UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE FOREIGN EXCHANGE BENCHMARK RATES ANTITRUST LITIGATION	No. 1:13-cv-07789-LGS

REPLY MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

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PRELIMINARY STATEMENT

Following extensive notice (*see* ECF Nos. 927-936) of Lead Counsel's fee application, to the Settlement Classes, only one objection – an attorney-driven objection filed by a professional objector – was received.[1] The lack of objections from classes consisting of numerous sophisticated corporations and professional and institutional investors supports approval of the fee request. *See In re Bisys Sec. Litig.*, No. 04 Civ. 3840, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (noting that only one individual raised any objection, "even though the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive").

In opposition to Lead Counsel's fee request stands one objection filed by serial objector counsel, John Pentz and Edward Cochran. ECF No. 963 ("Obj. Mem."). Numerous courts have criticized objector's counsel as well-known professional objectors who file groundless objections and frivolous appeals all in an effort to forestall the finality of settlements. The objection misstates both the applicable law and facts. The Court should reject it for the following reasons:

First, the objection ignores the appropriate legal standard for evaluating fee requests set forth by *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000). Instead, the objection asks the Court to award the "minimum necessary to litigate the case effectively" by selectively quoting a discussion of reasonable hourly attorney rates in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. Albany*, 493 F.3d 110 (2d Cir. 2007).[2] *Arbor Hill* does not

[1] Unless otherwise defined herein, all capitalized terms have the meanings ascribed to them in the Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses. ECF No. 938 ("Fee Memo").

[2] The objector does not even cite the correct *Arbor Hill* opinion. *Arbor Hill* was amended *sua sponte*, and the correct version of the opinion can be found at 522 F.3d 182 (2d Cir. 2008) (as amended).

modify the six-factor reasonableness analysis that the Court is required to apply to a common fund fee award under *Goldberger*, 209 F.3d at 47.

Second, the objection relies on a flawed survey of fee awards. The survey cobbles together opinions perceived to be favorable to its desired conclusion, while omitting unfavorable cases. In contrast, Lead Counsel submitted the reports of noted scholars on attorney's fees, Professors Miller and Fitzpatrick, who after analyzing a broad landscape of fee awards, empirically demonstrate the reasonableness of Lead Counsel's request.

Third, the objection incorrectly measures litigation risk. The objection asserts that following the first settlement there was no risk of non-recovery. Putting aside the myriad events that can derail a class settlement from an agreement in principle to final approval, the law is clear that litigation risk is measured from when a case is filed.

Fourth, the objection makes additional minor, albeit incorrect, arguments. It asserts that Lead Counsel could have applied for various fees along the way, should submit various lodestar breakdowns, and should take a percentage from the net, versus gross, settlement amounts. As demonstrated below, each of these arguments lacks merit.

Finally, objector Kornell's deposition testimony confirms that the objection was his counsel's, not his. Beyond this admission, Kornell conceded that he had little knowledge of the contours of the case or the settlements. He admitted that he knew nothing at all about Plaintiffs' Counsel's efforts to secure over $2 billion in settlements.

Lead Counsel's fee request is fair and reasonable. It is within the range of fees awarded in class actions of similar magnitude and complexity. It fairly compensates the many attorneys who worked thousands of hours over the course of several years and put tens of millions of their own dollars at risk to achieve these impressive settlements. For these reasons, as well as those

set forth below and in Lead Counsel's opening papers, Lead Counsel respectfully requests that the Court grant their fee request.

