [DE # 92] and Mark Gullickson [DE #97].

Plaintiffs offered to mediate with all objectors before the Final Approval Hearing, hoping to avoid an appeal that would delay delivery of significant benefits by the Settlement Class. Joint Decl. ¶ 45. On May 15, 2018, Class Counsel mediated with *pro se* objector Thompson and all but one of the professional objectors.[11] Linda Singer of JAMS was the mediator. *Id.* ¶ 46. The sole professional objector holding out from mediation was Ms. Threatt represented by Mr. Frank, who refused Class Counsel's repeated requests to attend the mediation or to discuss his objection. *Id.* Class Counsel does not now know whether the objector participants in the mediation will withdraw their objections, but each participant (except Mr. Helfand) confirmed that Class Counsel's suggestion to reduce its fee request to $14.5 million fee would be reasonable and acceptable to them. *Id.*

III. ARGUMENT

A. The Preferred Method to Calculate the Attorney's Fees in this Common Fund Case is a Percentage of the Recovery

1. A Lodestar Cross-Check Should Not Be Used in this Case Because it Would Misalign the Interests of the Class and Class Counsel

In common fund cases, "the percentage-of-the-fund calculation is preferable to the lodestar calculation." *E.g.*, *Ruiz v. XPO Last Mile, Inc.*, No. 5-CV-2125 JLS (KSC), 2017 WL

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[10] After submitting his objection, Mr. Khobragade expressed to Class Counsel his desire to withdraw his objection. Joint Decl., ¶ 41. Class Counsel has filed with the Court a copy of correspondence from Mr. Khobragade expressing his intent to withdraw. [DE #103].

[11] The mediating professional objectors were Mr. Kron (represented by Ms. Tucker), Ms. Collins (represented by Messrs. Hanigan and Bandas), Ms. Sanchez (represented by Messrs. Luppi and Bacharach), and Mr. Hefland (representing himself).

6513962, at *6 (S.D. Cal. Dec. 20, 2017). "Many courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner." *Aichele v. City of Los Angeles,* CV1210863DMGFFMX, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015).

Using a lodestar cross-check neither makes sense nor assists the Court to determine a reasonable fee for Class Counsel. This is not a situation, as Mr. Frank warns, where a cross-check is needed to discourage "hasty, undervalued settlements." [DE # 85 at 16.] Rather, Class Counsel settled at the optimal point, maximizing relief for the Settlement Class. If Class Counsel had failed to settle early, the Class faced a grave risk of total defeat of its usury claims. The Ninth Circuit had certified this case for a rare interlocutory appeal. Critically, every court except this Court (eight courts in seven cases)—including the Eleventh Circuit involving the same fee and the same Bank—rejected arguments that the EOBC or its equivalent was usurious interest. And four of these defeats occurred *after* Plaintiffs reached a settlement with BANA. *See McGee v. Bank of Am., N.A.*, 2015 WL 4594582 (S.D. Fla. July 30, 2015), *aff'd* 674 F. App'x 958 (11th Cir. Jan. 18, 2017); *Shaw v. BOKF, Nat'l Ass'n*, 2015 WL 6142903 (N.D. Okla. Oct. 19, 2015); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 150 F. Supp. 3d 593, 641-642 (D.S.C. 2015); *Johnson v. BOKF, N.A. d/b/a Bank of Texas*, No. 3:17-cv-663, Dkt. No. 30 (N.D. Tex. Oct. 24, 2017) (dismissal with leave to amend but renewed motion to dismiss pending); *Moore v. MB Fin. Bank, N.A.,* No. 17 C 4716, 2017 U.S. Dist. LEXIS 189585 (Nov. 16, 2017); *Dorsey v. T.D. Bank, N.A.*), No. 6:17-cv-01432, Dkt. No. 30 (D.S.C. Feb. 28, 2018), *appeal filed*, Case No. 18-1356 (4th Cir.); *Fawcett v. Citizens Bank, N.A.*, No. 17-11043, Dkt. No. 37 (D. Mass., Apr. 19, 2018).

The Class's best interests were served by settling this case early and would not have been served by continuing the litigation. More litigation would have served only to increase Class Counsel's lodestar. The Ninth Circuit has cautioned that "it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary

on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino*, 290 F.3d at 1050 n.5. Just as Mr. Frank argued in *Eubank* that he should be entitled to an attorneys' fee award because he "worked with efficiency and alacrity," Ex. A at 12, the same is true of Class Counsel here. The case law Mr. Frank referenced in *Eubank* likewise demonstrates that class action attorneys should be rewarded, not penalized, for efficiently driving a case to resolution. *Id.* (("For good reason, courts are 'reluctant to rely heavily on a method for determining whether a contingency fee is reasonable that penalizes efficiency.'" *Kirby v. Berryhill*, No. 14 CV 5936, 2017 WL 5891059, at *1 (N.D. Ill. Nov. 29, 2017)).

Even in this case Mr. Frank acknowledges that a "lodestar occasions a misalignment between the interests of class members and their counsel, because counsel's fees do not depend on the success its client obtains." [DE # 95 at 15.] Yet, Mr. Frank contends, this "misalignment" occurs only when "employing the lodestar as [a] baseline methodology" and purportedly does not occur when "employing the lodestar as a backup crosscheck." [*Id.*] What is the basis in law or logic for this distinction between a "baseline" lodestar and a "crosscheck" lodestar? And why does he not apply this distinction when seeking fees for himself? Mr. Frank never satisfactorily answers these questions. His distinction is not supported by logic or case law. Whether used as a "baseline" and then multiplied, or used as a "crosscheck," a lodestar encourages counsel to work more hours, not to efficiently maximize results for the class.

Inserting an incentive to work a case more than needed not only misaligns class counsel's interest with that of the class, it could have proven disastrous here. In fact, had Class Counsel continued to litigate this case to drive up their lodestar before settlement, they may have missed their only chance at settlement. The Ninth Circuit could have reversed this Court's ruling consistent with the Eleventh Circuit and every other district court to have decided the issue. Instead, Class Counsel convinced the nation's second largest bank to (1) stop charging EOBCs costing it more than a billion dollars of certain revenue, (2) pay tens of millions of dollars to the Settlement Class, (3) forego collection on tens of millions of dollars to the class, and (4) pay for the notice and administration of the Settlement. That is no small feat in light

of the legal landscape Plaintiffs were confronting.

The special circumstances of this case appeared to have been foreshadowed by *Vizcaino*; there, the Ninth Circuit warned district courts not to use the loadstar cross-check to penalize class counsel who wisely settle a case early:

> We do not mean to imply that class counsel should necessarily receive a lesser fee for settling a case quickly; in many instances, it may be a relevant circumstance that counsel achieved a timely result for class members in need of immediate relief. The lodestar method is merely a cross-check on the reasonableness of a percentage figure. . . .

290 F.3d at 1050 n. 5. While in certain cases a lodestar cross-check may be a sensible method to verify the reasonableness of class counsel's fee request, it not a sensible method under the particular circumstances of this case.

The Court should not penalize Class Counsel for negotiating the best possible realistic result for the Settlement Class without needlessly delaying settlement in an effort to accumulate more lodestar. Indeed, the delay incentivized by a lodestar method could have resulted in the Settlement Class getting no relief at all in light of the subsequent developing case law, all of which has gone against the Settlement Class.

2. The Court Must Explain Why its Award of Fees Is Reasonable, But It is Not Required to Use a Lodestar Cross-check

The objections rest on the false premise that this Court *must* use a lodestar cross-check. Ninth Circuit law holds the opposite. *See, e.g.*, *Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 547 (9th Cir. 2016) ("[A] cross-check is entirely discretionary . . . ."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("Under Ninth Circuit law, the district court has discretion in common fund cases to choose either the percentage-of-the-fund or the lodestar method"). Mr. Frank summarized the equivalent Seventh Circuit law in a brief filed last week, where he argued that courts "are under no obligation to cross-check the requested fees against the lodestar." Ex. A, at 11; *accord, e.g.*, *Yamada*, 825 F.3d at 547.

The Ninth Circuit has instructed that courts should not use a "mechanical or formulaic approach" to determine an appropriate fee award. *In re Bluetooth Headset Prods. Liab. Litig.*, 654

F.3d 935, 944 (9th Cir. 2011). The court's obligation, instead, is to ensure the award is "reasonable." *Id.* at 941. The court has discretion in *how* it calculates a fee, or *what methods* it uses to calculate a fee. *Id.* at 942. But that discretion must ultimately be used to "to achieve a reasonable result." *Id.*

Mr. Frank would have this Court believe that a reasonable result can be achieved *only* by using a lodestar cross-check. But that is not the law. Again, no specific method is required to calculate a fee; what is required is the award of a reasonable fee. Generally, for common fund cases, the Ninth Circuit has held that "courts typically [may] calculate 25% of the fund as the 'benchmark' for a reasonable fee award, providing adequate explanation in the record of any 'special circumstances' justifying a departure." *Id.* at 942. Granted, the Ninth Circuit encourages courts to use a "second method" to verify the reasonableness of a fee. *See id* at 944-45. Thus, for example, the lodestar cross-check in some circumstances may be an appropriate method to verify the reasonableness of a fee calculated under a percentage-of-recovery method. *See id.*

But that does not mean the lodestar cross-check is *always* an appropriate method to verify the reasonableness of a fee award. Sometimes—and this case is one of those times—the lodestar cross-check is an inappropriate method. Instead of requiring this Court to use the lodestar cross-check, the Ninth Circuit merely requires this Court to explain why the "amount awarded [is] not unreasonably excessive in light of the results achieve." *Id.* at 943, 945. Thus, to verify the reasonableness of Class Counsel's fee request, this Court may, and should, compare the benefits obtained for the Class to the amount of fees sought. Based on this method, Plaintiffs" reduced fee request is clearly reasonable.

