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 The Honorable Jorge L. Alonso

CLASS MEMBER KEVIN McDONALD'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL REPLY BRIEF

Objector Kevin McDonald respectfully requests that this Court grant leave to file a single supplemental brief in response to Plaintiffs' Motion for Final Approval of Class Action Settlement (Dkt. 2220)[1], Motion for Award of Attorneys' Fees and Expenses (Dkt. 2222), Plaintiff's Reply Memorandum in Support of Final Approval (Dkt. 2244), and Reply Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees (Dkt. 2245). Mr. McDonald's proposed brief is attached hereto as Exhibit A. Mr. McDonald seeks leave to file a supplemental brief in order to streamline the final approval process by providing the Court with advance briefing concerning issues raised by Plaintiffs after the filing of Mr.

[1] District Court document entries are notated herein as "Dkt." followed by the document number.

McDonald's original objection. Plaintiffs' subsequent filings total approximately 48 pages, including declarations. Objector's proposed reply is less than 14 pages.

The attached brief identifies and briefly addresses the important merits issues this Court faces. By submitting this brief in advance of the hearing, Mr. McDonald seeks to promote efficient management of litigation and to sharpen the issues for discussion. He respectfully submits that the supplemental brief will assist the Court in its analysis of the fairness, adequacy, and reasonableness of the proposed settlement. Moreover, allowing Mr. McDonald to submit his brief will reduce the time required for oral argument.

MEMORANDUM OF LAW

The Court should not "assume the passive role that is appropriate when there is genuine adverseness between the parties" in the class settlement context where defendant and plaintiff are both advocating in favor of approval. *Redman v. Radioshack Corp.*, 768 F.3d 622, 629 (7th Cir., 2014) citing *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir.2014); *Staton v. Boeing Co.*, 327 F.3d 938, 959–61 (9th Cir.2003); *In re GMC Pick–Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 801, 819–20 (3d Cir.1995). "When there are objecting class members, the judge's task is eased because he or she has the benefit of an adversary process: objectors versus settlors (that is, versus class counsel and the defendant)." *Redman*, 768 F.3d at 629.

"Allowing class members an opportunity thoroughly to examine counsel's fee motion...is essential for the protection of the rights of class members. It also ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately-tested, information to evaluate the reasonableness of a proposed fee." *See Mercury Interactive Corp. Sec's Litig.*, 618 F.3d 988, 994 (2010); *accord Redman*, 768 F.3d at 638-39.

Mr. McDonald should be allowed to meaningfully participate in this process. *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992). Constitutional due process demands that Mr. McDonald be given an opportunity to respond - especially where, as here, Plaintiffs have attempted to improperly bias this Court by leveling *ad hominem* attacks which not only lack probative value, but are baseless (as demonstrated in the attached brief). In short, Mr. McDonald is entitled to preserve his interests in a settlement that will ultimately bind him. *Devlin v. Scardelletti*, 536 U.S. 1, 2, 122 S. Ct. 2005, 2007, 153 L. Ed. 2d 27 (2002).

Indeed, Mr. McDonald must be able to independently assess the settling parties' assertions of fairness, based on the record developed in the case. *Girsh v. Jepson*, 521 F.2d 153, 157-58 (3d Cir. 1975) (it is "elemental" that an objector is "entitled to an opportunity to develop a record in support of his contentions by means of cross examination and argument to the court" and that the denial of that opportunity is a violation of due process).

WHEREFORE, class member Kevin McDonald respectfully requests leave to file the brief submitted herewith.

Date: October 17, 2016

Respectfully submitted,

s/ John W. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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 email 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.

Date: October 17, 2016

s/ John W. Davis
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EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

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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 The Honorable Jorge L. Alonso

CLASS MEMBER KEVIN McDONALD'S SUPPLEMENTAL REPLY BRIEF

I. The Market Rate Analysis Supports a Much Lower Fee Than Class Counsel Seek

Central to Class Counsel's response to the McDonald Objection is the argument that the Seventh Circuit employs a "market rate" analysis to determine contingent common fund fees, and that a market rate analysis would justify their request for a fee. *See* Reply Memorandum in Support of Plaintiffs' Motion for an Award of Attorneys' Fees (Dkt. 2245 at 4-8). Applying a market rate analysis cannot possibly enlarge the fee as Class Counsel imply. The fee they seek far outstrips the fees ordinarily awarded in cases of this size, whether or not a "market rate" analysis is used. As might be expected, cases decided under a market rate analysis hew fairly close to the national average.[1] *See, e.g., In re Trans Union Corp. Privacy Litig.*, 629 F.3d 741, 744–45 and 748 (7th Cir. 2011) (noting lawyers' request for 17% of $110 million cash component of settlement was slightly under the 17.6 - 19.5 percentage range set forth in Eisenberg & Miller data, and modifying award to that amount) citing Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 51 (tab.1) (2004).