ARGUMENT

I. GOLDBERGER PROVIDES THE STANDARD TO EVALUATE COMMON FUND FEE AWARDS

"The reasonableness of a fee . . . is evaluated considering the *Goldberger* factors." *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014). Yet the objector urges the Court to set the fee at "'the minimum necessary to litigate the case effectively.'" Obj. Mem. at 3 (quoting *Arbor Hill*, 493 F.3d 110). The objector argues that *Arbor Hill* somehow modifies *Goldberger*. *See* Obj. Mem. at 4. *Arbor Hill* does not modify the *Goldberger* standard. The Second Circuit has rejected the application of *Arbor Hill* that the objector advances, finding that an attorneys' fee award in common fund cases "does not necessarily approximate what a client would pay; rather, it must reflect 'the actual effort made by the attorney to benefit the class.'" *Carlson v. Xerox Corp.*, 355 Fed. Appx. 523, 528 (2d Cir. 2009).[3]

If the Second Circuit intended *Arbor Hill*, a fee shifting case focusing on the application of the lodestar method, to upend common fund fee jurisprudence in this Circuit, as the objector contends, it would have mentioned *Goldberger* somewhere in the opinion. It does not. Instead, *Arbor Hill* "proposed the use of a modified version of the lodestar approach and recommended abandonment of the term 'lodestar' for the alternative term 'presumptively reasonable fee.'" *McDaniel v. County of Schenectady*, 595 F.3d 411, 420 (2d Cir. 2010). Rather than "first determining the lodestar (multiplying an hourly rate by the number of hours worked) and then adjusting the lodestar through a multiplicative factor to account for case-specific considerations,

[3] Unless otherwise noted, citations are omitted.

Arbor Hill suggested that a district court should assess case-specific considerations at the outset, factoring them into its determination of a reasonable hourly rate for the attorneys' work." *Id.* at 420. This is a distinction that makes little difference to the end result. *See id.* at 422 (stating that "[f]rom a mathematical perspective, of course, it makes little difference whether a court, following *Arbor Hill*, considers case-specific factors to estimate a reasonable rate for an attorney's services, which is then multiplied by the number of hours worked, or whether the court takes the traditional approach and considers these same factors in calculating a multiplier to the lodestar"). The Second Circuit made clear that "[t]he *Goldberger* factors are applicable to the court's reasonableness determination whether a percentage-of-fund or lodestar approach is used, . . . and in the latter context, indicate whether a multiplier should be applied to the lodestar." *Id.* at 423. Accordingly, courts have continued to apply a traditional lodestar cross-check "to ensure that an otherwise reasonable percentage fee would not lead to a windfall." *Colgate*, 36 F. Supp. 3d at 349; *see also Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (stating that lodestar cross-check "is meant to serve as a rough indicator of the propriety of a fee request").

II. THE OBJECTION'S FLAWED SURVEY OF FEE AWARDS SHOULD BE REJECTED

The starting point for analyzing the reasonableness of the requested fee is historical data of fee awards from other common fund cases. *See Colgate*, 36 F. Supp. 3d at 349. On this point, Lead Counsel submitted the reports of two leading scholars on analyzing attorneys' fees, Professors Miller and Fitzpatrick. Both Professors Miller and Fitzpatrick examined Lead Counsel's fee request in the context of historic class action fee awards. They each empirically demonstrate and conclude that Lead Counsel's requested fee is within the range of fees awarded in similar litigation. *See* Miller Decl., ECF No. 939-39, ¶8; Fitzpatrick Decl., ECF No. 939-40,

¶8. Professor Fitzpatrick, for example, opined that the requested fee is within one standard deviation of the 11.40% mean among all billion-dollar percentage-method fee awards in class action settlements, and even closer to the 14.43% mean percentage among billion-dollar antitrust cases. *Id.*, ¶¶20, 21, tbl. 2.

In contrast to Professors Miller's and Fitzpatrick's rigorous analyses, the objection presents a flawed survey of fee awards in "megafund cases." Obj. Mem. at 9. Relying on 12 cases, apparently selected solely on the basis that they awarded lower percentages than sought by Lead Counsel, the objection concludes that "historic fee awards in megafund cases" average 7.0%. Obj. Mem. at 9-10. The objection's survey, however, arbitrarily excludes fee awards in cases settled after 2013,[4] omits cases that awarded a higher fee percentage than requested here,[5] and includes inapposite cases.[6]

The objection fails to state any reasons why the size, complexity, and subject matter of the cases in its list − but not others analyzed in the Fee Memo or cited by Fitzpatrick − represent an appropriate benchmark. For example, the objection fails to explain why it excluded a $1.1 billion settlement in an antitrust class action case, *TFT-LCD*, 2013 WL 1365900. Like here,

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[4] *E.g.*, *In re Credit Default Swaps Antitrust Litig.*, No. 13-md-2476 (DLC), 2016 WL 2731524, at *16 (S.D.N.Y. Apr. 26, 2016) ("*CDS Litigation*") (13.61% fee award).