Finally, the objectors rely, incorrectly, on cases involving fee-shifting or claims-made settlements—which are different from common fund cases. Fee-shifting cases like *Perdue v. Kenny A.*, 559 U.S. 542 (2010), turn on statutory interpretation, which has no application to common fund cases, for which the fee awards are based on common law. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 ("The bar against risk multipliers in statutory fee cases does not apply to common fund cases."); *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) ("[T]he district court

misapplied the principles that govern fee shifting cases to the common fund case before it."). Indeed, the Supreme Court expressly limited *Perdue* to attorney fee awards made "under federal fee-shifting statutes." 559 U.S. at 546. Multiple courts have recognized this limitation on *Perdue*. *In re Apollo Grp. Inc. Secs. Litig.*, No. CV-04-2147-PHX-JAT, 2012 WL 1378677, at *7 n.1 (D. Ariz. Apr. 20, 2012) ("[The reasoning in *Perdue* has not been extended to common fund cases, and Ninth Circuit precedent distinguishes between common fund cases and statutory fee cases."); *In re BioScrip, Inc. Secs. Litig.*, 273 F. Supp. 3d 474 (applying similar reasoning in section titled "The *Perdue* Presumption Against a Lodestar Enhancement Does Not Apply When a Court Awards Fees from a Common Fund Created after a Settlement") (S.D.N.Y. 2017); *Jackson v. Wells Fargo Bank, N.A.*, 136 F. Supp. 3d 687, 719 (W.D. Pa. 2015) (distinguishing *Perdue* because "[w]hile the lodestar method generally is the primary analysis in statutory fee-shifting cases, in common fund cases it serves only to cross-check the reasonableness of the results of a percentage-of-recovery method.") Because this is a common fund settlement, *Perdue* does not apply.

B. The Over $1.26 Billion in Relief Achieved by Class Counsel is Excellent, Particularly Considering the Litigation Risks Posed

The objectors suggest that Class Counsel do not deserve their requested fee based on the results obtained. They are wrong. As an initial matter, merely objecting that a settlement is not enough is not grounds to disapprove the settlement. *See, e.g.*, *Hanlon*, 150 F.3d 1011, 1027 (9th Cir. 1998). Anyone can claim settlements should be larger; but the objectors' criticisms here, made in hindsight, fail to recognize: (a) the benefits to Settlement Class members, including the extraordinary $1.2 billion in practice changes, $66.6 million in cash and debt relief, and $2.0 million in administration costs, or (b) the substantial risk that Settlement Class could have recovered nothing.

When calculating the value of the Settlement for purposes of a percentage-of-the-fund analysis, this Court should include cash *and* non-cash benefits that can be *reliably valued*, as well as attorneys' fees and expenses, and administrative costs paid by the defendant. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003) ("[W]here the value to individual class members

of benefits deriving from injunctive relief can be accurately ascertained . . . courts [may] include such relief as part of the value of a common fund for purposes of applying the percentage method . . . ."); *see also id.* at 975 (holding that "[t]he post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class," and courts may "include that cost in a putative common fund benefiting the plaintiffs for all purposes, including the calculation of attorneys' fees").[12]

Using this total benefit value, Ninth Circuit courts then apply 25% as the "'benchmark' percentage for the fee award," which "can then be adjusted upward or downward to account for any unusual circumstances involved in the case." *Paul, Johnson, Alston & Hunt,* 886 F.2d 268, 272 (9th Cir. 1989). Here, taking into account all relief obtained through the settlement ($1,268,600,000), the Class Counsel are requesting a mere 1% of the total calculable settlement value and just 21% of the cash portion ($66.6 million in cash and debt relief and $2.0 million in administration costs). The objections conveniently ignore the extraordinary benefit of the injunctive relief obtained and devalue the debt relief aspect of the Settlement. Consequently, this Court should reject those objections.

1. The Bank's $1.2 Billion Practice Change is Extremely Valuable

Mr. Frank asserts that the practice change obtained under the Settlement—a value of $1.2 billion—is worthless. Lacking factual support, Mr. Frank speculates that the Bank will "simply charge accountholders other fees to make up for the revenue loss." [DE # 85 at 30.] As a factual matter, Mr. Frank's speculation is contradicted by the Bank's own assessment that it will, in fact, lose $1.2 billion in revenue from this practice change. *See* Bhamani Decl., ¶ 8 ($20 million/month for 60 months). And, indeed, far from speculation, the Settlement explicitly provides that "BANA shall not implement or assess EOBCs, *or any equivalent fee*, in connection with BANA consumer checking accounts, for a period of five years" (DE # 69-2 ¶ 2.2(a)(1) (emphasis added)), as does the proposed final approval order, which was first submitted with the preliminary approval motion. (*Id.* at Ex. E, ¶ 6.)

[12] Mr. Kron improperly ignores *Staton* in arguing that administration costs should not be included in the Settlement's value. [DE # 84 at 5.]

Nor does Mr. Frank offer any authority for his argument, which is inconsistent with case law. *See, e.g.*, *Allen v. Similasan Corp.,* 318 F.R.D. 423, 427 (S.D. Cal. 2016) (rejecting Mr. Frank's argument; noting strong contingency of repeat users, many of whom would benefit). When, as here, the non-cash portion of a settlement can be reliably valued, courts often include the value of this relief in the common fund and award class counsel a percentage of the total. *See, e.g.*, *Staton*, 327 F.3d at 974. Similarly, courts routinely consider the value of injunctive relief provided to both class members and the general public more broadly. *See, e.g.*, *In re TracFone Unlimited Service Plan Litigation,* 112 F. Supp. 3d 993, 1005 (N.D. Cal. 2015). Mr. Frank asks this Court to award a percentage-of-the-fund of no more than 10% of the monetary relief to the Class. But with the $1.2 billion properly included, Class Counsel's fee request is even less than that—a mere 1% of the total relief under the Settlement.

Asking the Court to ignore the obvious benefit that BANA's $1.2 billion practice change, Mr. Frank relies on *Koby v. ARS National Services, Inc*. 846 F.3d 1071 (9th Cir. 2017), which is easily distinguished. The settlement in *Koby* was entirely illusory, providing no monetary award to class members. It merely required a disclosure that the defendant had voluntarily adopted after the litigation was initiated. Moreover, the Ninth Circuit found that most of the class were unlikely to benefit from the new disclosure. *Id.* at 1080. In contrast, here, the Class is receiving automatic cash payments and debt forgiveness, and will save substantial money from BANA's practice change, which eliminates hefty bank service fees charged to consumers on top of ordinary overdraft fees. Unlike the *Koby* disclosure-only settlement, the majority of Settlement Class members would almost certainly incur EOBCs in the future but for the practice change. The Consumer Financial Protection Bureau, for example, determined in a 2014 study that approximately eight percent of bank customers account for almost 75 percent of all overdraft fees. *See* CFPB, Data point: checking account overdraft, *available at* https://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf (last visited May 20, 2018). In addition, although not quantifiable, Class members will benefit from credit reporting corrections, which the objectors do not address, but which should also be taken into account. *See, e.g.*, *Vizcaino*, 290 F.3d at 1049 ("Incidental or non-monetary benefits

conferred by the litigation are a relevant circumstance.").

2. The $66.6 Million in Cash and Debt Relief Payments is an Impressive Victory Given the Significant Risks of Continued Litigation

Ignoring and devaluing BANA's $1.2 billion practice change, the objectors further criticize the cash and debt relief portion of the Settlement as not providing enough relief to the Settlement Class, suggesting, for example, that "the class will receive less than 10% of its potential damages." (DE # 85 at 25.) But this figure alone is impressive in light of other settlements that have been found reasonable in this Circuit, as well as the significant risks of continued litigation given the negative outcomes in similar cases. In the securities fraud context, for example, the median recovery of investor losses is between 1.3-2.7%, which almost always is without any additional injunctive relief. Fitzpatrick Dec. ¶ 19 n.5. [DE #80-3] And the objectors disregard that BANA's practice change provides 100% relief from future EOBCs. In valuing common funds for purposes of attorneys' fees, courts regularly include both the monetary relief available to the class as well as nonmonetary relief based on practice changes. *See, e.g.*, *Wolfgeher v. Commerce Bank, N.A.*, No. 1:09-MD-02036-JLK (S.D. Fla. Aug. 2, 2013) (approving award of 30% of $23,200,000 total settlement value, which included $18,300,000 in cash and practice changes with estimated value of $4,900,000); *Lopez v. JPMorgan Chase*, No. 1:09-MD-02036-JLK (S.D. Fla. Dec. 19, 2012) (approving award of 30% of $162 million total settlement value, consisting of $110 million cash and overdraft fee policy change with estimated value of $52 million); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814, at *15 (S.D.N.Y. Sept. 9, 2015) (evaluating fee request based on "total gross value of the settlement," which included "$40.5 million in cash" plus practice changes worth "an additional $94.3 million in [non-monetary] value to the Class").

