UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	)	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Honorable Jorge L. Alonso

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND REASONABLE COSTS AND EXPENSES FOR LEAD PLAINTIFFS

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE PROPOSED FEE AWARD IS REASONABLE 3

A. The Class's Reaction Supports the Requested Fees and Expenses..........................3

B. The Sole Objection to the Proposed Fee Award Should Be Overruled 4

1. The Objection Ignores Overwhelming Evidence that the Proposed Fee Is Consistent with the Market Rate 4

2. This Case Is Not Subject to a Fee-Shifting Regime 8

3. Lead Counsel's Lodestar Is Well Documented, and Its Reasonable Hourly Rates Reflect the Relevant Marketplace.......................................12

4. The Objector's Claim and Some Pointed Judicial Commentary About His Counsel's *Modus Operandi* 14

III. CONCLUSION...15

1188010_2

TABLE OF AUTHORITIES

Page

CASES

Allapattah Services, Inc. v. Exxon Corp.,
454 F. Supp. 2d 1185 (S.D. Fla. 2006) 6

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
421 U.S. 240 (1975)..11

Bailey v. Meister Brau, Inc.,
535 F.2d 982 (7th Cir. 1976) 11

Barnes v. Fleetboston Fin. Corp.,
No. 01-10395-NG, 2006 WL 6916834
(D. Mass. Aug. 22, 2006)..14

Boeing Co. v. Van Gemert,
444 U.S. 472 (1980)..11

Chieftain Royalty Co. v. SM Energy Co.,
No. CIV-11-177-D, 2016 U.S. Dist. LEXIS 128414
(W. D. Okla. Mar. 10, 2016)..15

Davis v. Apple,
No. CGC-02-415376 (San Francisco Sup. Ct. Nov. 20, 2003)..15

Destefano v. Zynga, Inc.,
No. 12-cv-04007-JSC, 2016 WL 537946
(N.D. Cal. Feb. 11, 2016)..10

Faught v. Am. Home Shield Corp.,
444 F. App'x 445 (11th Cir. 2011) 14

Florin v. Nationsbank, N.A.,
34 F.3d 560 (7th Cir. 1993) 11, 12

Foos v. Ann Taylor,
No. 3:11-cv-2794, 2013 U.S. Dist. LEXIS 193070
(S.D. Cal. May 20, 2013)..14

Gaffney v. Riverboat Servs.,
451 F.3d 424 (7th Cir. 2006) 11

Goldberger v. Integrated Resources, Inc.,
209 F.3d 43 (2d Cir. 2000)..4

Page

Haggart v. Woodley,
809 F.3d 1336 (Fed. Cir. 2016)....................10

In re Checking Account,
830 F. Supp. 2d 1330 (S.D. Fla. 2011) 14

In re Enron,
586 F. Supp. 2d 732 (S.D. Tex. 2008) 7, 8

In re Genworth Fin. Sec. Litig.,
No. 3:14-cv-682, 2016 U.S. Dist. LEXIS 132269
(E.D. Va. Sep. 26, 2016)....................6

In re Synthroid Mktg. Litig.,
264 F.3d 712 (7th Cir. 2001) .... *passim*

In re Urethane Antitrust Litig.,
No. 04-1616-JWL, 2016 WL 4060156
(D. Kan. July 29, 2016)....................6

Johnson v. Meriter Health Servs. Emple. Ret. Plan,
No. 10-cv-426-wmc, 2015 U.S. Dist. LEXIS 158859
(W.D. Wis. Jan. 5, 2015) 7

Kirchoff v. Flynn,
786 F.2d 320 (7th Cir. 1986) 5

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991)....................9, 11

Larson v. JPMorgan Chase,
530 F.3d 578 (7th Cir. 2008) 4

Martin v. Caterpillar Inc.,
No. 07-cv-1009, 2010 U.S. Dist. LEXIS 145111
(C.D. Ill. Sept. 9, 2010)....................5

Muransky v. Godiva Chocolatier, Inc.,
No. 15-60716-CIV-DIMITROULEAS/SNOW,
2016 U.S. Dist. LEXIS 126810 (S.D. Fla. Sept. 16, 2016) 2, 15

Musick, Peeler & Garrett v. Employers Ins.,
508 U.S. 286 (1993)....................9, 11

Page

Pierce v. Visteon Corp.,
791 F.3d 782 (7th Cir. 2015) 10

Shane Group, Inc. v. Blue Cross Blue Shield,
825 F.3d 299 (6th Cir. 2016) 12

Silverman v. Motorola Solutions, Inc.,
739 F.3d 956 (7th Cir. 2013) 3, 4, 9

Van Alen v. Dominick & Dominick, Inc.,
560 F.2d 547 (2d Cir. 1977)....................11

Van Gemert v. Boeing,
516 F. Supp. 412 (S.D.N.Y. 1981) 11

Western Fed. Corp. v. Erickson,
739 F.2d 1439 (9th Cir. 1984) 9

White v. Sundstrand Corp.,
256 F.3d 580 (7th Cir. 2001) 13

Williams v. Rohm and Haas Pen. Plan,
658 F.3d 629 (7th Cir. 2011) 6, 7, 12

STATUTES, RULES AND REGULATIONS

15 U.S.C.,
§77k(e) 9
§78i(f) 10
§78r(a)....................10
§78u-4(a)(6) 11
§78u-4(a)(8) 11
§78u-4(c)....................10