[5] *E.g.*, *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (31.33% fee award); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) (28.5% fee award).

[6] For example, *Cobell v. Salazar*, No. 1:96-cv-01285, 2011 WL 10676927 (D.D.C. July 27, 2011), was an unprecedented $3.4 billion settlement of the government's mishandling of Individual Indian Money Trusts, requiring all three branches of the government to approve the settlement. Dennis M. Gingold and M. Alexander Pearl, *Tribute to Elouise Cobell*, 33 PUB. LAND & RESOURCES L. REV. 189 (2012). In *Cobell*, the plaintiffs' attorneys entered into an agreement with the government to seek no more than $99 million in attorneys' fees. Agreement on Attorneys' Fees, Expenses, and Costs, Case No. 1:96-cv-01285, ECF No. 3664-1 (D.D.C. Dec. 17, 2010), attached as Ex. 1 to the Declaration of Christopher M. Burke ("Burke Decl."), filed concurrently herewith. *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 645 (E.D. La. 2010), "was not a class action settlement, but was rather a complicated opt-in resolution of individual personal injury claims." *Id.* *Vioxx* awarded 6.5% of the $4.85 billion total settlement to attorneys who performed common benefit work in the case. *Id.* However, the primary counsel in *Vioxx* were paid up to 32% in attorneys' fees pursuant to individual contingency-fee agreements and a court-imposed cap on fees. *Id.*

TFT-LCD involved allegations of a long-running price-fixing conspiracy in a case in which there were parallel criminal price fixing charges and guilty pleas. *Id.*, at *1-*2, *7. In rejecting the objections that the fee should be reduced to 25% or lower to avoid a "windfall" for counsel, the court awarded a 28.6% fee award (using a 2.4-2.6 lodestar multiplier) because of the exceptional overall result, excellent recovery individual claimants would receive, difficult damages analysis, the fact that legal services were provided over the course of several years, and the advancement of large amounts of money to fund the case. *Id.*, at *7-*8.

The Court should reject the objection's biased attempt at constructing a historical average fee percentage. Instead, the Court should rely on Professor Miller's and Fitzpatrick's empirical work. *See McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 386 (S.D.N.Y. 2017) (rejecting a limited sample of common fund fee awards and relying on Professor Miller's and Fitzpatrick's empirical studies).

The objection also cites *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), in support of its requested 8% fee award. Obj. Mem. at 3, 4, 7. While the objection focuses on *Visa Check*'s lower percentage award of fees (6.511% of a $3,383,400,000 settlement fund), it ignores *Visa Check*'s award of a higher lodestar cross-check multiplier of 3.5. 297 F. Supp. 2d at 509, 526.[7]

While cases have awarded lower percentages of attorneys' fees than Lead Counsel's request, simply comparing percentages does not demonstrate that Lead Counsel's request is either unfair or unreasonable. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*,

[7] Context, of course, matters. In *Visa Check*, class counsel originally asked for an almost 10x multiplier. 297 F. Supp. 2d at 522. The Court rejected class counsel's original request, calling it "absurd" and "fundamentally unfair," before settling on a 3.5 multiplier. *Id.* at 522-23.

246 F.R.D. 156, 177 (S.D.N.Y. 2007) ("the mere fact that courts have awarded lower fees in several other cases does not weigh against" the requested fees); *Colgate*, 36 F. Supp. 3d at 348 (cautioning that using "any fixed percentage for all cases as the ultimate fee or even a starting point for the analysis 'seems to offer an all too tempting substitute for the searching assessment that should properly be performed in each case'") (quoting *Goldberger*, 209 F.3d at 52). Notably, in the recent *CDS Litigation*, which has many parallels to this case, including similar risks, complexities, and settlement size, the Court awarded 13.61% of an almost $2 billion settlement, which equated to a multiplier of "just over 6." *CDS*, 2016 WL 2731524, at *17.