The portion of monetary damages recovered here and the $1.2 billion in injunctive relief is a significant feat standing alone, but even more so when measured against the risk the class faced. After this Court denied BANA's motion to dismiss here, the Eleventh Circuit affirmed a decision of a Florida federal district court finding BANA's EOBC to be a lawful, non-interest service charge. *See McGee v. Bank of Am., N.A.*, 674 Fed. App'x. 958 (11th Cir. Jan. 18, 2017)

(unpublished). Thus, even if the Ninth Circuit had affirmed this Court's decision, a circuit split would have been created, and BANA could have petitioned for certiorari to the Supreme Court. And even if the Supreme Court had denied certiorari, Plaintiffs would still have faced BANA's non-pleadings defense that it did not act "knowingly," as required by, 12 U.S.C. § 86.

Mr. Frank suggests these real risks serve as a proper basis to reduce, rather than increase Class Counsel's fee, asserting that Class Counsel should not be rewarded for taking on such a "weak" case. (DE # 85 at 25.) This argument is contrary to Circuit law. The Ninth Circuit has held that a district court's failure to properly account for risk is an abuse of discretion. *See, e.g.*, *Vizcaino*, 290 F.3d at 1048-49 ("Risk is a relevant circumstance."); *Wash. Pub. Power Supply Sys. Sec. Litig.,* 19 F.3d 1291, 1302 (9th Cir.1994) (holding that "district court abused its discretion in denying a risk multiplier" where case was 'fraught with risk and recovery was far from certain'"). Moreover, in *Eubank*, Mr. Frank argued that he should be rewarded with attorneys' fees for taking on such a "risky" case with a low probability of success, and achieving "exceptional results in the face of extraordinary opposition." Ex. A at 11-12.

The same reasoning should apply here where Class Counsel obtained the instant Settlement in the face of contrary case law throughout the country. It is extraordinary that Class Counsel obtained *any* Settlement. And, in fact, the Settlement obtained is extremely beneficial to the Class, providing *over a billion dollars* in benefits. This is the only case successfully resolved for bank account holders challenging continuous overdraft fees. That this Action survived a motion to dismiss, and later settled with the relief it did, is a tremendous victory. Indeed, following the settlement in this case, an additional four cases based on the same legal theory against different banks were dismissed, bringing the total number of unsuccessful cases to seven. *See* Section III.A.1, *supra.*

3. Class Counsel's Fee Request is Already Discounted in Light of the Total Value of the Settlement

The objectors also incorrectly criticize attributing full value to the $29.1 million in debt relief payments with which BANA will credit Settlement Class members' accounts. In asserting that these debt reduction payments are worth less than cash, Mr. Frank, for example, argues

that "[e]ither [Class Counsel's fee] percentage should be reduced or the $29.1 million of debt reduction should be heavily discounted to account for its lower value."[13] [DE # 85 at 26.] However, the Objectors ignore that Class Counsel's fee percentage is already low given the Settlement's over $1.26 billion value. Compared to the total value of relief made available here, Class Counsel's now-reduced fee request of $14.5 million (to address concerns of objectors who mediated with Class Counsel) represents a mere 1% of Settlement Class members' recovery. And considering just the $68.6 million in cash, debt relief, and administration costs, it is lower than the 25% benchmark typically applied in this Circuit. Indeed, Class Counsel's reduced $14.5 million fee request could be viewed as 25% of the $37.5 million cash portion of the settlement, plus 17.6% of the $29.1 million debt relief portion (quantifiable as 21.1% of the overall relief, when including settlement administration costs).

In other words, although Class Counsel would be entitled to an upward departure from the 25% benchmark under Ninth Circuit case law based on the value of BANA's practice change, they are not asking for one. Instead, their requested fee represents 1% of the total value of the Settlement and 21.1% of the cash component (including administration costs and debt relief). This request is in line with, or below, other fee awards based on settlements with debt relief components. Indeed, in *Eubank*, Mr. Frank stated that a 19.7% award was "eminently reasonable," Ex. A at 11; the same reasoning should apply to the nearly identical percentage at issue here. *See also In re: Easysaver Rewards Litig.*, No. 09-cv-02094-BAS-WVG, 2016 WL 4191048, at *2, *4-5 (S.D. Cal. Aug. 9, 2016) (approving 22.7% of $38 million, which included both "a $12.5 million non-reversionary cash fund plus $20.0 merchandise credits automatically sent" to class members); *In re Lloyd's Am. Tr. Fund Litig.*, No. 96 Civ. 1262 RWS,

[13] Ms. Sanchez cites *Amchem Products, Inc. v. Windsor*, 521 U.S. 597 (1997), to argue for separate subclasses, claiming the cash benefit and debt relief portions of the settlement are in conflict. (DE # 88 at 5-6.) But, in that case, there was a clear divide between class members who had actually suffered critical asbestos-related injuries and those who had not, but were exposed to asbestos. Id. at 626. By contrast here, all Settlement Class members suffered the same type of monetary injuries, which both the Settlement's cash and debt relief portions address. Thus, all Settlement Class members' interests are aligned.

2002 WL 31663577, at *8 (S.D.N.Y. Nov. 26, 2002) (approving approximately 28% of the total settlement value, which included $8,500,000 in cash and "$11,500,000 in Credit Notes to be used by Class Members to reduce debt they owed or were claimed to owe"); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 46-47 (E.D. Pa. 2000) (approving fee of one third of the total settlement value, plus one third of the interest accrued on the fund, where total settlement value included $5.97 million in cash and $1.3 million in loan forgiveness); *Jacobs v. Huntington Bancshares Inc.*, No. 11-CV-000090 (Oh. Com. Pl. June 2, 2017) (approving 40% award of the total settlement value, with a $8,975,000 cash fund and $7,000,000 debt forgiveness).

The two class cases Mr. Frank cites do not persuade otherwise and in fact, support Class Counsel's $14.5 million fee request here. In both *Smith v. CRST Van Expedited*, No. 10-CV-1116-IEG (WMC), 2013 WL 163293 (S.D. Cal. Jan. 14, 2013), and *Cosgrove v. Citizens Auto. Finance*, No. 09-1095, 2011 WL 3740809, at *8-10 (E.D. Pa. Aug. 25, 2011), the debt relief considerably dwarfed the cash relief, meaning a 25 percentage-of-the-fund award would have swallowed up any cash payments to the class. Thus, the attorneys in *Smith* and *Cosgrove* requested less than the full 25%—just as Class Counsel do here. To compensate for this, the *Smith* and *Cosgrove* courts still awarded the attorneys a higher percentage of the cash payments to the class: 33% in *Smith* ($875k fee request, with $2.625 million cash portion) and 43% in *Cosgrove* ($1.25 million fee request, with $2.9 million cash portion). *Id.* Class Counsel's $14.5 million fee request falls within this range (at 38% of the $37.5 million in cash payments, or 21.1% of the total value, including debt relief and settlement administration), which is consistent with the percentage ranges in the overdraft context (25%-44%). *See* Fee Application at 18-19 (chart listing percentage-of-the-fund awards in overdraft cases).

4. Class Counsel's Fee Request Discounts for Economies of Scale

Mr. Frank also asserts that Class Counsel's fee percentage should be reduced to account for economies of scale, arguing that the size of the fund is not the result of class counsel's efforts, but the size of the class. However, Class Counsel's requested fee percentage *does* take into account gains from economies of scale. As stated above, with the additional $2.15 million reduction to which Class Counsel consents, Class Counsel only seek 21.1% of the Settlement's

cash portion (including debt reduction and settlement administration) and just 1% of the total value made available, compared to a typical 33-40% contingency fee paid in individual cases. Indeed, Mr. Frank cites Fitzpatrick's study to support this argument; but Fitzpatrick's empirical data showed that for settlements in the $30-72.5 million range, the mean and median fee percentages were 22.3% and 24.9% respectively. (*See* DE # 85 at 29.) Class Counsel's reduced fee falls even below this range.

Nor is this a "megafund" settlement. [*Contra* DE # 85 at 19.] Megafund settlements range between $111 million and over $1 billion. *In re NCAA Grant-in-Aid Antitrust Litig.*, No. 4:14-md-2541-CW, 2017 WL 6040065, at *5 & n.30 (N.D. Cal. Dec. 6, 2017) (citing cases). In any event, no so-called "megafund" case indicates that Class Counsel's 21.7% request here is inappropriate. Rather, *In re NCAA* observed that the average "megafund" attorneys' fee award in 2011 *exceeded* 20%. *Id.* at *6. The Ninth Circuit, moreover, has expressly refused to adopt objectors' megafund "increase-decrease rule" that Mr. Frank advocates here "as a principle governing fee awards." *See, e.g.*, *Vizcaino*, 290 F.3d at 1047.