17 C.F.R.
§240.10b-5 11

Federal Rules of Civil Procedure
Rule 11 ....10, 11
Rule 11(b) 11

Page

LEGISLATIVE HISTORY

Private Securities Litigation Reform Act of 1995 ....3, 8, 11

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970..................10

SECONDARY AUTHORITIES

4 William B. Rubenstein, *Newberg on Class Actions* (5th ed. 2016)
§13:21 14

I. INTRODUCTION

The $1,575,000,000 Settlement and Lead Counsel's request for attorneys' fees and expenses are fair and reasonable for all of the reasons explained in Lead Counsel's opening papers, including the Settlement's size, the record-setting percentage of damages recovered, the extraordinary amount of time, effort, and funds Lead Counsel dedicated to the case from its inception through trial and appeal to the eve of a retrial, and the substantial risk of non-recovery. Critically, the requested attorneys' fee meets the Seventh Circuit's standard for reasonableness: it is consistent with the market rate for sophisticated legal services rendered in cases like this. *Cf. In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*").

Now, with the Settlement Notice disseminated to potential Class Members, including the 33,871 Class Members with accepted claims, the Settlement Class's positive reaction overwhelmingly supports approval of the requested fee. Eligible Class Members comprise a veritable Who's Who of sophisticated investors – including mutual fund complexes, large state pension funds, union pension funds, and charitable foundations – ***and none of them objected***. There are more than 9,389 Class Members with an allowed loss in excess of $5,000 – and none of them objected. As the chart below illustrates, 1,700-plus eligible claimants have an allowed loss in excess of $100,000 – and none of them objected.

Allowed Loss	Accepted Claims	Objections
> $5,000,000	67	0
$1,000,000-$5,000,000	230	0
$100,000-$1,000,000	1,405	0

The lone objection was filed by Kevin P. McDonald ("McDonald" or "Objector") (Dkt. No. 2242), a former Household employee. Objector's claim was rejected because it was duplicative of the claim filed by Vanguard, the trustee of Household's Tax Reduction Investment Plan ("TRIP Plan"), which bought the stock for the benefit of McDonald and thousands of other participants in that employee benefit plan. And Vanguard, the TRIP Plan's administrator (with its $37.6 million

1188010_2

claim), did not object. Objector's allowed loss under the Plan of Allocation is $1,734, approximately 0.000000828% of the total allowed loss for all claimants.

While Objector stands to gain very little through his objection, his attorney John W. Davis undoubtedly cares a great deal. As recently as September 16, 2016, United States Magistrate Judge Lurana S. Snow described Davis and some of his cohorts as "'professional objectors' ***who threaten to delay resolution*** of class action cases unless they receive extra compensation." *Muransky v. Godiva Chocolatier, Inc.*, No. 15-60716-CIV-DIMITROULEAS/SNOW, 2016 U.S. Dist. LEXIS 126810, at *9 (S.D. Fla. Sept. 16, 2016).[1]

Regardless of his suspect motivation or choice of counsel, Objector's scattershot objections ignore the record and fundamentally misstate the law. He argues that fee percentages should fall as the stakes increase (Objection at 6), rather than rising as specified in Lead Counsel's negotiated fee agreement; that "'a sensible ceiling'" on lodestar-based awards would be a multiplier of two (*id.* at 7); and that Lead Counsel's lodestar is inadequately documented and improperly inflated. *Id.* at 11-13. All of these criticisms share a common defect: none is supported by any evidence of ***market-based*** practices, which the Seventh Circuit holds is the determinative factor.

As Professor Charles Silver points out, "although the Objection claims to apply the mimic-the-market approach adopted by the Seventh Circuit, it does nothing of the sort." Second Supplemental Report of Professor Charles Silver on the Reasonableness of Lead Counsel's Fee Request ("Silver 2nd Supp. Rpt."), ¶2. Instead, the Objection "ignores the market for legal services almost entirely," and provides almost no "evidence tending to show what real clients pay real lawyers in relevant contexts." *Id.* In so doing, the Objection disregards the Seventh Circuit's repeated admonition that "any method" of determining fees "other than looking to prevailing market rates assures random and potentially perverse results." *Synthroid I*, 264 F.3d at 719.

Tacitly acknowledging his lack of market-based evidence, Objector instead urges a new, farcical framework for determining attorneys' fees in securities-fraud class actions: he contends that the fee award must be capped because it is governed by a fee-shifting statute. Again, Objector is

[1] ***Emphasis*** is added and internal citations omitted throughout, unless otherwise indicated.

wrong: notwithstanding the thousands of decisions awarding fees in securities cases, Objector cannot cite a single one holding that the attorneys' fee award should be made pursuant to a fee-shifting scenario – and with good reason, for no fee-shifting statute applies to this case. Moreover, even where claims ***are*** brought under statutes with fee-shifting provisions, the Seventh Circuit has repeatedly held that where a settlement creates a common fund the fee must be determined by looking to the market rate.

As Professor Silver opines, "[t]he McDonald Objection is worse than wrong; it is misleading and dangerous, and it should be overruled." Silver 2nd Supp. Rpt., ¶1. The Settlement is not just fair, reasonable and adequate – it is remarkable, arguably the greatest recovery ever obtained in a securities class action.[2] The request for attorney's fees, analyzed under Seventh Circuit precedent, should be granted.