Visa Check's settlement fund was almost 50% larger than the Settlement Fund here, and the Court explicitly incorporated a sliding scale when calculating the fee. *Visa Check*, 297 F. Supp. 2d at 521. Applying *Visa Check*'s fee percentage to this case would be applying a sliding scale from a settlement 50% larger. Professor Fitzpatrick's report also incorporates *Visa Check* into his analysis and still concludes Lead Counsel's request is within accepted ranges.

III. LITIGATION RISK IS MEASURED WHEN A CASE IS FILED

The objection incorrectly argues that following the execution of settlement agreements in 2015, the case presented no risk of non-recovery. Obj. Mem. at 2, 5. "'Litigation risk,'" however, "'must be measured as of when the case is filed,' rather than with the hindsight benefit of subsequent events." *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 497 (S.D.N.Y. 2004) (quoting *Goldberger*, 209 F.3d at 55). "The point at which plaintiffs settle with defendants . . . is simply not relevant to determining the risks incurred by their counsel in agreeing to represent them." *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 257-58 (7th Cir. 1988); *see also* Silver Rep., ECF No. 939-41, at 9-10 (discussing "hindsight bias" of viewing nonpayment risk *ex post*). Subsequent developments in the case, such as an early settlement, are examined within the other *Goldberger* factors. *See Skelton*, 860 F.2d at 257-58 (stating that

early settlement is taken into account in fee analysis through counsel's investment of time, as "counsel worked fewer hours than they would have if the case had gone to trial").

As set forth in Lead Counsel's opening memorandum, at the commencement of this Action, there was a significant risk of non-payment. *See* Fee Memo at 18-20. The objection asserts that the DOJ's investigation and guilty pleas made this a riskless case. Obj. Memo at 2. Yet it ignores the lengthy discussion of the impact of the government investigations in the Fee Memo (at 16-18) and the Lead Counsel Declaration (ECF No. 939, ¶¶243-54). When the original complaint was filed in November 2013, no regulator or agency had concluded its investigation. There was no guarantee that government action would be taken. The first guilty pleas were not entered into until May 2015 − 18 months after the commencement of the Action. *See TFT-LCD*, 2013 WL 1365900, at *8 (finding that, in a case with guilty pleas which established liability, other risks the case presented warranted an upward adjustment of the fee). This case is not a follow on action where Class Plaintiffs simply piggybacked on the efforts of government regulators and law enforcement.[8]

Significantly, the objection also fails to consider the risks associated with class certification. The Court recently acknowledged the challenges Class Plaintiffs face in certifying litigation classes. *See* Hearing Tr. at 11:4-6 (April 11, 2018). This risk, of course, existed at the outset. Because the objection measures litigation risk from the wrong point and fails to address the actual factual record related to risk, it should be rejected.

[8] The DOJ's and other regulators' findings were much more limited in scope compared to the conspiracy Class Plaintiffs allege in the Action. Fee Memo at 17.

IV. OBJECTOR'S REMAINING ARGUMENTS ARE MERITLESS

A. The Lodestar Cross Check Confirms the Reasonableness of the Fee

The lodestar cross-check demonstrates that the requested multiplier is reasonable and proportionate to the percentage fee award. Under the lodestar cross-check, the requested 16.51% fee award produces a multiplier of 2.19. Fee Memo at 12-14. Professor Miller opined that the lodestar cross-check multiplier "is below what would be expected in a case of this dimension." *See* Miller Decl., ECF No. 939-39, ¶33. And, Professor Fitzpatrick concluded that a 2.19 multiplier "would be the lowest ever in an antitrust settlement of more than $1 billion, and less than half of the highest such multiplier (which was awarded in 2016 by another judge in the Southern District of New York)." Fitzpatrick Decl., ECF No. 939-40, ¶24;[9] *see also Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving of a lodestar multiplier of 3.5).