C. Class Counsel's Request is Reasonable Even with a Lodestar Cross-Check

The objectors attack certain aspects of Class Counsel's lodestar calculation in order to drive down the lodestar and artificially inflate the multiplier. They also argue that the multiplier is too high. These arguments ignore the contingency fee nature of class action practice, which is inherently risky (this Action being a prime example). Because a lodestar cross-check is neither necessary nor helpful, the objectors' focus on Class Counsel's lodestar is irrelevant. In any event, even considering Class Counsel's lodestar ($1.64 million) and multiplier (8.8), the fee request is reasonable. Indeed, Mr. Frank argued in *Eubank* that a 9.3 multiplier was reasonable, Ex. A at 13; thus, a lesser multiplier here should be found reasonable.

1. Class Counsel's Lodestar No Longer Includes Anticipated Work and Properly Includes Time Spent on the Mediation, Fee Petition, and Other Litigation

Certain objectors suggest Class Counsel's lodestar is inflated due to the inclusion of anticipated future work relating to final approval and appeal, time spent on the fee petition,

and pre-*Farrell* work. They also suggest that time spent on settlement mediation, negotiation, and drafting should be reduced. But again, if this Court agrees—as it should—that a lodestar cross-check is not necessary or helpful here, the inclusion of any such time is irrelevant to the Court's analysis. In any event, these arguments lack merit.

First, the amount of time Class Counsel estimated for future work has already turned out to be a significant underestimate. Joint Decl., ¶¶ 47-52. In fact, even after subtracting for future work previously included in the Fee Application, Class Counsel's lodestar has increased by $214,522.65 to a total of $1,642,570.15 in the time since filing the Fee Application. *Id.* ¶ 52. That increase in lodestar, combined with Class Counsel's revised fee request of $14.5 million, equates to a reduced multiplier of 8.8. This revised lodestar does not include any additional future time for appearing at the Final Fairness hearing or defending the Settlement on appeal, which based on Class Counsel's experience, will likely exceed 200 hours if the settlement is attacked on appeal.[14]

With respect to the remaining categories, Ninth Circuit courts routinely approve fees associated with such work. Similarly, there is nothing inappropriate about including time spent on a fee petition. *See, e.g.*, *Shvager v. ViaSat, Inc.*, No. CV 12-10180 MMM (PJWx), 2014 WL 12585790, at *17 (C.D. Cal. Mar. 10, 2014) ("The lodestar includes the hours reasonably expended on the fee application".) Class Counsel's hours spent on related litigation for which they will not be compensated may also properly be accounted for in their lodestar. *See, e.g.*, *Brown*, 2017 WL 3494297, at *3, 7 n.3, 8 (finding lodestar that included hours spent in unsuccessful litigation of different case with similar claims against same defendant to be

[14] In any event, courts routinely take anticipated future work into consideration when awarding class action attorneys' fees. *E.g., Bellows v. NCO Fin. Sys., Inc.*, No. 07-CV-1413 W(AJB), 2009 WL 35468, at *8 (S.D. Cal. Jan 5, 2009); *Brown v. CVS Pharmacy, Inc.*, No. CV15-7631 PSG (PJWx), 2017 WL 3494297, at *7-9 & n.3 (C.D. Cal. Apr. 24, 2017); *McCulloch v. Baker Hughes Inteq Drilling Fluids, Inc.*, No. 116CV00157DADJLT, 2017 WL 5665848, at *8 (E.D. Cal. Nov. 27, 2017).

reasonable). (*See also* DE # 80-3 at ¶ 26 n.6.) Mr. Frank's cited cases are not analogous here.[15]

Similarly, time spent in mediation and settlement negotiations is compensable. *See, e.g.*, *Moore v. Verizon Commc'ns Inc.*, 2014 WL 588035 (N.D. Cal. 2014) (finding it reasonable to have four senior attorneys attend mediation in complex class action); *Loretz v. Regal Stone, Ltd.*, 756 F. Supp. 2d 1203, 1215 (N.D. Cal. 2010) (awarding fees for five lawyers to prepare for and attend one day mediation). Mr. Frank's cited cases [DE # 85 at 14] are distinguishable in that the Settlement here was significantly more complex, and meaningful and substantial damages-related discovery occurred as part of negotiations. *Compare Dugan v. Lloyds TSB Bank, PLC*, No. C 12-02549, 2014 WL 1647652, *1, 4 (N.D. Cal. Apr. 24, 2014) (finding 327 hours spent on class settlement negotiation to be excessive, where settlement was only $1.55 million for class members, with no injunctive relief); *Makaeff v. Trump University*, 2015 WL 1579000, at *1-2 (S.D. Cal. Apr. 9, 2015) (not a class action settlement but, rather, a settlement for attorneys' fees related to a successful anti-SLAPP motion); *Reyes v. Bakery & Confectionary Union*, 2017 WL 6623031, at *11 (N.D. Cal. Dec. 28, 2017) (finding that multiple attorneys did not need to participate in mediation, where settlement was only $10 million without any additional non-monetary relief). And unlike in *Reyes*, the reasonableness of lawyers participating in the mediation is supported by the fact that the Bank had essentially the same number of representatives there. Joint Decl. ¶ 12.

2. An 8.8 Multiplier is Reasonable

Although a multiplier analysis is irrelevant and counter-productive for the reasons discussed above, the objectors' attempt to characterize Class Counsel's fee request as reflecting an 18 multiplier is misleading. Instead, Class Counsel's reduced $14.5 million fee request reflects a multiplier of 8.8, which is well within the range courts have previously approved. *See, e.g.*, *Vizcaino*, 290 F.3d at 1051 n.6 (noting multipliers up to 19.6); *Steiner v. American Broadcasting Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming where the lodestar multiplier was 6.85);

[15] For example, *Lota v. Home Depot U.S.A.* was a "single plaintiff [employment] discrimination case." 2013 WL 6870006, at *15 (N.D. Cal. Dec. 31, 2013). The unrelated fees disallowed in that case pertained to plaintiff's unrelated bankruptcy. Id. at *8-9

Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (awarding fee with 15.6 multiplier); *In re Doral Financial Corp. Securities Litigation*, No. 05-cv-04014-RO (S.D.N.Y. Jul. 17, 2007) (same with 10.26 multiplier); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 481 (S.D.N.Y. 2013) ("Courts regularly award lodestar multipliers of up to eight times the lodestar, and in some cases, even higher multipliers."). Indeed, in *Eubank*, Frank acknowledged that such multipliers are "far from unprecedented," citing *Stop & Shop* and additional case law. Ex. A at 13 (citing *In re Penthouse Exec. Club Compensation Litig.*, No. 10 Civ. 1145, 2014 WL 185628, at *10 (S.D.N.Y. Jan. 14,) 2014) (noting multipliers as high as eight or "even higher"); *In re Qwest Commc'ns Int'l, Inc. Secs. Litig.*, No. 01-cv-1451, 2006 WL 8429707, at *4 (D. Colo. Sept. 29, 2006) (noting multipliers as high as ten).

Suggesting that Class Counsel is receiving a windfall is untrue. Class Counsel's fee request represents a risk happening to pay off in one limited instance where others unanimously tried and failed. As Mr. Frank acknowledged in *Eubank*, where a case is "exceptionally risky and difficult," as is the case here, "[t]hat too justifies the reasonableness of the fee." Ex. A at 12. Numerous courts in overdraft cases have thus had no issue with awarding 30% and upwards of common fund settlements. *See* Fee Application at 18-19 (chart listing up to 44% percentage-of-the-fund awards in overdraft cases). These fee awards in overdraft cases, primarily in the range of 30-35% (consistent with Class Counsel's 33% retainer agreement) reflect the "market" rate for this common-fund case and take into account the contingency nature of Class Counsel's practice. *See, e.g.*, *Vizcaino*, 290 F.3d at 1050 (citing "counsel's expectation of court-awarded fees" as supporting the reasonableness of a fee award). Although a multiplier of 8.88 standing alone might seem high, Class Counsel's work litigating the central legal issue in this case—whether an EOBC constitutes interest under the NBA— illustrates why such a higher multiplier is appropriate here.

Mr. Frank argued in *Eubank* that he is entitled to a multiplier because his litigation rarely results in attorneys' fee awards. Ex. A at 12. As he states, "[a]ttorneys who take on such risk are entitled to a multiple of their lodestar." *Id.* Such reasoning applies here. As noted above, of the eight cases that Class Counsel litigated across the country against national banks

asserting the same novel legal claim, only this one has reached a favorable resolution for the class. Every other case has been dismissed at the pleading stage or is pending a decision on a motion to dismiss. This is the only case where class counsel may be rewarded for the risk they agreed to assume when filing these cases. "In common-fund cases, 'attorneys whose compensation depends on their winning the case must make up in compensation in the cases they win for the lack of compensation in the cases they lose." *Vizcaino*, 290 F.3d at 1051.