II. THE PROPOSED FEE AWARD IS REASONABLE

A. The Class's Reaction Supports the Requested Fees and Expenses

There are 33,871 Class Members entitled to share in the historic recovery here, including thousands of institutional investors with fiduciary duties to protect their beneficiaries' assets. ***None*** of those sophisticated Class Members objected to either the Settlement or the requested fee award. "Their silence here speaks loudly." Silver 2nd Supp. Rpt., ¶7. In a similar situation in *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 959 (7th Cir. 2013), the Seventh Circuit noted the importance of non-objection from institutional investors:

> A district judge, looking out for the interests of all class members, sometimes must consider issues that the class representatives and their lawyers prefer to let pass. ***This is not such a situation, however***. Institutional investors such as pension funds and university endowments hold claims to more than 70% of the settlement fund. These institutional investors have in-house counsel with fiduciary duties to protect the beneficiaries. That these large investors, looking out for themselves, help to protect the interests of class members with smaller stakes is a premise of several rules in the Private Securities Litigation Reform Act of 1995. ***The difference between 27.5% of $200 million and a smaller award (say, one averaging 20%) could be a tidy sum for institutional investors (including this suit's lead plaintiff, a pension fund), one worth a complaint to the district judge if the lawyers' cut seems too high. Yet none of the institutional investors has protested*** . . . .

[2] Lead Plaintiffs defend the Settlement in a concurrently filed reply memorandum.

Here, institutional investors hold claim to approximately 90% of the Settlement Fund. Supplemental Declaration of Michael J. Dowd Filed in Support of Motions for Final Approval of Class Action Settlement and For an Award of Attorneys' Fees and Expenses, ¶4 ("Dowd Supp. Decl."). There are 67 claimants with more than ***$5 million*** of allowed losses, and ***1,702*** with more than ***$100,000*** of allowed losses. *Id.*, ¶3. "Yet none" of these claimants "has protested." *Silverman*, 739 F.3d at 959.[3] Instead it appears these major stakeholders, like the institutional investor Lead Plaintiffs who oversaw this action, "support both the settlement and the plan of allocation" and recognize that Lead Counsel "deserve an award of 24.68% of the Settlement Amount." *See* Glickenhaus Decl., ¶¶7-8 (Dkt. No. 2230) ("This was a long, difficult and dangerous road. Lead Counsel's performance was outstanding."); *see also* Parker Decl., ¶5 (Dkt. No. 2231) ("In our view, Lead Counsel deserve the agreed-to fee for bearing tremendous risks and obtaining a best-of-its-kind result."). "Evidently, the institutional investors understand that over 14 years of litigation during which a litigation class was certified, the case was tried to a verdict, and the judgment was overturned on appeal, Lead Counsel incurred enormous costs and risks, justifying a large fee." Silver 2nd Supp. Rpt., ¶6.

B. The Sole Objection to the Proposed Fee Award Should Be Overruled

1. The Objection Ignores Overwhelming Evidence that the Proposed Fee Is Consistent with the Market Rate

Trying to prop up his position, Objector largely relies on manuals for judges, studies of judicial positions, and out-of-circuit case law rather than offering evidence of market rates – the Seventh Circuit's fee-award paradigm.[4] Silver 2nd Supp. Rpt., ¶3. Indeed, the Seventh Circuit's approach to attorney-fee awards is straightforward: "courts must do their best to award counsel ***the market price*** for legal services, in light of the ***risk of nonpayment*** and the ***normal rate of compensation in the market*** at the time." *Synthroid I*, 264 F.3d at 718. The *Synthroid I* panel held

[3] *See also Larson v. JPMorgan Chase*, 530 F.3d 578, 581 (7th Cir. 2008) (large sophisticated public pension investor with $6 million claim presumed to follow litigation since "[l]arge pension funds have securities lawyers on retainer, and their lawyers would have known about and monitored the progress of the class action").

[4] For example, Objector relies on *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000), but the Seventh Circuit has expressly rejected the Second Circuit's "chopped salad" approach. *See, e.g.*, *Synthroid I*, 264 F.3d at 719 ("The second circuit's consider-everything approach . . . lacks a benchmark; a list of factors without a rule of decision is just a chopped salad.").

that the "market rate for legal fees depends in part on the risk of nonpayment a firm agrees to bear, in part on the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case." *Id.* at 721. In their opening brief, Lead Counsel demonstrated that each of these factors supports the fee request here. *See* Plaintiffs' Motion and Memorandum of Law in Support of Motion for an Award of Attorneys' Fees and Expenses and Reasonable Costs and Expenses for Lead Plaintiffs ("Plaintiffs' Mem.") (Dkt. No. 2222).

Lead Counsel have established that "the 'prevailing method' of compensating lawyers for 'similar services' is the contingent-fee" and, therefore, "the contingent fee ***is*** the 'market rate.'" *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (emphasis in original); *see also Martin v. Caterpillar Inc.*, No. 07-cv-1009, 2010 U.S. Dist. LEXIS 145111, at *4-*5 (C.D. Ill. Sept. 9, 2010) ("approaching the determination through the lens of the market," percentage fee award most appropriate because "'most suits for damages in this country are handled in the plaintiff's side on a contingency fee basis'"). All of the evidence before the Court shows – and Objector does not contest – that "the case would be handled on a class action contingency fee basis in the private market." *McKinnie v. JP Morgan Chase Bank*, N.A., 678 F. Supp. 2d 806, 815 (E.D. Wis. 2009); *see also id*. ("[C]lass members have little motivation to retain counsel on an hourly basis because they are not guaranteed to prevail on their claims and the individual damages suffered were nominal. A contingency fee arrangement is appropriate in such a case because it insulates the plaintiffs from any economic risk if their litigation is ultimately unsuccessful.") As such, the Court should "award attorneys' fees as a percentage of the common fund because it most closely replicates the market for the legal services provided." *Id.*