Even to the extent that they diverge, market rate theory does not support a 25% fee of a fund exceeding a billion dollars. On the contrary, one of the seminal "market rate" line of cases Class Counsel rely on is *In re: Synthroid*, in which the percentage scale ultimately applied was much lower than Class Counsel seek here: 30% of the first $10 million, 25% of the next $10 million, 22% on the recovery from $20 – 46 million, and 15% of amounts over $46 million. The Seventh Circuit determined that to be "a decent estimate of the fee that would have been established in *ex ante* arms'-length negotiations." *In re Synthroid Mktg. Litig.*, 325 F.3d 974,

[1] Although there are data suggesting that the advent of the market rate doctrine preceded an increase, relative to the national average, in the percentage awards in this Circuit, those same awards also represented slightly lower multipliers over lodestar. NEWBERG ON CLASS ACTIONS § 15:79 (5th ed.).

980 (7th Cir. 2003). Were the same formula used here, Class Counsel's fee would be $240,570,000.00.

Moreover, the *Synthroid* formula was applied to a smaller recovery. Objector has pointed out that settlement recoveries close to or exceeding a billion dollars are subject to a much lower percentage award, given the economies of scale involved in litigating to obtain those recoveries. *See* Objection to Proposed Settlement, Dkt. 2242 at ECF 5, citing *In re Enron Corp. Securities* , 586 F.Supp.2d 732, 768 (S.D. Tex., 2008).[2]

Class Counsel argue that the *Enron* fee agreement incorporated a formula that increased as the recovery increased, rather than applying decreasing percentages. That is true, but the distinction does nothing to justify Class Counsel's fee request: the *Enron* percentage range started at 8% and went up to 10%. *In re: Enron*, 586 F.Supp.2d at 768. Class Counsel here seek a fixed percentage of 24.68% applied to the entire recovery. That is almost two and a half times the maximum percentage in *Enron*. If *Enron's* increasing percentage terms were applied here, Class Counsel's fee would be closer to $155 million, and not $388 million.

Similarly, in *UnitedHealth* the plaintiff (represented by Class Counsel's predecessor firm) negotiated a sliding fee of 11-13%. The court ultimately awarded 11.92%. In light of the these terms negotiated by *bona fide* sophisticated plaintiffs, the fee that "real clients" (as

[2] It is no help to point out that there was no *ex ante* fee agreement in *Synthroid*, and the courts were tasked with determining *ex post* what an *ex ante* fee agreement would have been. The fee in the instant matter does not qualify for *ex ante* status because it was negotiated almost two and a half years after the complaint was filed. *See* Silver Decl. at ¶9, Dkt. 2247 at ECF 3. ("In fact, the retainer agreement upon which Lead Counsel's fee request is based was negotiated in April, 2005."). *See also Enron*, 586 F.Supp.2d at 766 ("In setting fees ex-post, the Court's evaluation of the risk of recovery, the skill of the attorneys, the complexity of the case, and the merit of the settlement or award are infected with hindsight bias.").

If Class Counsel nevertheless insist on relying on the agreement, then the Court here has the more difficult task of determining *ex post* whether an agreement made *in medias res* between highly sophisticated class counsel and a single, relatively unsophisticated union pension fund is equivalent to an *ex ante* agreement with a truly sophisticated institutional plaintiff.

Professor Silver puts it)[3] agree to pay appears to be much closer to 10% than 25% in cases approaching this size and complexity.

II. Litigation Risk Does Not Justify the Requested Fee

Class Counsel suggest this case was riskier than other cases like it, favoring a higher fee. The market rate analysis considers competition for control of the case as indicative of *ex ante* perception of risk. *E.g.*, *Silverman v. Motorola Sols., Inc*., 739 F.3d 956, 958 (7th Cir. 2013) ("When this suit got under way, no other law firm was willing to serve as lead counsel. Lack of competition not only implies a higher fee but also suggests that most members of the securities bar saw this litigation as too risky for their practices."). But unlike *Silverman*, in which no other firms stepped forward, this case was viewed as highly desirable. McDonald Objection, Dkt. 2242 at ECF 6-7.