Mr. Frank misleadingly cherry-picks inapplicable cases to suggest applying the requested multiplier to this case is improper. (Dkt. 85 at 10-11, 16.) The two Ninth Circuit decisions he cites (*id.* at 16) involved claims-made settlements, not common funds. *See Hyundai*, 881 F.3d at 706; *In re Magsafe Apple Power Adapter Litig.*, 2015 WL 428105, at *4 (N.D. Cal. Jan 30, 2015); *contra Vizcaino*, 290 F.3d at 1051 n.6 (Ninth Circuit decision noting multipliers of up to 19.6). Frank also attempts to invoke Seventh Circuit dicta in *Florin v. Nationsbank*, 34 F.3d 560, 565 (7th Cir. 1994). But according to the cases Frank cited in *Eubank*, courts in that circuit "have found that the use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." *Kaufman v. Am. Express Travel Related Servs., Co.*, at *13 n.19 (N.D. Ill. Mar. 2, 2016) (internal quotations and modifications omitted); *see* Ex. A at 1, 10-13.

As for Mr. Frank's other cases, most awarded reduced fees due to substantive concerns with the class relief or the quality of counsel, which are not present here. *See, e.g.*, *Bayat v. Bank of the West*, 2015 WL 1744342, at *5 (N.D. Cal. Apr. 15, 2015) (settlement where only 1.9% of class members made money claims, while this case automatically compensates all class members); *Rose v. Bank of Am.*, 2014 WL 4273358, at *5, 11 (N.D. Cal. Aug. 29, 2014) (settlement where only about 3% of class members made claims, which the court found to be "not 'exceptional'"); *Cruz v. Sky Chefs, Inc.*, 2014 WL 7247065, at *7 (N.D. Cal. Dec. 19, 2014) (expressing "concern[] with the quality and thoroughness of counsel's efforts"); *Viceral v. Mistras Grp., Inc.*, No. 15-cv-02198-EMC, 2017 WL 661352, at *4 (N.D. Cal. Feb. 17, 2017) (finding fee reduction justified in light of the "relatively small recovery for the class"); *Greenberg v. Colvin*, 2015 WL 4078042, at *7, 10 (D.D.C. July 1, 2015) (Social Security Act case, where attorneys' fees are *capped* at 25%, and the court reduced the requested fee award to 20%,

resembling Class Counsel's fee request here).

D. There is No Basis to Strike Fitzpatrick's Declaration

Numerous courts have correctly relied on Fitzpatrick's study, which is the most comprehensive examination of federal class action settlements and attorneys' fees ever published. (*See* Dkt. 80-3 ¶¶ 3-4 (listing cases)). Mr. Frank himself relies on it. (*See* DE # 85 at 29.) The objectors in *In re Checking Account Overdraft Litigation*, 830 F. Supp. 2d 1330, 1638 n.41 (S.D. Fla. 2011), similarly sought to strike Fitzpatrick's testimony. The court denied those requests as without foundation. *Id.*

Mr. Frank mischaracterizes Fitzpatrick's analysis as legal conclusions. Fitzpatrick conducted a comprehensive meta-analysis of class action settlements. Although that analysis must, by its nature, include citation to case law, the declaration is not a substitute for Class Counsel's legal arguments in their Attorneys' Fee Application or a legal conclusion based on the cases. This Court is more than capable of reaching its legal conclusion, but will be aided by the expert analysis. Contrast Frank's cherry-picked case citations to Fitzpatrick's analysis of a universe of empirical data. He can draw conclusions that Frank cannot and that other courts have found helpful in granting fee awards.

Mr. Frank incorrectly suggests that the court in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, & Products Liability Litigation*, 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017), rejected Fitzpatrick's analysis. (DE # 85 at 25.) In fact, the court found that Fitzpatrick's opinion "actually elucidates the Court's reasoning." 2017 WL 1352859, at *3 n.3.

E. Mr. Frank's *Cy Pres* Arguments are Without Merit.

Frank argues that a secondary distribution must occur "if economically feasible." [DE #85 at 5-7.] Although the Parties believe the Agreement made this sufficiently clear, the Parties have now agreed that a secondary distribution will definitively occur if it is economically feasible. Joint Decl., ¶ 18. Thus, Frank's concern is moot.

Frank also argues that any *cy pres* recipient must be identified in the Settlement or class notice. [DE #85 at 5-7.] Frank is correct that it is appropriate to identify a *cy pres* before granting final settlement approval, and the Parties have agreed to designate the Center for

Responsible Lending ("CRL") as the recipient, should a *cy pres* distribution occur. Joint Decl., ¶ 18. But Frank is incorrect that the reason to identify a *cy pres* recipient is to "preserve[] the right of absent class members to distance themselves from causes or institutions that they would rather not support." [DE #85 at 6.] He cites no case for this proposition. Rather, as the court in *Thomas v. Magnachip Semiconductor Inc.*, explains, the only reason to identify a *cy pres* recipient is to enable the Court to evaluate whether the proposed recipient "bears a substantial nexus to the interests of the class members." No. 14-CV-01160-JST, 2016 WL 1394278, at *8 (N.D. Cal. Apr. 7, 2016) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 821 (9th Cir. 2012)). Now that the parties have identified CRL as the recipient, the Court may satisfy the concerns stated in *Dennis v. Kellogg Co.* and evaluate whether CRL "bear[s] any nexus to the plaintiff class or to their [usury] claims." *See* 697 F.3d 858, 869 (9th Cir. 2012).

There is no more worthy recipient than CRL, should a *cy pres* distribution occur, since CRL has a substantial nexus to the usury and banking issues underpinning this case. As its website states, "CRL is a nonprofit, non-partisan organization that works to protect homeownership and family wealth by fighting predatory lending practices. Our focus is on consumer lending: primarily mortgages, payday loans, credit cards, bank overdrafts and auto loans."[16] Since CRL's work relates directly to the issues at the heart of the litigation, the Court should approve CRL as a *cy pres* recipient and reject Frank's *cy pres*-related objections.

IV. CONCLUSION

This Court should overrule all the objections.

16 *See* https://www.responsiblelending.org/about-us (last visited May 30, 2018).

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Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENT EUBANK, JERRY DAVIS, RICKY FALASCHETTI, RITA CICINELLI, ROBERT JOSEPHBERG, JEFFREY ACTON, KENNETH HECTHMAN, JAMES NEIMAN, AMY CHASIN and EDWARD RUHNKE, individually and on behalf of all others similarly situated, *Plaintiffs*, v. PELLA CORPORATION and PELLA WINDOWS AND DOORS, INC., *Defendants*.	No.: 06 C 4481 Hon. Sharon Johnson Coleman

MOTION FOR ATTORNEYS' FEES AND FOR INCENTIVE AWARD, AND MEMORANDUM OF LAW IN SUPPORT, OF THEODORE FRANK, ATTORNEY FOR OBJECTOR MICHAEL SCHULZ

This case, the Court of Appeals explained, "underscores the importance . . . of objectors" in class litigation. *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014). When the first settlement landed before the Court of Appeals, the Circuit described it as "inequitable" and "scandalous"—a settlement that was "stacked against the class." *Id.* at 721, 724. The settlement "should have been disproved on multiple grounds." *Id.* at 723. But for the work of objectors, with Theodore Frank as their lead attorney on appeal, the class would have been between about $15 million and $22 million worse off. Seventh Circuit precedent supports an attorneys' fees award of over 30% of this added value or over 30% of the total fee award, *Kaufman v. American Express Travel Related Services Co.*, 877 F.3d 276, 287-88 (7th Cir. 2017), yet Frank requests only $1,500,000.

BACKGROUND

I. The District Court Approves a Settlement That Pays Class Counsel More in Attorneys' Fees Than the Class Will Receive in Benefits

A. The Settlement

Plaintiff Leonard Saltzman sued defendant Pella Corporation in 2006. Dkt. 1. Saltzman was represented in the case by his son-in-law, Paul M. Weiss of the Complex Litigation Group. *Eubank v. Pella Corp.*, 753 F.3d 718, 721 (7th Cir. 2014). The class action complaint alleged that Pella sold defective windows. Dkt. 1 ¶¶11-16. Saltzman sought damages under product-liability and consumer-protection laws. *Id.* ¶¶39-77.

In 2011, class counsel signed a settlement agreement with Pella. *See* Dkt. 277-1 ("Initial Settlement"). The Initial Settlement created two mechanisms by which class members could receive compensation for their defective windows. The relatively less cumbersome one, dubbed the "Claims Process," allowed for an award of up to $750 if a class member submitted a 12-page, notarized claim form. *Id.* ¶55. Alternatively, the "Arbitration Process" offered up to $6,000 in

compensation *but required the class member to show causation*. *Id.* ¶¶55, 61(b). Electing to arbitrate also required submission of a 13-page, notarized form. Dkt. 277-1. The class representatives asserted that the settlement was worth over $100 million to the class, Dkt. 291 at 8-10, while Pella claimed it was worth between $36 million and $54 million. Dkt. 290-1.

To class counsel, the settlement was worth $11 million—that was the maximum amount of attorneys' fees and expenses that Pella agreed to pay. Initial Settlement ¶¶50(7), 101. The trial court approved the settlement (over the objections described below). Class counsel requested, and the court ordered that he receive, the full $11 million. *Eubank*, 753 F.3d at 723.