Lead Counsel has submitted declarations from Professor Silver demonstrating that the market rate in this case is certainly no less than 24.68% of the recovery. Professor Silver opined that "in the private market for commercial litigation and securities fraud cases," the prevailing range "runs from 25 percent to 40 percent." *See* Supplemental Report of Professor Charles Silver on Attorneys' Fees ("Silver Supp. Report") (Dkt. No. 2226), ¶4. Professor Silver included a table of 64 cases in which judges awarded fees in excess of 25% to plaintiffs' counsel in so-called "megafund" cases. Silver

Supp. Report, ¶¶19-22, Table 1.[5] Professor Silver also explained that there are only a handful of cases similar to *Household*, and that the courts in these cases all awarded fees ***in excess*** of the percentage requested here. Silver Supp. Report, ¶¶23-30, Table 2. Importantly, in one of these cases, plaintiffs' counsel had negotiated fee agreements calling for fees in excess of 25%. *See Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006) (agreements with most, if not all plaintiffs, were for one-third of recoveries). In another similar case, *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2016 WL 4060156, at *5 (D. Kan. July 29, 2016), the court noted that "a one-third fee is customary in contingent-fee cases, and indeed that figure is often higher for complex cases or cases that proceed to trial." Finally, Professor Silver provided evidence of similar agreements negotiated between sophisticated investors and Lead Counsel in other securities class actions. *See* Silver Supp. Report at 23, Table 4.

In response to this overwhelming evidence of the relevant market rate, Objector comes to the table empty-handed. He offers no competing declaration from an expert in this field, but instead erroneously claims that (i) the Seventh Circuit has erected a "ceiling" in megafund cases whereby (ii) fees are limited to two times the lodestar amount. *See* Objection at 7-8.

Objector is dead wrong on both counts. The Seventh Circuit expressly ***rejects*** the notion of a "megafund cap," reasoning that "'[p]rivate parties would never contract for such an arrangement, because it would eliminate counsel's incentive to press for' a higher settlement." *See Williams v. Rohm and Haas Pen. Plan*, 658 F.3d 629, 636 (7th Cir. 2011). The *Williams* court held that limiting a percentage fee award to a certain lodestar multiple should be rejected for the same reason.

[5] Since Professor Silver compiled Table 1, a 65th fee of more than 25% was awarded in a "megafund" case. On September 26, 2016 counsel was awarded a $61,320,000 fee – 28% of the $219 million settlement – in the *Genworth* securities class action. *In re Genworth Fin. Sec. Litig.*, No. 3:14-cv-682, 2016 U.S. Dist. LEXIS 132269, at *22 (E.D. Va. Sep. 26, 2016). Notably, as with the $500 million-plus securities fraud settlements discussed in Plaintiffs' opening papers (Plaintiffs' Mem. at 19 & Exhibit C), the percentage of damages recovered for investors in Household – 75% to 252% depending on the damages model – dwarfs the percentage of damages recovered for investors in *Genworth*. Indeed, in *Genworth*, the "settlement represents approximately 15% of the damages the plaintiffs could win if they prevailed on each and every issue." *Genworth*, 2016 U.S. Dist. LEXIS 132269, at *10 n.3 (approving settlement and comparing the 15% recovery favorably with the 3.6% "'median settlement' in 'class actions brought under the PSLRA'").

Williams, 658 F.3d at 636.[6] In fact, Seventh Circuit courts awarding percentage fees are not even obliged to conduct lodestar analyses – let alone impose arbitrary caps. *Id.* ("consideration of a lodestar check is not an issue of required methodology"). This is consistent with the Seventh Circuit's insistence that fees must be awarded based on market rates. Not surprisingly, Objector provides no evidence that real clients cap fees at his suggested (or any other) lodestar multiplier when negotiating ***contingency fee*** arrangements – nor could he: "[w]hen hiring lawyers on straight contingency (as class members do), real clients set fees as percentages of their recoveries. They do not otherwise seek to limit lawyers' risk premiums or hourly rates." Silver 2nd Supp. Rpt., ¶28.

Straining to demonstrate that the relevant market rate nonetheless is below 25%, Objector points to cases such as *Enron* and *WorldCom*, where counsel agreed to a lower fee percentage. However, "Enron and WorldCom were scandalous frauds that captivated the public, led to criminal indictments, and precipitated the collapse of enormous companies. By comparison, the alleged fraud at Household was a minor event." Silver 2nd Supp. Rpt., ¶24. Because of the nature of these cases in which plaintiffs' law firms were tripping over themselves to represent the investor classes, the ***market*** dictated lower percentages. In *Enron*, for example, 20 plaintiffs' firms sought appointment as lead counsel.[7] *See* Plaintiffs' Mem., Ex. B. Similarly, in *WorldCom*, 13 firms vied for lead counsel (*id.*, Ex. B) and approximately 80 institutional investors filed opt-out cases – further

[6] The $43.5 million fee award affirmed by the *Williams* panel represented a ***5.85*** lodestar multiplier. *See* Appellants' Opening Brf. at 7 & 32, in 7th Cir. No. 10-3713; *accord Johnson v. Meriter Health Servs. Emple. Ret. Plan*, No. 10-cv-426-wmc, 2015 U.S. Dist. LEXIS 158859, at *17 (W.D. Wis. Jan. 5, 2015) (same). Thus, Objector's insinuation, based on a fee-shifting case, that the Seventh Circuit has "never approved" a fee that was more than three times the lodestar in a common fund case like this one is simply wrong. In fact, Objector cites no case where the Seventh Circuit has reversed a district court for awarding a percentage of the recovery in a common fund case on the ground that the district court was required to cap fees based on a lodestar calculation. The reason is that the Circuit's *ex ante* market-based approach considers different factors than the necessarily *ex post* perspective a lodestar cap entails. *See Synthroid I*, 264 F.3d at 719.