The objection attempts to fault Lead Counsel for not applying for attorneys' fees at various points in time after certain settlements were reached. Obj. Memo at 5 n.2, 8. Objector's proposal, however, would likely have resulted in massive costs to the Settlement Classes, requiring numerous rounds of costly notice for individual settlements. Lead Counsel staged their motion for preliminary approval before their motion for approval of a notice plan and plan of distribution in order to trigger critical settlement cooperation as quickly as possible. The Court allowed Lead Counsel to defer notice until such time as the Plan of Distribution was fully developed and could be comprehensively described to the Settlement Classes. Lead Counsel ultimately chose to conduct a single notice and claims process for all 15 settlements. This not

[9] According to Fitzpatrick's study of billion-dollar class action settlements that awarded attorneys' fees under the percentage method, the five antitrust settlements had lodestar cross-check multipliers of 2.5, 3.4, 3.5, 4.0, and 6.2. Fitzpatrick Decl., ECF No. 939-40, ¶24.

only saved notice and administration costs, but also eliminated the risk of confusion that could have resulted from the dissemination of multiple notices. Lead Counsel made an appropriate strategic decision to seek fees only once.[10]

The objection appears to suggest that Lead Counsel could have obtained the same results if they had put in lesser effort, or no effort, once the initial settlements were obtained. Obj. Mem. at 8. This is simply not the case. Evidence, including millions of pages of documents and terabytes of transactional data, needed to be collected, analyzed, and brought to bear to effectuate the settlements (*i.e.*, prepare the plan of distribution and notice plan) and to continue litigating against the remaining Defendants. This is a single case against multiple defendants; it is not 16 cases against 16 defendants. There exists joint and several liability and the potential for treble damages. With substantial claims still alive, Lead Counsel could not simply pack up their bags and move on to the next case, or simply assume the remaining Defendants would fold and pay hundreds of millions to settle. They had to (and continue to) vigorously work to maximize recovery for the classes, regardless of the prior settlements.

The objection also asks that Lead Counsel submit a breakdown of lodestar by year and Defendant. Obj. Mem. at 6, 8 n.6. A yearly breakdown is not required by *Goldberger*, which

[10] Objector's argument also conflicts with the practice of courts in this Circuit and others to use intertwined lodestar in multiple-defendant cases for purposes of the cross-check. *See, e.g.*, *In re Automotive Parts Antitrust Litig.*, No. 12-md-02311, 2017 WL 3525415, at *4 n.2 (E.D. Mich. July 10, 2017) (rejecting objectors' argument that lodestar calculation should be limited to work performed after the period covered by a prior fee award and stating it would be "impractical to compartmentalize and isolate" the work that assisted in achieving all of the settlements); *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, Nos. 12-970, 15-4143, 15-4146, ECF No. 2252 (E.D. La. Feb. 15, 2017) at 47, Burke Decl., Ex. 2 (viewing the BP settlements together with the HESI and Transocean settlements when conducting lodestar cross-check); *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42, 2015 WL 6964973, at *7 (E.D.N.Y. Nov. 10, 2015) (performing lodestar cross-check based on work from inception through August 2015 where settlements ranged from July 2013 to April 2015); *In re Processed Egg Prods. Antitrust Litig.*, No. 08-md-2002, ECF No. 1570 (E.D. Pa. Nov. 20, 2017) (noting that "[i]n calculating a lodestar award to evaluate a settlement that occurs before the conclusion of a case, courts may include the time spent by counsel performing tasks that are not directly related to the settlement"), Burke Decl., Ex. 3.

states that where the lodestar is "used as a mere cross-check" to a percentage fee calculation, "the hours documented by counsel need not be exhaustively scrutinized by the district court." *Goldberger*, 209 F.3d at 50.[11] Therefore, Lead Counsel's submissions of summaries of the hours billed in the case, billing rates, and detailed attorney background information is sufficient for purposes of a lodestar cross-check. *See* ECF Nos. 939-1-33.