B. Opposition to the Settlement and Schulz's Objection

Objectors opposed the Initial Settlement both in the trial court and on appeal. The objectors included four class members, who had earlier served as class representatives but who were dismissed by Saltzman and Weiss after refusing to support the Initial Settlement. Class member Michael J. Schulz also objected. Schulz's attorney Christopher Bandas engaged Theodore Frank to handle any appeal. Declaration of Theodore Frank ¶2 ("Frank Decl.").[1] Frank is the leading attorney vindicating the rights of class members against unfair class action settlements through his work with the non-profit Center for Class Action Fairness (the "Center"), which he founded in 2009. Frank and the attorneys of the Center have represented class members in dozens of cases challenging unfair and abusive class action procedures, settlements, and fee requests. *Id.* ¶3. Those efforts have generated over $100 million in additional settlement benefits. *Id.* The Center has won reversal or remand of unfair class action settlements or

[1] At first, Bandas made the sole appearance on behalf of Schulz, while Frank ghostwrote briefs on behalf of Bandas. Frank performed the great majority of appellate work on behalf of Schulz. Frank Decl. ¶4. Bandas is not submitting a separate fee request; he will receive a portion of any fees that are awarded to Frank. *Id.* ¶16.

distributions in fifteen different federal appeals spanning five different circuits. *Id.* In cases where the Center did not have a client, such as this one, Frank has worked as a private attorney on appellate issues if he found merit in the objection.

Through Bandas and a local counsel, Schulz filed an objection in the trial court raising three main defects. First, he argued that Weiss—who at the time he negotiated the settlement was the subject of an attorney disciplinary investigation—was motivated to reach a quick settlement over a fair settlement as a result of his impending disciplinary problems. Weiss was thus impermissibly conflicted and inadequate to serve as class counsel. Dkt. 319 at 2-4; Dkt. 255. Second, Schulz argued that Saltzman was an inadequate class representative because of his close familial relationship to Weiss. Dkt. 319 at 4; Dkt. 255. Finally, Schulz argued that the settlement was not worth the $100 million value that class counsel had ascribed to it (or even the $36 million to $54 million that Pella claimed it to be worth). Dkt. 319 at 5-6.

The district court denied the objections and approved the settlement. Schulz appealed, as did the group of former class representatives.[2]

II. Relying Heavily on Schulz's Arguments, the Seventh Circuit Reverses the District Court's Approval of the Settlement

Schulz led the charge on the appeal. In his briefing, Schulz added to and expanded upon the deficiencies he had first identified in his objection. *See* Frank Decl. Exs. 1-3. Schulz's counsel, Frank, received the majority of the objectors' time at oral argument. Counsel for the group of four objectors received the remaining time. *Id.* ¶6. For Schulz and the other objectors, the appeal was a wholesale victory, a complete win. The court not only rejected the settlement,

[2] Another class member, Ron Pickering, objected and appealed. Pickering's brief did not make any unique arguments. He filed no reply and presented no oral argument. Frank Decl. ¶6. A fourth appeal was filed by objector Dave Thomas, but was dismissed for a failure to prosecute.

but also concluded Saltzman and his lawyer, Weiss, were not adequate representatives of the class. *Eubank*, 753 F.3d at 729.

In reaching that conclusion, the Seventh Circuit drew heavily from Schulz's arguments. For example, the Seventh Circuit agreed with Schulz that "it was improper for the lead class counsel to be the son-in-law of the lead class representative." *Eubank*, 753 F.3d at 723. As Schulz explained, "[e]ven though a plaintiff is not entitled to share in the attorney's fees, a plaintiff might still be motivated to maximize the attorney's fee where there is a close relationship between the plaintiff and the attorney." Frank Decl. Ex. 1 at 16. The court adopted nearly identical reasoning, explaining that the relationship between Saltzman and Weiss "created a grave conflict of interest; for the larger the fee award to class counsel, the better off Saltzman's daughter and son-in-law [Weiss] would be financially." *Eubank*, 753 F.3d at 724.[3]

The Seventh Circuit also adopted Schulz's argument that Weiss's ethical and financial problems rendered him inadequate class counsel. Schulz pointed out that Weiss was the subject of a disciplinary investigation, explaining that "class counsel's own legal troubles created settlement leverage that prejudiced the class relative to a class counsel not facing sexual harassment allegations." Frank Decl. Ex. 1 at 19. "[I]f Weiss were suspended or disbarred before the case settled," Schulz continued, "he might be precluded from obtaining his share of a multi-million-dollar fee." *Id.* at 20. The Seventh Circuit said exactly the same thing: "Weiss's ethical embroilment was another compelling reason for kicking him and Saltzman off the case"

[3] The settling parties defended the adequacy of Saltzman as class representative by noting that four additional named plaintiffs bore no familial relationship to Weiss. But Schulz pointed out that those four named plaintiffs, chosen at the time of settlement, were chosen *precisely* because they supported the settlement after the original four did not. Frank Decl. Ex. 1 at 11. The Seventh Circuit invoked that very argument: "The appellees . . . point out that Saltzman was one of five class representatives, and the other four didn't have a conflict of interest," but the Court of Appeals rejected the new named plaintiffs because they were "selected by the conflicted lead class counsel." *Eubank*, 753 F.3d at 724.

because "[i]t was very much in [Weiss's] personal interest . . . to get the settlement signed and approved *before* the disciplinary proceeding culminated in a sanction that might abrogate his right to share in the attorneys' fee award in this case." *Eubank*, 753 F.3d at 724; *see id.* at 722.

Appellees defended Weiss's conflicts by arguing that he was just one of many attorneys representing the class. The Seventh Circuit, however, adopted Schulz's argument that Weiss had "*de facto* control of the litigation through power of the purse" because the Initial Settlement's provision vested in Lead Class Counsel the "sole discretion" to allocate any attorneys' fees, costs, expenses, and disbursements. *Compare* Frank Decl. Ex. 3, *with Eubank*, 753 F.3d at 721 ("Realistically *he* [*i.e.*, Weiss] was the lead class counsel.").

Even beyond those deficiencies, Schulz identified numerous indicia of "self-dealing" that, he argued, precluded approval of the settlement. Again, the Seventh Circuit agreed:

- Schulz pointed out that recovery under the settlement required claimants to "successfully jump[ ] through all the hoops of a 12-page claim form," among other requirements, which would "substantially" reduce the value of the settlement's benefits. Frank Decl. Ex. 1 at 23, 24. And, at least for the Arbitration Process, Pella retained the right to challenge payment of the claim for lack of causation. *Id.* at 24. The Seventh Circuit seized on these aspects of the settlement, agreeing with Schulz that the settlement's value to the class was likely "less than $1.5 million." *Eubank*, 753 F.3d at 724-26; *compare* Frank Decl. Ex. 1 at 23 (settlement worth "substantially less than $1.5 million").

- Schulz explained that Pella was already issuing some refunds to class members under its warranty program, and noted that the valuation of the settlement agreement did not account for money that class members would have received anyway under the warranty. Frank Decl. Ex. 1 at 23. The Seventh Circuit agreed that the settlement's treatment of payments received under the warranty further undermined the reasonableness of the settlement. *Eubank*, 753 F.3d at 726.

- Schulz noted that the class attorneys received their $11 million fee award immediately—in fact, they received $2 million even before the settlement was final—while the benefits to class members were paid out over time. Frank Decl. Ex. 1 at 24. The Seventh Circuit criticized this "suspicious feature of the settlement," commenting that class counsel's "feeble efforts" did not justify "generous attorneys' fees[ ]." *Eubank*, 753 F.3d at 724, 726; *see also id.* at 723 (noting "asymmetry").

- Schulz criticized the "clear sailing" and "kicker" provisions of the settlement as used in the original settlement, which prohibited Pella from contesting any fee request at or below $11 million and which ensured that any unawarded fees would revert to Pella rather than the class. The clear-sailing provision "lays the groundwork for lawyers to 'urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red carpet treatment on fees,'" Frank Decl. Ex. 1 at 28, while the kicker "deter[s] court scrutiny of the fee award," *id.* at 30. The Seventh Circuit again agreed, finding these provisions "questionable" and faulted the district court for refusing to delete them from the settlement agreement. *Eubank*, 753 F.3d at 723.

Indeed, Schulz was the only appellant to argue several of these points.[4]

Ultimately, Schulz argued, the "settlement requires class members to accept a $750 cap on claims through a burdensome claims process that in many ways gives class members no more than what they already had before the settlement"—*i.e.*, payment under the warranty. Frank Decl. Ex. 1 at 30. Pella was "required to pay nearly nothing it was not already paying. . . . What the class does receive is subject to Pella's challenge later, and even those who overcome Pella's challenges might get nothing but a coupon." Frank Decl. Ex. 2 at 14. "Pella, on the other hand: is exonerated from future lawsuits; surrenders no defenses; retains the right to challenge claims; . . . and caps its potential liability to every potential claimant." *Id.* at 14-15. The Seventh Circuit put it more colorfully: "Class counsel sold out the class." *Eubank*, 753 F.3d at 726. For a settlement worth *at most* $8.5 million, a highly compromised class counsel agreed to a settlement that guaranteed $11 million for himself. *Id.* That was not fair, adequate, and reasonable. It was Objector Schulz's advocacy that helped the Seventh Circuit reach that conclusion.

In the Seventh Circuit, Frank also opposed both a motion to dismiss the appeal and a petition for rehearing; Frank further protected the appeal through ghostwriting an opposition to a motion for a gigantic appeal bond that, if successful, might have derailed the appeal. Frank Decl.