Nor is there anything else in the record to suggest that this case was more than twice as risky as every other large securities case in history. Data collected by economic consultants shows that, for the top ten securities settlements of all time, ranging from just over $1 billion to an aggregate of over $7 billion in the *Enron* case, the fees and expenses combined were an average of 9.7% of the funds. *See* Svetlana Starykh and Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, NERA Economic Consulting (January 25, 2016) Tab. 2 at page 31.[4] Excluding the top five cases, and using only comparable cases in which the recovery was between $1 billion and $2.5 billion, the fees and expenses accounted for 9.1% of the common funds. *Id*. In a more recent context, the only comparable settlement in 2015 was *American International Group, Inc*., at $970.5 million; there, the fees and expenses of $122.5 million equated to 12.6% of the fund. *Id*., Table 1 at page 30. But that is

[3] Silver Decl., Dkt. 2247 at ECF 11

[4] Available at: http://www.nera.com/publications/archive/2016/2015-Securites-Trends-Report.html (last visited October 16, 2016).

something of an outlier: between 2011 and 2015, median attorneys' fees (excluding expenses) for securities settlements in excess of $1 billion were 9.6%. *Id*., Fig. 32 at page 36. That is up from the period 1996 through 2010, during which median fees for billion-dollar settlements were 7.6%. *Id*.

Precedential fee awards in settlements similar to this one in size do not support the fee requested here, regardless of whether a market rate analysis is applied, and instead suggest that the request is at least twice as high as it should be. Class Counsel are therefore reduced to arguing that the fee agreement they negotiated with one of the Lead Plaintiffs should nevertheless serve as a viable indicator of a reasonable market rate. As set forth below, it does not.

III. The Fee Agreement Made with IOUE Should Not Bind the Class

Despite the fact that a request for nearly 25% of a $1.575 billion common fund is facially insupportable under applicable precedent, Class Counsel urge this Court to make an exception because the fee was negotiated by a "sophisticated lead plaintiff." Dkt. 2245 at ECF 13 fn7. However, not all institutional lead plaintiffs are "sophisticated" as that term is used in the context of negotiating fees with outside counsel in complex litigation. Stephen J. Choi, Jill E. Fisch A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH U. L.Q. 869, 880 (2005) (drawing a distinction between mutual funds and pension funds, and concluding that "Mutual funds have failed to participate in securities fraud litigation at all, despite their substantial holdings" even though "mutual funds were the institutions that Congress really expected to serve as lead plaintiffs because of their substantial share of the securities market."). In fact, data show that securities class action lead plaintiffs are often not large mutual funds, but generally tend to be

smaller pension and union funds. *Id*. at 895-96 (reporting that "in both the pre- and post-PSLRA periods, the private institutional lead plaintiffs are relatively small, unknown institutions.")

This case is an example. Here, Class Counsel negotiated their fee agreement with the International Operating Union of Engineers Local No. 132 Pension Plan ("IOUE"). Dkt. 2222 at ECF 13. When Class Counsel filed the Amended Consolidated Class Action Complaint, the IOUE administered approximately $160 million for about 3,000 plan participants. Dkt. 54 at ECF 17.

By comparison, the Regents of the University of California managed approximately $63.3 ***billion*** at the time it filed its amended complaint in *Enron*.[5] Even so, the UC Regents are but small players next to *WorldCom* plaintiff New York State and Local Retirement System, which manages close to $190 billion[6], and the California Public Employees' Retirement System ("CalPERS"), which has served as lead plaintiff in cases such as *In re UnitedHealth Group Inc. PSLRA Litig.*, and which manages in excess of $300 billion.[7] These numbers suggest that IOUE with its $160 million under management is not, in fact, a "sophisticated" plaintiff positioned to negotiate a reasonable market rate fee. Yes, the IOUE is technically an institution and not a natural person, but:

> Institutional status, however, is a noisy proxy for having a substantial stake in the litigation. Many institutional lead plaintiffs are quite small and have relatively minor stakes. Similarly, many smaller institutions lack any particular sophistication. It is unclear why these institutions should be analyzed as distinct from individual lead plaintiffs with similar size stakes or why we should expect the institutions to add distinctive value to litigation.