[7] Objector says the *Enron* fee award supports his position. However, Objector ignores that the fee agreement negotiated by a sophisticated lead plaintiff in that case also called for an ***increasing*** fee sliding scale. *In re Enron*, 586 F. Supp. 2d 732, 769 (S.D. Tex. 2008). The recovery in *Enron*, like the recovery here, demonstrates that such incentives actually work. As the *Enron* court held: "The graduated formula in the fee agreement has served the best interests of the class in inspiring counsel to continued zealousness, tenacity, and substantial investment of its own funds, resources and legal services over this lengthy period . . . ." *Id.* The same analysis applies here.

demonstrating the case's attractiveness.[8] In stark contrast, only three law firms sought appointment in *Household*; two later withdrew, and there were no opt-out cases.[9]

Objector's blithe dismissal of the negotiated fee agreement also falls flat. Objector does not dispute that the terms of the agreement were bargained for between sophisticated parties when the ultimate recovery was unknown and nearly all of the work lay ahead. Instead, he argues that the agreement was structured for a ***smaller*** case – and thus shows himself to be doubly wrong.

First, Objector's argument contradicts his suggestion elsewhere that it was apparent from the start that *Household* was equivalent to *Enron* and *WorldCom*. Second, it "is just an exercise in Monday-morning quarterbacking." Silver 2nd Supp. Rpt., ¶14. The agreement here was structured to incentivize Lead Counsel to maximize the recovery. The fact that Lead Counsel exceeded expectations and generated a result beyond what may have seemed possible in 2005 is a reason to approve the fee, not cut it. *Id*. ("Mr. McDonald may wish to punish success, but a judicial practice of refusing to honor contracts that yield excellent results would harm investors by weakening lawyers' incentives in cases where the damages, and therefore the potential recoveries, are especially large."); *see also id*., ¶15 ("law does not punish success," but instead "entitles lawyers who perform exceptionally well to collect the fees promised in their contracts").

2. This Case Is Not Subject to a Fee-Shifting Regime

Objector argues that "federal securities claims are subject to a fee shifting regime," requiring that any award of attorneys' fees be limited to Lead Counsel's lodestar. Objection at 10-11. This

[8] Neil L. Selinger, *Why Funds Opt Out of Class Actions*, Pensions & Investments, Feb. 20, 2006.

[9] Objector's observation that seven complaints were initially filed and then consolidated does not change these facts. Multiple initial complaints are often filed in securities-fraud cases for various reasons. And, as Objector concedes, those complaints do not constitute a commitment to litigate the case to its completion because the Private Securities Litigation Reform Act of 1995 ("PSLRA") dictates consolidation and appointment of a lead plaintiff who will control the case (and whose counsel will invariably incur the correspondent risk and expense). Ultimately, only three firms were willing to seek representation of the class. This, combined with the lack of opt-outs, demonstrates *Household's* initial attractiveness was a far cry from *Enron* and *WorldCom*. Objector's suggestion to the contrary is based on nothing more than improper *ex post* observation of the size of the overturned verdict and the ultimate settlement – a methodology roundly criticized by the Seventh Circuit. *See Synthroid I*, 264 F.3d at 718 (at "the end," when the amount recovered is known, "hindsight alters the perception of the suit's riskiness").

fantastic notion, based on Objector's unsupported reading of the federal securities laws, is patently erroneous and should be rejected. The reasons are myriad.

First, Objector's argument contradicts controlling Circuit precedent. Indeed, in assessing attorney-fee requests, the Seventh Circuit treats securities-fraud class actions as ***common fund*** cases, not as cases subject to a fee-shifting statute.[10] For example, in *Sutton v. Bernard*, a securities-fraud class action, the Seventh Circuit held that the district court erred first in applying the "degree of success" standard articulated in a fee-shifting case "to its calculation of a fee percentage in a common fund case," and second in failing to "factor into its assessment the value that the market would have placed on Counsel's legal services had its fee been arranged at the outset." 504 F.3d 688, 693-94 (7th Cir. 2007); *see also id.* at 692 (criticizing the district court for "misappl[ying] the principles that govern fee shifting cases ***to the common fund case before it***"). The Seventh Circuit specifically distinguished fee-shifting cases from the securities-fraud class action at issue, where "the district court was required to determine a reasonable attorneys' fee for Counsel to be paid out of the common fund." *Id*. at 692-93 (discussing differences between statutory fee-shifting cases and common fund cases). The Seventh Circuit then vacated the district court's fee award of 15% because it was based on an erroneous conclusion of law. *Id*. at 694; *accord Silverman*, 739 F.3d at 956-57 (affirming award of 27.5% of settlement fund in a securities-fraud class action).