[4] Schulz was the only objector-appellant, for example, who challenged the "kicker" provision or who argued that the inordinately complex claims process would reduce class recovery below $1.5 million.

¶8. Such scorched-earth tactics are not uncommon in appeals challenging a class settlement, in part because deficient class settlements so often result where class counsel abdicate their ethical duties to the class. *Id.* Because of Frank's experience in opposing unfair class settlements, he ably opposed these tactics. *Id.*

Unsurprisingly, the press lauded Frank's efforts in the Seventh Circuit. Reporting on the case, *Forbes* explained that "[w]ere it not for objectors (represented in this case by attorney Ted Frank . . .), there would be no one to point out the obvious conflicts of interest that riddle such cases." Frank Decl. Ex. 5. And a headline in *The Litigation Daily* proclaimed, "Objector Frank Convinces Posner To Toss Pella Deal." *Id.* Ex. 6.

III. The Parties Reach a Revised Settlement That Triples the Relief for the Class

Back in district court on remand, class counsel—now Robert Clifford of the Clifford Law Offices (Weiss having been suspended from the practice of law for 30 months)—sought preliminary approval of a new settlement on February 8, 2018. *See* Dkt. 672. That settlement creates a $25,750,000 fund to compensate claims associated with the defective windows. *Id.* at 5. Of that fund, $23,750,000 will compensate class members during the claims period and is non-reversionary—with one exception, unclaimed funds will not revert to Pella. *Id.* An additional $2,000,000, which is reversionary, will be used to compensate claimants during an "extended period." *Id.* at 10. Thus, the Revised Settlement represents an increase in value of over $15 million above the Seventh Circuit's $8.5-million estimate of the Initial Settlement's value. The complex claims process of the Initial Settlement was also overcome by the appeal, with the Revised Settlement calling for a "simple and efficient claims process." *Id.* at 12-13.

Finally, the Revised Settlement provides for $9 million in attorneys' fees. *Id.* at 21.

ARGUMENT

I. Frank Is Entitled to Fees for the Approximately $15 Million to $22 Million Improvement Achieved Through His Efforts on Appeal

Counsel for an objector who confers a material benefit on the class is entitled to a fee award. *In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 748 (7th Cir. 2011); 7B Charles A. Wright & Arthur Miller, *Federal Practice & Procedure* § 1803 n.6 (3d ed. 2004). As Judge Posner remarked in this very case, if "object[ors] persuade the judge to disapprove [the settlement], and as a consequence a settlement more favorable to the class is negotiated and approved, the objectors *will receive a cash award that can be* substantial." *Eubank*, 753 F.3d at 720 (emphasis added); *see also Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (holding that objectors' "lawyers who contribute materially to the proceeding" are entitled to a fee).

Objectors are entitled to attorneys' fees because they "serve as a highly useful vehicle for class members, for the court and for the public generally" to bring adversarial scrutiny to proposed class action settlements. *Great Neck Capital Appreciation Inv. P'ship, LP v. PricewaterhouseCoopers, LLP*, 212 F.R.D. 400, 412 (E.D. Wis. 2002). "Therefore, a lawyer for an objector who raises pertinent questions about the terms or effects, intended or unintended, of a proposed settlement renders an important service." *Id.* at 413. When those efforts "improve[ ] the settlement, assist[ ] the court, and/or enhance[ ] the recovery in any discernible fashion," the objectors' counsel are entitled to a fee. *Id.* at 413.

A. A $1.5 Million Attorney's Fee Is Less Than the Amount Due to Frank

Improve the settlement, assist the court, and enhance the recovery of the class is precisely what Objector Schulz did. In fact, Schulz's efforts enabled the class to increase its recovery from three-fold to ten-fold. In rejecting the flawed Initial Settlement, the Seventh Circuit

concluded it was worth far less than advertised—at most only $8.5 million. *Eubank*, 753 U.S. at 726-27. Schulz plausibly argued that the accurate characterization of the settlement's value was less than $2 million. Frank Decl. Ex. 2 at 8-15. On remand, though, the parties negotiated a settlement worth a guaranteed $23,750,000 and as much as $25,750,000. They had that opportunity only because Schulz challenged the settlement's deficiencies on appeal and won.

In exchange for earning that substantial benefit for the class, Frank seeks attorneys' fees of $1.5 million.[5] By each metric, that fee request is reasonable and justified. In the Seventh Circuit the "central consideration" in assessing the reasonableness of an attorneys' fee "is what [objector's] counsel achieved for the members of the class rather than how much effort [objector's] counsel invested in the litigation." *Redman v. Radioshack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014). Thus, the Seventh Circuit has approved objectors' fees calculated as a percentage of the total attorneys' fees that matches the percentage of class recovery attributable to the objectors' efforts. *Trans Union*, 629 F.3d at 747-48 (awarding objectors 37% of total fee award where objectors' efforts were responsible for 37% of the total benefit conferred).

Here, the appeal yielded between *two-thirds and ninety percent of the total class recovery*: an increase of between $15,250,000 and $21,750,000 resulting in a total class benefit of $23,750,000 (excluding the reversionary $2 million fund).[6] To be sure, "[t]he final settlement

[5] Counsel for Frank did confer with current class counsel, Clifford, concerning a negotiated fee award for Schulz. Clifford neither agreed nor disagreed, and simply advised that attorneys who believe they are entitled to a fee from the settlement fund should independently file a motion for such fees as directed in the Court's preliminary approval order. Dkt. 675.

[6] The total value may be slightly less. If any amount of the $23,750,000 remains after all claims have been paid, Pella is entitled to seek reimbursement of the notice costs that it paid. Because "[n]otice and fees . . . are costs, not benefits," any reimbursement should not be included in the value of the settlement. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 781 (7th Cir. 2014). Thus, if the claims do not exhaust the $23,750,000 fund and Pella is reimbursed the cost of notice, the increased value to the class may be less than $15,250,000. The settling parties do not appear to have disclosed the cost of notice, however, or to have estimated the likelihood that money will remain in the fund at the end of the claims period. We thus

was the result of the combined efforts" of class counsel and objectors' counsel. *Trans Union*, 629 F.3d at 747. Recognizing that fact, Frank proposes that one-third of the increased settlement value be attributed to objectors who prevailed on appeal, and two-thirds of the increased value be attributed to class counsel's efforts on remand. *See id.* at 747-48. Under that allocation, the counsel for objectors who prevailed on appeal would receive one-third of the $9 million in common benefit fees, or $3 million. Frank further proposes that he evenly split that $3 million with counsel for the other objector group that fully briefed the appeal and argued alongside Frank at oral argument. *See id.* (splitting attorneys' fees between objectors that prevailed on appeal). Thus, Frank requests an attorneys' fee award of $1.5 million. That $1.5 million fee award amounts to just 16.7% of the $9 million allocated for attorneys' fees.

The $3 million fee that Frank proposes for the objectors who succeeded on appeal (which he proposes splitting with another objector group) represents between 13.8% and 19.7% of the $15,250,000 to $21,750,000 increase in value that is attributable to objectors' efforts. That is well below the percentage that the Seventh Circuit has approved as a reasonable fee award to objectors. In *Kaufman*, 877 F.3d 276, for example, the court approved an attorneys' fee award for objectors that amounted to 34% of the increased value of the settlement. *Id.* at 287-88. The court did so, moreover, even though the *Kaufman* objectors had "filed 'a number of repetitive and meritless objections'" and thus the court questioned the extent to which they could rightfully claim credit for some of the improvements in the settlement. *Id.* at 288. Schulz did none of that here. If an attorneys' fee award amounting to 34% of the improvement is appropriate in

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assume that the fund will be completely exhausted by claims. Even if not, the approximate magnitude of the benefit delivered will not change dramatically unless notice is unusually expensive.

Kaufman, then an award ranging between 13.8% and 19.7% of the benefit in this case is eminently reasonable.

B. Efficiency and Risk Justify the Lodestar Multiple that Schulz's Counsel Would Receive

District courts in the Seventh Circuit are under no obligation to cross-check the requested fees against the lodestar. *In re Dairy Farmers of Am., Inc.*, 80 F. Supp. 3d 838, 849 (N.D. Ill. 2015); *see also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011); 5 *Newberg on Class Actions* § 15:88 (5th ed.) (noting in Seventh Circuit that "a cross-check is not applicable"). Indeed, the Seventh Circuit has emphasized that attorneys' fees do not depend on "how much effort . . . counsel invested in the litigation," but rather on "what . . . counsel achieved." *Redman*, 768 F.3d at 633. Taking account of "what counsel achieved" in this case, a $1.5 million fee is reasonable.

"[T]he reasonableness of a fee cannot be assessed in isolation from what it buys." *Redman*, 768 F.3d at 633. The $1.5 million fee Frank requests bought a lot—most notably, a tremendous increase in the value of the settlement. Schulz's counsel, Frank and Bandas, worked with exceptional efficiency and achieved exceptional results in the face of extraordinary opposition. In achieving those exceptional results, Frank amassed a lodestar of $161,125—an underestimate that does not include Bandas's time. Frank Decl. ¶¶ 15-16.[7] A $1.5 million fee on that lodestar would represent a multiplier of 9.3. Including Bandas's fees would drive the multiplier lower. (A conservative combined lodestar of $200,000 yields a 7.5 multiplier.) Under these circumstances, where Frank delivered an extremely valuable benefit for the class and

[7] The lodestar calculation does not include any of Bandas' hours and investment in the case because Bandas was unable to report with accuracy the time that he spent representing Schulz during the objection and appeal. Bandas will nonetheless share in any fee award. Frank Decl. ¶ 16.

worked with enviable efficiency, a $1.5 million fee represents a reasonable multiple of counsel's investment.