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[5] *In re Enron Corp. Securities* , 586 F.Supp.2d 732, 766 (S.D. Tex., 2008); The Regents of the University of California, Treasurer's Annual Report at 4 (2004-2005).

[6] *In re Worldcom, Inc.*, 263 F.Supp.2d 745 (S.D.N.Y., 2003); New York State and Local Retirement System, Comprehensive Annual Financial Report (2015)

[7] *In re UnitedHealth Grp. Inc. PSLRA Litig.*, No. 06-CV-1691 (D. Minn.); CalPERS "Facts at a Glance," October 2015.

Choi, et al., 83 WASH U. L.Q. at 880 (footnote omitted). There is neither evidence, nor reason to assume, that the IOUE has particular experience dealing with outside litigation counsel in complex commercial litigation. Indeed, the fee agreement the IOUE made appears to be scaled to a case valued at a few hundred million dollars, rather than one involving in excess of a billion dollars. *See* Supplemental Report of Professor Charles Silve on Attorneys' Fees, Dkt. 2226 at 22-23. That Class Counsel bargained successfully for the more generous terms applicable to such cases bespeaks a lack of expertise in valuing the case *ex ante* on the part of the IOUE and Class Counsel or, more likely, just IOUE.

Moreover, Lead Plaintiffs in this case are a group of unrelated investors with relatively small holdings:

Lead Plaintiff	**Total Shares Purchased**	**Total Cost**	**Total Loss**
Glickenhaus & Co.	179,700	$9,640,313.00	$3,938,169.00
PACE Industry Union-Management Pension Fund	45,000	$2,799,299.00	$1,367,329.00
I.O.U.E. Local No. 132 Pension Plan	27,800	$1,663,744.00	$756,063.00

Declaration of Marvin A. Miller, Dkt. 22, Exs. A & B; Amended Consolidated Class Action Complaint, Dkt. 50, Ex. 1.

That seriously undercuts any presumption that the smallest member of that group was able to drive a hard bargain with Class Counsel:

> Courts and commentators that have criticized the use of lead plaintiff groups argue that such groups are often formed by counsel and as a result do not exert the type of lawyer control that was the objective of the PSLRA. If this is true, institutional participation as part of a group may not be as effective in monitoring counsel, and ***we would not expect such groups to have a significant effect on fee awards or fee structures***.

Choi, et al., 83 WASH U. L.Q. at 882 (footnote omitted) (emphasis added), citing *Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 811-16 (N.D. Ohio 1999) (appointing group of unrelated investors as lead plaintiff would thwart legislative purpose of greater client control over class counsel), followed in *In re Bally Total Fitness Sec. Litig.*, No. 04C3530, 2005 WL 627960, at *3–4 (N.D. Ill. Mar. 15, 2005).

The Lead Plaintiff bench is even thinner than it appears, in fact. Among them, the entity with the largest holdings and alleged losses is Glickenhaus & Co. But it is an investment advisor, a fact only obliquely disclosed in its declaration. Dkt. 2230 at ¶2 (Declaration of James Glickenhaus) ("As a money manager, Glickenhaus's investment portfolio includes shareholder positions in numerous publicly-traded companies."). As such, Glickenhaus & Co. presumptively does not have standing to assert claims based on the shares it manages. *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008) (plaintiff must have legal title or property interest in a legal claim to have Article III standing to pursue it), discussed in *CWCapital Asset Mgmt., LLC v. Chicago Properties, LLC*, 610 F.3d 497, 501 (7th Cir. 2010) (explaining in *dicta* that "a real party in interest differs from a lawyer, or someone else with a mere power of attorney, in having a claim to the proceeds of the suit even if its claim derives from legal rather than equitable title — legal title being the sort held by a trustee."). *See also W.R. Huff Asset Management Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 107-10 (2d Cir.2008) (investment adviser could not pursue claims on behalf of its clients – even when the adviser had power of attorney and full discretionary authority to make investment decisions), followed by *Nat'l Council On Comp. Ins., Inc. v. Am. Int'l Grp., Inc.*, No.