Second, unlike true fee-shifting statutes, the federal securities laws do not allow for routine shifting of attorneys' fees to the prevailing party. Under Securities Act §11(e) – Objector's purportedly "express" fee-shifting provision – attorneys' fees may be shifted ***only*** if the court finds that the suit or its defense was frivolous or in bad faith. *See* 15 U.S.C. §77k(e) (granting district court discretion to assess attorneys' fees only "if the court believes the suit or the defense to have been without merit"); *Western Fed. Corp. v. Erickson*, 739 F.2d 1439, 1444 (9th Cir. 1984) (attorneys' fees may only be awarded under §11(e) if the claim or defense borders on the frivolous or

[10] This is true even ***after*** the Supreme Court's decisions in *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286 (1993) and *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), thereby undermining Objector's argument that the fee-shifting provisions in §§9 and 18 "must" govern claims arising under §10(b). *See* Objection at 10 n.11.

is brought in bad faith). Similarly, 15 U.S.C. §78u-4(c) provides for attorneys' fees only as a ***sanction*** for violating Rule 11. *See* 15 U.S.C. §78u-4(c) (directing courts to impose sanctions upon a finding that a party or attorney violated Rule 11(b)); *Destefano v. Zynga, Inc.*, No. 12-cv-04007-JSC, 2016 WL 537946, at *21 (N.D. Cal. Feb. 11, 2016) (rejecting as "unavailing" the objector's argument that the court should not award common-fund fees before determining whether fee liability should be shifted to defendants under 15 U.S.C. §78u-4(c) and Rule 11).[11]

Because the prevailing party in a claim under §§11 or 10(b) is not ordinarily entitled to have the losing party pay its attorneys' fees, Objector's reliance on fee-shifting cases limiting attorneys' fees to counsel's lodestar is misguided. For example, Objector cites *Pierce v. Visteon Corp.*, 791 F.3d 782, 787 (7th Cir. 2015), a case involving an award of attorneys' fees under ERISA's express fee-shifting provision. Unlike *Pierce*, however, this case was ***not*** litigated under a fee-shifting statute and was resolved via a settlement that yielded a common fund. *Cf. Sutton*, 504 F.3d at 692.[12] Moreover, *Pierce* actually supports Lead Counsel's fee request, as it suggests that a different result would obtain if there were a contract between counsel and the class. *See Pierce*, 791 F.3d at 787 ("But this case was litigated under a fee-shifting statute, and we do not see a good reason why, ***in the absence of a contract***, counsel should be entitled to money from the class on top of or in lieu of payment by the losing litigant."). Here, the contract (*i.e.*, fee agreement) between Lead Counsel and Lead Plaintiff IUOE provides the best evidence of the market rate for Lead Counsel's services, and thus supports the requested attorneys' fees. *See* Plaintiffs' Mem. at 6-8.

Third, Objector's contention that the fee-shifting provisions of 15 U.S.C. §§78i(f) and 78r(a) "must" govern claims arising under §10(b) is unfounded. Objection at 10 n.11. Despite the fact that these provisions were enacted more than 80 years ago, Objector fails to cite a single securities case

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[11] The objector in *Zynga* also argued, as does Objector here, that counsel's attorneys' fees should be capped at counsel's lodestar based on the purported fee-shifting provisions of the securities laws. *See Zynga*, No. 12-cv-04007-JSC (N.D. Cal.) (Dkt. No. 220 at 6-8). Mr. Davis served as co-counsel for the Objector in *Zynga* as well. In finding the withdrawn objection to the fee request "unavailing," the *Zynga* court implicitly rejected the objector's fee-shifting argument. This Court should do the same.

[12] For the same reasons, Objector's reliance on *Haggart v. Woodley*, 809 F.3d 1336 (Fed. Cir. 2016), is also unavailing, as that case involved a statutory award of attorneys' fees under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, not the settlement of a securities-fraud class action.

supporting his argument – and little wonder, for it has been explicitly rejected by both the Seventh and Second Circuits, and contradicts Supreme Court precedent. *See, e.g.*, *Bailey v. Meister Brau, Inc*., 535 F.2d 982, 994 n.16 (7th Cir. 1976) ("While statutory provisions by which a plaintiff may recover attorneys' fees appear in several sections of the federal securities laws . . . ***they are inapplicable to 10b-5 actions***."); *Sutton*, 504 F.3d at 692 (reversing district court for applying fee-shifting principles to common fund securities class action); *Van Alen v. Dominick & Dominick, Inc*., 560 F.2d 547, 553 (2d Cir. 1977) (rejecting argument that attorneys' fees should be awarded to the prevailing party in a §10(b) case by analogy to the express allowance of attorneys' fees in §§9 and 18); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980) (applying the common fund doctrine to the settlement of a securities class action).[13] Objector's argument also contradicts the PSLRA, which mandates that "[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable ***percentage*** of the amount of any damages and prejudgment interest actually paid to the class." 15 U.S.C. §78u-4(a)(6).[14]

Finally, even if Objector were correct that plaintiffs' claims involve fee-shifting statutes – and plainly, he is not – a percentage fee award would still be appropriate under Seventh Circuit precedent: "common fund principles properly control" cases initiated under fee-shifting statutes but are then "settled with the creation of a common fund." *Florin v. Nationsbank, N.A.*, 34 F.3d 560,

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[13] In *Boeing* the U.S. Supreme Court upheld the longstanding rule that a lawyer is entitled to a reasonable attorney fee from a common fund. *Boeing*, 444 U.S. at 481-82. Although Objector takes pains to point out the lodestar multiplier of the fee awarded on remand, he omits that the fee was over 36% of the judgment. *Van Gemert v. Boeing*, 516 F. Supp. 412, 420, Appendix II & n.9 (S.D.N.Y. 1981) (awarding fees of $3,211,607 out of a $8,736,526 judgment).