B. Market Rate Fee Agreements Support the Requested Award

In the Fee Memo, Lead Counsel explained how market rates and fee agreements between Class Plaintiffs and Plaintiffs' Counsel supported the reasonableness of the fee request. Fee Memo at 11-12; *see also* Silver Rep., ECF No. 939-41. Ignoring this discussion, the objection contends that, as a suitable proxy for a market rate fee negotiation, the "best evidence" of a fair market fee agreement in a megafund case is the 5% rate used by the State of Mississippi in 2005 in a matter involving Merck & Co. Obj. Mem. at 7. The objector does not explain why a 13-year old agreement in a securities class action lawsuit has any relevance to determining "market rates" in this Action. *See* Silver Rep., ECF No. 939-41 at 17-18 (stating that contingent fees of 25% or more do not prevail in "securities fraud class actions where certain public pension funds are at the helm"). Further demonstrating the inapplicability of the Mississippi retainer, lead counsel in *Merck* requested, and the court awarded, fees of 20% of a $1.062 billion settlement. *See In re Merck & Co., Inc. Sec., Derivative & "Erisa" Litig.*, MDL No. 1658, ECF No. 896 (D.N.J. June 28, 2016).

If the Court is inclined to consider evidence of what an *ex ante* agreement in a complex case like this would look like, Professor Silver submitted a declaration in which he opines,

[11] *See also In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241 (3d Cir. 2009) (finding over objections, including Pentz's, "it was not error for the District Court to rely on time summaries instead of reviewing actual time records"); *McGreevy*, 258 F. Supp. 3d at 390 n.4 (stating that where lodestar is used as a cross check, the Court "does not undertake a line-by-line analysis of [c]lass [c]ounsel's hours and staffing").

among other things, that the 16.51% fee request is (1) lower than the prevailing market rate in contingency fee agreements in similar litigation and (2) lower than any of the operative contingency fee agreements between Class Plaintiffs and Plaintiffs' Counsel. Silver Rep., ECF No. 939-41 at §§V, VI.

C. Fees Should Be Awarded Based on the Gross Settlement Fund

The objection incorrectly argues that if the percentage method is used, the fee calculation should be based on the net, instead of gross, Settlement Fund. The objection states that every appellate court to consider the issue has ruled in favor of basing fees on the net settlement fund. Obj. Mem. at 10-13. However, objector's counsel advanced this argument in the Eighth Circuit and lost. *See Huyer v. Buckley*, 849 F.3d 395, 397-98 (8th Cir. 2017) (agreeing with *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000) that fund administration costs may be considered as part of the benefit to the class and affirming calculation of expenses based on gross settlement fund). Ultimately, what matters is the reasonableness of the dollar amount in fees requested. *See Visa Check*, 297 F. Supp. 2d at 525 n.34 (overruling this exact objection and stating that "it makes no difference whether attorneys' fees are based on the net or gross recovery, so long as the fee is reasonable") (citing *Powers*, 229 F.3d at 1258). Lead Counsel's fee requested based on the gross settlement fund is reasonable.

V. OBJECTOR KORNELL CONCEDES MINIMAL KNOWLEDGE OF THE CASE AND THAT HIS OBJECTION IS LAWYER-DRIVEN

Courts regularly doubt arguments and motives of professional class action objectors. *See, e.g.*, *In re Initial Pub. Offering Sec. Litig.*, 721 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) ("I concur with the numerous courts that have recognized that professional objectors undermine the administration of justice by disputing settlement in the hopes of extorting a greater share of the settlement for themselves and their clients."); *Barnes v. FleetBoston Fin. Corp.*, No. 01-10395,

2006 WL 6916834, at *1 (D. Mass. Aug. 22, 2006) ("[O]bjectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements."); 4 William B. Rubenstein, *et al.*, NEWBERG ON CLASS ACTIONS §13:21 (5th ed.).