07 C 2898, 2009 WL 2588902, at *3 (N.D. Ill. Aug. 20, 2009). Thus, the fact that Glickenhaus & Co. may have later ratified the fee structure negotiated with the IOUE is irrelevant.[8]

Mere status as an "institutional investor" does not draw a presumption under the PSLRA of financial sophistication or more adequate oversight of counsel. *Cf., e.g., In re Groupon, Inc. Sec. Litig.*, No. 12 C 2450, 2012 WL 3779311, at *5 (N.D. Ill. Aug. 28, 2012) (collecting cases holding that institutional investors are not expressly favored over individuals with large losses as lead plaintiffs). It may be that large, sophisticated mutual or pension funds have the institutional motivation, talent, and experience to assess the potential value and risk of a case and to negotiate a reasonable contingent fee with litigation counsel. There is no justification for the presumption that any given local union pension fund (such as the IOUE) will have equivalent resources, and there is certainly no evidence to support that conclusion here.

IV. The Absence of Institutional Objectors is Not Compelling

Objector McDonald made a reasonable objection to the fee grounded in legal authority. Nevertheless, a large part of Class Counsel's argument is that the Court should ignore that argument because no other absent class member has echoed it. But an objector's (or objectors') arguments are either meritorious or they are not. A fee request is not made more reasonable

[8] Class Counsel's expert, Professor Charles Silver, seems to misapprehend the facts upon which he bases his declaration supporting the fee request. Apparently, he assumes (incorrectly) that all Lead Plaintiffs, including the largest, and most "sophisticated," of the Lead Plaintiff group (in holdings, losses, and funds under management), Glickenhaus & Co., were involved in the negotiations. Silver Decl. at ¶9, Dkt. 2247 at ECF 3. ("Ideally, fee terms would have been set for this case when the Court appointed the Glickenhaus Institutional Group to the Lead Plaintiff Position in December of 2002. In fact, the retainer agreement upon which Lead Counsel's fee request is based was negotiated in April, 2005."). As noted above, Class Counsel ultimately negotiated their fee agreement with the International Operating Union of Engineers Local No. 132 Pension Plan ("IOUE"). Dkt. 2222 at ECF 13. Of the three entities certified as Lead Plaintiff, IOUE had the fewest share purchases and the least amount of financial losses. *See* discussion, *supra*, at 7.

under the law by reference to the number or relative wealth of absent class members who might make the same argument against it, but for some unknown reason declined.

Nevertheless, Class Counsel's expert professes to be impressed with the lack of institutional objections to the fee request, suggesting that silence should be taken to mean that actual sophisticated institutions endorse the fee request.[9] There is no basis for that conclusion in this case. Contrary to the ideal, institutional shareholders rarely object to requested fees, no matter how high. Part of that may be explained by the well-documented difficulty in successfully objecting to fees in class actions. Brian T. Fitzpatrick, *The End of Objector Blackmail?* , 62 VAND. L. REV. 1623, 1631 & n.34 (2009) (contending that, despite objections, courts rarely reject settlements and reduce fees only slightly more frequently, citing research results that courts awarded the requested fees in full more than half the time, and that "downward departures tend to be quite small," such that courts awarding lower fees still award, on average, 90% of the requested fees.). Thus, even assuming that institutions have personnel or advisors capable of and engaged in analyzing the reasonableness of fee requests, the potential

[9] McDonald objects that Professor Silver's declaration is inadmissible under Fed. R. Evid. 702. He does not offer "anything more than the lawyers can offer in argument." *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir.1986); *In re. Prempro Prods. Liab. Litig.*, 554 F. Supp. 2d 871, 880, 885 (ED. Ark. 2008) (excluding expert declaration that was "more argument than expert testimony.") *aff'd in relevant part*, 586 F.3d 547 (8th Cir. 2009). Nothing at all in Professor Silver's declaration comprises "expert" testimony about the fee request or the context in which it occurs. Instead, Professor Silver's apparent task here is to lend the aura of academic objectivity to Class Counsel's request. He attempts that by repeating Class Counsel's legal arguments and pompously belittling Mr. McDonald for exercising his right to challenge this unprecedented fee request with reasonable legal arguments. The first is unnecessary; the second just ugly. Neither requires a paid expert. *See generally* Thomas E. Baker, *The Impropriety of Expert Witness Testimony on the Law* 40 U. Kan. L. Rev. 326 (1992). Stripped of its legal argument and oddly hostile condescension, there is no admissible opinion to be found in Professor Silver's declaration.

incremental per-share gain to the institution might reasonably be regarded as far too small and contingent to warrant appearing to oppose the fee.