[14] Objector relies on *Musick*, 508 U.S. 286, and *Lampf*, 501 U.S. 350, to support his argument – but to no avail. In *Musick*, the Supreme Court applied the express ***contribution*** provisions in §§9 and 18 to Rule 10b-5, while in *Lampf*, the Supreme Court borrowed §§9 and 18's express ***statute of limitations*** periods and applied them to claims under §10(b). *Musick*, 508 U.S. at 297-98; *Lampf*, 501 U.S. at 362. However, neither of those cases addressed attorneys' fees, and the Supreme Court counsels that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975) (discussing the "American Rule" with respect to attorneys' fees). There is no express provision in §10(b) that shifts attorneys' fees to a prevailing party (apart from the provision of the PSLRA allowing sanctions for Rule 11 violations and 15 U.S.C. §78u-4(a)(8)). In the absence of an express provision, this Court should decline to apply the fee-shifting provisions of §§9 and 18 to plaintiffs' §10(b) claims. *See Gaffney v. Riverboat Servs.*, 451 F.3d 424, 466 (7th Cir. 2006) (Seventh Circuit "follow[s] the 'American Rule' with respect to attorneys' fees, which requires 'express' statutory authorization of such fees," and declining to shift attorneys' fees to losing party where statute did not expressly provide for fee-shifting).

564 (7th Cir. 1993); *see also Williams*, 658 F.3d 629 (approving 24.17% common-fund fee in ERISA fee-shifting action). In *Florin*, the Seventh Circuit "restat[ed] the law of this circuit that in common fund cases, the decision whether to use a percentage method or a lodestar method remains in the discretion of the district court." *Florin*, 34 F.3d at 634-35. That Circuit-mandated discretion controls here. The Court should exercise that discretion to award a percentage of the common fund – 24.68% – which replicates the market for the legal services provided.

3. Lead Counsel's Lodestar Is Well Documented, and Its Reasonable Hourly Rates Reflect the Relevant Marketplace

Objector asserts that Lead Counsel's lodestar is inadequately documented and inflated. Objections at 11-13 (relying on *Shane Group, Inc. v. Blue Cross Blue Shield*, 825 F.3d 299 (6th Cir. 2016)). As a threshold matter, the Seventh Circuit does not require a lodestar analysis in a percentage fee award case. *Williams*, 658 F.3d at 636 (rejecting objectors' lodestar cross-check argument against 24.17% fee award: "consideration of a lodestar check is not an issue of required methodology"). Therefore, Lead Counsel's lodestar is irrelevant. In any event, Objector is wrong.

Unlike in *Shane Group*, where "class counsel ***provided no backup whatsoever***," with "no descriptions of work done" (825 F.3d at 310), Lead Counsel has submitted two declarations exhaustively describing its decade-plus efforts on behalf of the Class. Objector acknowledges just the Dowd Declaration, which by design focused primarily on expenses while summarizing lodestar information. However, Objector conspicuously ignores the 152-page Burkholz Declaration describing Lead Counsel's herculean litigation efforts over 14 years – including detailed descriptions of extensive motion practice, depositions taken and defended, the complicated first trial, the contested claims process, the 18-month-long Seventh Circuit appeal, and the renewed work leading up to the Settlement reached on the morning that the second trial was slated to begin.[15] (*Shane Group*, conversely, settled within two years of the district court's entry of an order denying defendants' motion to dismiss.) Moreover, as Lead Counsel has already demonstrated, the work in

[15] Indeed, Davis did not need to rely on Mr. Burkholz and Mr. Dowd; instead, he could simply have reviewed the 14-year-long docket with its 2,243 entries to fully and fairly assess the unprecedented commitment by Lead Counsel in this case.

this case was done efficiently when compared to other cases that have resulted in top securities class action settlements. *See* Plaintiffs' Mem. at 24-25, Ex. D.

Moreover, to the extent that the lone Objector contests the hourly rates set by Lead Counsel for certain partners, he neglects to compare Lead Counsel's rates to the rates customarily charged by defense counsel who played critical roles in this case. Skadden Arps partners charge $845-$1,150 per hour. Dowd Supp. Decl., ¶5. Cahill Gordon partners charge $920-$1,140. *Id.* Mr. Clement of the Bancroft firm, who briefed and argued the appeal for the Household Defendants, charges $1,350 per hour. *Id.* At $645-$960 per hour, Lead Counsel's partners' rates are lower than their adversaries who did not wait 14 years to be paid and never faced a risk of non-payment.

Further, Objector's criticism of Lead Counsel's insistence that defendants post a supersedeas bond reflects both his unfamiliarity with the litigation and Lead Counsel's obligations to the Class. Though Objector denigrates this expense as "wholly unnecessary" from the comfort of his Monday-morning, risk-free easy chair, the record demonstrates his ignorance. Lead Counsel consulted ***two*** bankruptcy firms to determine the propriety of proceeding without requiring that defendants post a supersedeas bond. Silver 2nd Supp. Rpt., ¶16. Based on that specialist advice, Lead Counsel concluded that the Class would only be adequately protected by a supersedeas bond and thus refused to accept a riskier alternative "with full awareness of the potential consequences." *See* Dkt. No. 2061 at 4; *see also* Silver 2nd Supp. Rpt., ¶¶16-17.