In fact, the lodestar multiplier is high *only* because Frank worked with efficiency and alacrity. For good reason, courts are "reluctant to rely heavily on a method for determining whether a contingency fee is reasonable that penalizes efficiency." *Kirby v. Berryhill*, No. 14 CV 5936, 2017 WL 5891059, at *1 (N.D. Ill. Nov. 29, 2017); *see also Grayson v. Berryhill*, No. 4:16-cv-61, 2017 WL 6209703, at *3 (N.D. Okla. Dec. 8, 2017) ("[I]f a firm can organize its practice efficiently by using less of its lawyers' time, yet still produce high quality legal work, it should not be penalized in the fee . . . ."); *Blatt v. Dean Witter Reynolds Intercapital Inc.*, 566 F. Supp. 1294, 1298 (S.D.N.Y. July 1, 1983) ("[T]o place exclusive reliance on time as a factor would penalize efficient performance of legal tasks."); *O'Rourke v. Healthdyne, Inc.*, Civ. A. Nos. 84-4295, 84-4296, 1986 WL 923, at *2 (E.D. Pa. Jan. 16, 1986) ("Awarding fees based on time alone may reward inefficiency and penalize those who are efficient and expeditious . . . .").

Objections are exceptionally risky and difficult. That too demonstrates the reasonableness of the fee. While a multiplier of 7.5 or 9.3 is high, it would not be a windfall here because so many objectors' successes go entirely uncompensated. Objectors often fail in procuring additional benefits for the class—even if an appeal succeeds—and thus risk receiving no fee at all. Between his non-profit work and his private practice, as of May 16, 2018, Frank has worked for objector-appellants on over thirty intermediate appeals of settlement approvals that have been ultimately decided on the merits. Though Frank and his team have had unprecedented success in this field—winning eighteen of those appeals—Frank has received court-awarded fees in only four of these cases. Frank Decl. ¶17. Attorneys who take on such risk are entitled to a multiple of their lodestar. *E.g.*, *In re Synthroid Mktg. Litig.*, 325 F.3d 974, 978 (7th Cir. 2003).

Further, a multiplier of 7.5 or 9.3 is far from unprecedented. In *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ. A. 03-4578, 2005 WL 1213926 (E.D. Pa. May 19, 2005), the court awarded a multiplier of 15.6. *Id.* at *18; *see also In re Penthouse Exec. Club Compensation Litig.*, No. 10 Civ. 1145, 2014 WL 185628, at *10 (S.D.N.Y. Jan. 14, 2014) (noting multipliers as high as eight or "even higher"); *In re Qwest Commc'ns Int'l, Inc. Secs. Litig.*, No. 01-cv-1451, 2006 WL 8429707, at *4 (D. Colo. Sept. 29, 2006) (noting multipliers as high as ten).

While Frank has litigated against large multipliers in other cases, those cases either involved substantially less risk or were litigated substantially less efficiently, or achieved compromised results rather than the complete success of Schulz's fully-litigated appeal. Frank Decl. ¶18. Where, as here, counsel is heavily experienced and uniquely accomplished in subjecting class action settlements to detailed appellate scrutiny, and those abilities are orchestrated efficiently to deliver tremendous benefit to the class, a lodestar multiplier of 7.5 to 9.3 is well within reason.

II. Schulz Is Entitled to a $2,000 Incentive Award

Frank requests for Schulz a $2,000 incentive award. Frank Decl. ¶¶19-20. It is appropriate to award objectors incentive awards. *See, e.g.*, *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 816-17 (N.D. Ohio 2010); *In re Apple Inc. Secs. Litig.*, No. 5:06-cv-05208, 2011 WL 1877988, at *16 (N.D. Cal. May 17, 2011). Objector incentive awards are justified for the same reason as class representative awards: "to induce individuals to become named representatives." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 722 (7th Cir. 2001). An objector such as Schulz, while not a named representative, acts on behalf of the class at cost to himself.

By objecting, Schulz exposed himself to the risk of private investigation and harassing discovery. He also forsook personal gain to benefit the entire class. Objectors, if they are

willing to selfishly sell-out the class, can settle their objections for substantial sums much larger than a $2,000 incentive payment. *See, e.g.*, Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 428-32. Just as class representatives receive incentive payments, so should objectors whose objections meaningfully contribute to class recovery. Schulz did that here. Because he did, the class is receiving *three times* what it would have received otherwise.

III. Objectors' Fees and the Incentive Award Should Be Funded from the $9 Million for Attorneys' Fees

"[T]he 'common benefit' theory is premised on a court's equity power." *United Steelworkers of Am. v. Sadlowski*, 435 U.S. 977, 979 (1978); *accord Rodriguez v. Disner*, 688 F.3d 645, 654 (9th Cir. 2012). Although class counsel who negotiated the Revised Settlement was not responsible for the deficiencies in the Initial Settlement, the class nonetheless should not pay twice for a benefit it should have received from the outset. *See McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 651 (E.D. Pa. 2015) (debiting objector's fee award from class counsel's award because class' benefit was only achieved on the "second try").

Perhaps this is why many courts across the nation have paid objector fees from class counsel's award.[8] That practice recognizes several realities, equities, and best practices of settlement and class representation. *See Great Neck*, 212 F.R.D. at 416-17. In *Great Neck*, the

[8] *See e.g., McDonough*, 80 F. Supp. 3d at 662 (awarding objector's attorneys' fees out of class counsel's fee award); *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, MDL No. 09-2067, 2014 WL 4446464, at *10 n.1 (D. Mass. Sept. 8, 2014) (same); *Lonardo*, 706 F. Supp. 2d at 816-817 (same); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 277 (E.D.N.Y. 2009) (same); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 563, 573 (D.N.J. 2003), *aff'd* 103 Fed. Appx. 695, 697 (3d Cir. 2004) (same); *In re Ikon Office Solutions*, 194 F.R.D. 166, 197 (E.D. Pa. 2000) (same); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998) (same); *In re Horizon/CMS Healthcare Corp. Secs. Litig.*, 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998) (same); *In re Citigroup Secs. Litig.*, No. 07-cv-9901(SHS), Dkt. No. 286, Order at 1-2 (S.D.N.Y. Sept. 10, 2013) (same with objector's expenses).

court recognized its equitable discretion to require the class to pay objector's fees, but correctly declined to do so. *Id*. at 417. Instead, the *Great Neck* court awarded the objector fees from "class counsel and the defendants as they may agree but without diminution of the sum awarded to the class." *Id*.; *accord Ikon Office Solutions*, 194 F.R.D. at 197 (Objectors' "fees and costs will be taken from class counsel's award to avoid dilution of the settlement fund.").

Awarding all legal expenses from the initial fee pot is not merely equitable, it is also good policy. It incentivizes class counsel to reject settlements that are objectionable to class members and to courts. Plenty of unfavorable settlements are approved quickly, quietly and unopposed, without a single objection filed. *See generally In re Continental Ill. Secs. Litig.*, 962 F.2d 566, 573 (7th Cir. 1992) ("No class member objected either—but why should he have? His gain from a reduction, even a large reduction, in the fees awarded the lawyers would be minuscule."). If class counsel are not responsible for paying the fees of successful objectors, then there will be little, if any, incentive for them to reach good settlements from the very outset.

While the $9 million fee award is in a separate and segregated fund, that $9 million should be considered part of a "constructive common fund" for purposes of the court's equitable powers regarding the common benefit doctrine. "Courts have relied on 'common fund' principles and the inherent management powers of the court to award fees to lead counsel in cases that do not actually generate a common fund." *In re Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995) (evaluating separate negotiated fee award as part of a "constructive common fund"); *see also Redman*, 768 F.3d at 630 (treating coupons plus the awarded attorneys' fees as if they were both part of a common fund).

CONCLUSION

The Court should award Schulz attorneys' fees in the amount of $1.5 million and Schulz an incentive payment of $2,000.

Dated: May 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed on May 21, 2018 the foregoing Motion for Attorneys' Fees and for Incentive Award, and Memorandum of Law in Support, of Theodore Frank, Attorney for Objector Michael Schulz, and accompanying documents, using the CM/ECF System, which will effect service on all parties.

/s/ *Thomas J. Wiegand*

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOANNE FARRELL, on behalf of herself themselves and all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A,

Defendant.

Case No.: 3:16-cv-00492-L-WVG

CERTIFICATE OF SERVICE

I, Jeff Ostrow, on this 1st day of June, 2018, hereby certify that Plaintiffs' Corrected Responses to Objections from Settlement Class Members was filed via the Court's CM ECF system, thereby causing a true and correct copy to be sent to all ECF-registered counsel of record.

Dated: June 1, 2018

s/*Jeff Ostrow*
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