That is amplified by the fact that institutions competent to analyze and object to a fee request are so large and diversified that their typical loss from a single company's fraud is too inconsequential even to pursue relief as a named plaintiff in the underlying class action in the first place. David H. Webber *Is "Pay-to-Play" Driving Public Pension Fund Activism in Securities Class Actions? An Empirical Study* 90 BOSTON U. L. REV. 2031, 2040 (2010) (noting study result that the average claimed loss for an institutional investor lead plaintiff in a securities class action is $3.9 million and opining that loss would be "inconsequential for the institutional investors with billions of dollars in assets that Congress envisioned as its ideal lead plaintiffs."). If that is so – and even putting aside the highly contingent nature of the endeavor – then the incremental gain to the institution intervening to oppose the fee in a settlement would be even more inconsequential.

Indeed, institutions have been surprisingly lax in filing claims in securities settlements at all. James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 424 (2005) (reporting evidence obtained from securities claims administrators that on average, only about 28% of eligible institutional investors file claims in securities class action settlements). Numerous reasons for this have been proposed and discussed in academic literature, ranging from institutional bias in favor of corporations and against the class action bar, ignorance of the settlement, lack of internal systems to discover and make claims, and the perception that the return will not justify the effort, among others. Brian J. Shea, *Better Go it Alone: An Extension of Fiduciary Duties for Investment Fund Managers in Securities Class Action Opt-Outs*, 6 WM. & MARY BUS. L.

REV. 255, 269 - 272 (2015) (setting forth a concise summary of the theories surrounding the results of the Cox & Thomas study, *supra*.). Whatever the reason, the majority of institutions do not file claims and thus have neither a motivation nor the legal standing to object to the fees requested. *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 957 (7th Cir. 2013) (concluding that an objector who did not file a claim "lack[ed] any interest in the amount of fees, since he would not receive a penny from the fund even if counsel's take should be reduced to zero"); *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1126 (9th Cir. 2002) (objector lacked standing to appeal a fee award, having failed to make a claim against the common fund in the settlement).

Given the realities of institutional participation, or non-participation, in class action securities cases, it is at least as likely that the absence of institutional opposition to the fee request results from rational apathy rather than a conviction that the IOUE artfully negotiated an outstanding deal with Class Counsel. Certainly, the silence of absent class members can hardly supplant this Court's own duty to ensure that the fee is reasonable by reference to controlling authority and common sense. McDonald is not a sophisticated mutual fund, but he is present before this Court and he is right, and that is what counts.

V. Class Counsel's *Ad Hominem* Attacks are Misguided, Particularly When Lead Counsel are Recidivist Rule 11 Violators in this Court

In an attempt to shift scrutiny away from their fee by inviting the Court to bias, Class Counsel attack Objector's counsel and his so-called "*modus operandi.*" These attacks are not only improper, they are incorrect. First, Class Counsel state that Objector's counsel was recently described by a magistrate judge in the Southern District of Florida as a "professional objector." What counsel fail to mention is that the magistrate's characterization was expressly rejected and ignored by the district judge. *Muransky v. Godiva Chocolatier, Inc.*, S.D. Fla., No. 15-60716-CIV-Dimitrouleas/Ssnow, Dkt. 99 (S.D. Fla. Sept. 28, 2016) (" . . . ignoring Judge

Snow's comments regarding 'professional objectors,' the Court finds that the requested attorneys' fees are reasonable under the *Johnson/Camden I* analysis;")

Similarly, Class Counsel refer to a thirteen year old California state trial court order disqualifying an attorney representing Objector's counsel in an action against Apple Computer. However, counsel omit that the court found that any conflict was cured by retention of new counsel, and that the entire matter was scrutinized by the California Court of Appeal which affirmed the trial court's ultimate finding that Objector's counsel was an adequate representative plaintiff. Class Counsel's other baseless attacks on Objector's counsel are similarly unavailing. The reality is that, unlike Class Counsel, Objector's counsel has never been sanctioned by any court and has, in fact, been praised by the judiciary for his work in representing absent class members.[10] Objector's counsel has been successful in challenging unfair settlement agreements and has, in many instances, obtained substantial benefits for class members and improvements to proposed settlements. [11]

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[10] *Lees v. Anthem Ins. Co. Inc.*, USDC, E.D. Mo., No. 4:13-CV-01411, Doc. 68 at 32:3-9, *see also Lees v. Anthem Ins. Co. Inc.*, No. 4:13CV1411 SNLJ, 2015 WL 3645208, at *4 (E.D. Mo. June 10, 2015) (agreeing with objector that requested $2,083,333.33 common-fund fee award was unreasonable and awarding $1.625 million); *Faught v. Am. Home Shield Corp.*, No. 2:07-CV-1928-RDP, 2010 WL 10959223, at *20 n.14 (N.D. Ala. Apr. 27, 2010), aff'd, 668 F.3d 1233 (11th Cir. 2011). ("The court was very impressed with Mr. Davis and fully appreciates both his candor and advocacy.")