Finally, Objector suggests that Lead Counsel somehow inflated its lodestar by advising the Court of combined time and expenses – but Lead Counsel correctly noted that the lodestar multiplier was 5.4 ***without*** expenses. Plaintiffs' Mem. at 25. The additional combined figure was provided to demonstrate the investment of time ***and*** cash ($105 million) in comparison to the requested fee. Indeed, in ordering Plaintiffs to pay the bond costs, this Court relied on *White v. Sundstrand Corp.*, 256 F.3d 580 (7th Cir. 2001), where the Seventh Circuit described both legal services and the risk of cost awards and other expenses as part of the overall "risk of failure" that contingent-fee lawyers take "***in exchange for a premium award if the class prevails***." *Id.* at 585-86. The combined figure remains an apt one.

4. The Objector's Claim and Some Pointed Judicial Commentary About His Counsel's *Modus Operandi*

McDonald is a former Household employee and a participant in the Household TRIP Plan – an employee benefit plan. In 2012, defendants objected to any claims submitted by former Household employees, as well as to the claim submitted by Vanguard on behalf of the TRIP Plan. Over plaintiffs' objection, Special Master Stenger found that both former Household employees (like Objector) and the TRIP Plan were Household "affiliates," and, therefore, excluded from the Class due to the Class definition. Dkt. No. 2015. Lead Counsel timely objected to the Special Master's Report and Recommendation on July 23, 2015 (Dkt. No. 2023), but this Court deferred ruling on that objection. Had Lead Counsel not objected and the Special Master's findings been adopted, McDonald would not be a Class Member at all. However, in light of Lead Counsel's objection to the Special Master's Report and Recommendation, the Vanguard TRIP claim (and consequently, McDonald) is considered eligible to participate in the recovery. McDonald's objection is seemingly at odds with his own interest: either he does not understand the lay of the land or his motive in objecting is something other than an effort to increase his recovery. Given the precarious nature of his claim, one wonders why he would even bother to object.

Perhaps the answer lies with Objector's counsel John Davis – a "professional objector."[16] Indeed, Davis has represented objectors (or been one himself) in numerous proceedings across the nation – no fewer than 29 times – with courts often finding his objections to be without value and his arguments baseless. *See, e.g.*, *Faught v. Am. Home Shield Corp.*, 444 F. App'x 445, 446 (11th Cir. 2011) (affirming denial of fees to Davis and agreeing with district court that "the objectors' claims were based on speculation that [was] unsupported by the record"); *In re Checking Account*, 830 F. Supp. 2d 1330, 1336 (S.D. Fla. 2011) ("reject[ing] the arguments of Objectors in all respects, and find[ing] that they [were] completely unsupported in the record . . . and unpersuasive"); *Foos v. Ann*

[16] According to *Newberg on Class Actions*, professional objectors are "lawyers [who] organize their legal practice around objecting." 4 William B. Rubenstein, *Newberg on Class Actions* §13:21, at 351 (5th ed. 2016). Such "[r]epeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements." *Id.* at 351 n.11 (quoting *Barnes v. Fleetboston Fin. Corp.*, No. 01-10395-NG, 2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006)).

Taylor, No. 3:11-cv-2794, 2013 U.S. Dist. LEXIS 193070, at *3 (S.D. Cal. May 20, 2013) (requiring Davis-represented objector to post an appeal bond because "[t]he Court [had] concluded that each objection was without merit"); *Chieftain Royalty Co. v. SM Energy Co.*, No. CIV-11-177-D, 2016 U.S. Dist. LEXIS 128414, at *5-*6 (W. D. Okla. Mar. 10, 2016) ("easily find[ing] that an appeal bond [was] appropriate" when the arguments of Davis's client were "without merit" and the appeal "carrie[d] the risk of delaying allocation and payment" "to the vast majority of class members who did not object"); *Muransky*, 2016 U.S. Dist. LEXIS 126810, at *9 (concluding that Davis and several cohorts are "'professional objectors' ***who threaten to delay resolution*** of class action cases unless they receive extra compensation").

Equally troubling is Davis's demonstrated disregard for Class Members. As tabulated by a California Superior Court, Davis and fellow serial objector Steven Helfand have:

1) "confidentially settled or attempted to confidentially settle putative class actions in return for payment of fees and other consideration ***directly to them***";

2) "entered into a confidential settlement and dismissal in a putative class action ***without court approval***"; and

3) "threatened to assert new claims against defendants and to add individual defendants" if their settlement demand (involving payment to themselves) was not met.

Davis v. Apple, No. CGC-02-415376, Order Granting Defendants' Motion to Disqualify Attorney Steven Helfand, at 3 (San Francisco Sup. Ct., Nov. 20, 2003) (disqualifying Helfand as Davis's attorney). His history demonstrates Davis's willingness to delay payment to Class Members if it may benefit himself. His client's baseless objection should be overruled.

III. CONCLUSION

For the foregoing reasons, Lead Counsel's application for attorneys' fees should be granted.

DATED: September 29, 2016 Respectfully submitted,

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I hereby certify that on September 29, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses for counsel of record denoted on the attached Service List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 29, 2016.

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