As discussed in Class Plaintiffs' response to Kornell's untimely objection (ECF No. 1023 at 5-6), Pentz is well known in federal courts as being a serial objector. Kornell's other lawyer, Cochran, swims in the same waters. *See, e.g.*, *In re UnitedHealth Grp. Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108-09 (D. Minn. 2009) (describing Cochran as a "remora[]" that "contributed nothing" of value with his "laughable" objections and whose only "goal was, and is, to hijack as many dollars for [himself] as [he] can wrest from a negotiated settlement").[12] While Cochran has not filed an appearance before this Court, he is representing the objector as co-counsel with Pentz. *See* Kornell Dep. Tr. at 10:2-11 ("Q. And who are you represented by in this case? A. Ed Cochran. Q. Is Mr. Pentz serving as your attorney as well, or just Mr. Cochran? A. My understanding is that Mr. Pentz is co-counsel with Mr. Cochran. Q. So to be clear, you consider both of them to be your attorneys in this case? A. I do."). *See* Burke Decl., Ex. 4.

Kornell admitted at his deposition that the objection is lawyer-driven (Kornell Dep. Tr. at 55:1-3 ("Q. So the objection to the size of the fee is your counsel's objection and not yours? A. Yes.")), and that he had no objection to the settlements or attorneys' fees prior to speaking with counsel. *Id.* at 54:3-6. With respect to the propriety of the requested fee, Kornell agreed that "in assessing the reasonableness of an attorney fee for a particular class action case . . . it is important to know the particulars of what happened." *See* Kornell Dep. Tr. at 20:1-6. Yet Kornell barely understands the allegations of wrongdoing, the claims, or the parties involved in

[12] *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 246 (D.N.J. 2005); *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 n.18 (3d Cir. 2001); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. MDL 1203, 2002 WL 32154197, at *15 (E.D. Pa. Oct. 3, 2002); *Visa Check*, 297 F. Supp. 2d at 517-18 & n.18.

the case, and has not read any of the complaints. *Id.* at 41:25-44:13. He has no knowledge of the work performed by Plaintiffs' Counsel in litigating the case. *Id.* at 51:4-52:25, 55:4-21. He played no role in drafting or developing his objection. *Id.* at 53:23-54:1, 55:1-3; *see also id.* at 54:7-25 (explaining that he only learned "why" he made the objections to the requested attorneys' fees and expenses on the day of his deposition). *See TFT-LCD*, 2013 WL 257125, at *1 (chastising Pentz for his "minimal efforts at keeping his client informed of the status of his objection, and . . . practice of counsel filing objections on behalf of objectors without fully explaining the nature of the matters at issue").

Put simply, Kornell has admitted that he has no basis upon which to assess the reasonableness of the requested fees, or to object. Pentz and Cochran are using Kornell, as they have used others before him, including Pentz's father, wife, and mother-in-law, in an improper attempt to obtain fees on their own behalf.[13] *See, e.g.*, *Tenuto v. Transworld Sys.*, No. 99-4228, 2002 WL 188569, at *2 (E.D. Pa. Feb. 2, 2002) (father); *Barnes*, 2006 WL 6916834, at *2 (mother-in-law); *id.*, at *4-*5 & n.1 (wife served as objector in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361 (D. Me. Oct. 7, 2003)).

[13] The objection was originally filed jointly on behalf of Keith Kornell and Gregory Galan. Galan ostensibly withdrew his objection for health reasons. ECF Nos. 1010, 1011, 1013. He, too, lacked any knowledge of the case. Galan Dep. Tr. at 81:8-10 ("Q. Do you know what this lawsuit is about? A. No."). Despite these facts and Galan's felony conviction for grand theft for stealing from his own clients (he was an attorney), objector's counsel saw fit to file an objection on his behalf. *See* Galan Dep. Tr. at 42:9-13, 49:22-50:2, Burke Decl., Ex. 5.

CONCLUSION

Lead Counsel respectfully requests that the Court overrule the objection in its entirety and grant Lead Counsel's application.

DATED: April 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted on the Electronic Mail Notice List.

s/ Christopher M. Burke
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