[11] *Rodriguez v. West Publishing Corp.*, C.D. Cal., No. 2:05-cv-03222-R-Mc; Dkt. 563, Hrg. Tr., 7:8-14, July 13, 2009. (Elimination of $325,000.00 of improper incentive awards increased value of fund available to class members), *see also Rodriguez v. W. Pub. Corp.*, No. CV 05-3222 R (MCX), 2010 WL 682096, at *4 (C.D. Cal. Feb. 3, 2010), *aff'd sub nom. Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012), and *aff'd sub nom. Frailich v. Zwerling, Schachter & Zwerling*, LLP, 480 F. App'x 878 (9th Cir. 2012); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (reducing class counsel's requested fees thereby increasing the value of the common fund); *In re HP Inkjet Printer Litig.*, No. 5:05-CV-3580 JF, 2011 WL 1158635, at *6 (N.D. Cal. Mar. 29, 2011), rev'd and vacated, 716 F.3d 1173 (9th Cir. 2013) ("The objectors' concerns about the e-credits are valid. The fact that the credits are nontransferable, redeemable only at HP.com, and cannot be used with other coupons or discounts significantly reduces their cash value."); *The Authors Guild Inc. v. Google, Inc.*, 2009 WL 2980745 (S.D.N.Y. September 8, 2009) (declining to approve settlement on an "opt-out" basis).

Application of the moniker "professional objector" to absent class members and their counsel who dare to raise concerns regarding proposed class settlements is now in vogue with the class action plaintiffs' bar. The term "professional objector" was adopted by the plaintiffs' bar in its quest to marginalize dissenting voices by engaging in *ad hominem* attacks.[12] Class Counsel misconstrue (or alternatively desire to ignore) the intent of the law which provides a procedure for class members who are not the named representatives to be represented and to have a voice in the determination as to whether the settlement is fair, adequate, and reasonable. Class Counsel's *ad hominem* attacks on Objector's counsel comprise a violation of counsel's duty of candor to the Court. Class Counsel are aware that the outrageous accusations contained in the document they have submitted are not supported by fact or law.

Of greater concern than Class Counsel's improvident attack on Objector McDonald and his counsel is Class Counsel's own record. Unlike Objector's counsel, Robbins Geller has been sanctioned on numerous occasions. Indeed, the firm was recently sanctioned in 2014 in this very district for failing to "verify the allegations so as to remain ignorant of the truth." Judge Castillo found Robbins Geller's conduct to be "reckless and unjustified." *City of Livonia Employees' Retirement System v. The Boeing Company*¸ 306 F.R.D. 175, 182 (2014). Even more troubling is Judge Castillo's finding of recidivism by Robbins Geller, citing two other recent cases where Robbins Geller had filed complaints based on confidential witnesses alleged to have personal knowledge of defendants' scienter when, in fact, they did not. *Id.* at 182-183. Notably, the lead attorney in *Boeing* was none other than Michael J. Dowd who is leading the charge here.

Class Counsel's immaterial *ad hominem* attacks on objector's counsel are but a symptom and continuation of the documented history of misconduct by Robbins Geller in this district.

[12] *See, e.g.*, *Credit / Debit Card Tying Cases*, Superior Court of California, No. JCCP 4335, Hrg. Tr., 15:24-27; 16:7-9, August 6, 2010.

Class Counsel are entitled to a fee here, but the difference between a reasonable fee of 5-10% and the 25% being sought is well over a hundred million dollars. That is a powerful incentive to backslide into the sort of conduct for which courts have sanctioned the firm. Thus, this Court should view its current filings with heightened scrutiny.

VI. Conclusion

Objector respectfully requests that if the Court grants final approval, that it award a reasonable fee consistent with the authorities cited herein.

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Respectfully submitted,

s/ John W. Davis

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